

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1917

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RICHMOND:  
DAVIS BOTTOM, SUPERINTENDENT PUBLIC PRINTING  
1918



## ATTORNEYS GENERAL OF VIRGINIA

*From 1775 to 1918*

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

### Officers of the Attorney General

|                           |                                   |
|---------------------------|-----------------------------------|
| JNO. GARLAND POLLARD..... | <i>Attorney General</i>           |
| LESLIE C. GARNETT*.....   | <i>Assistant Attorney General</i> |
| J. D. HANK, JR.....       | <i>Assistant Attorney General</i> |
| LEON M. BAZILE.....       | <i>Law Assistant</i>              |
| ELISE S. FITZWILSON ..... | <i>Secretary</i>                  |
| MALRIE L. HUNTER.....     | <i>Stenographer</i>               |

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\*Hon. Leslie C. Garnett resigned August 7, 1917, and Hon. J. D. Hank, Jr., was appointed as his successor.

# REPORT

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COMMONWEALTH OF VIRGINIA,  
OFFICE OF THE ATTORNEY GENERAL,  
RICHMOND, *January 5, 1918.*

*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 January 1, 1918. 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 January 1, 1918.

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 Pending in the Supreme Court of the United States.

1. *Armour & Co. v. Commonwealth.* Merchants' license tax. In error from the Supreme Court of Appeals of Virginia.

2. *Bragg, Talbot Darby, v. R. S. Weaver & H. Flippin.* Bill praying for injunction to restrain use of plaintiff's soil for repair of public highway. In error from the Supreme Court of Appeals of Virginia.

3. *Dalton Adding Machine Co. v. Commonwealth.* Non-resident corporation doing business in Virginia. In error from the Supreme Court of Appeals of Virginia.

4. *General Railway Signal Co. v. Commonwealth of Virginia, at the relation of the State Corporation Commission.* Non-resident corporation doing business in Virginia. In error from the Supreme Court of Appeals of Virginia.

5. *Virginia v. West Virginia.* On petition for mandamus against the General Assembly of West Virginia. The Supreme Court granted a rule against the members of the Senate and the House of Delegates of the State of West Virginia, which rule, the State of West Virginia and the other respondents moved to discharge, which motion the court took under advisement. No decision has been rendered at this time (Jan. 4, 1918). See appendix.

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

1. *Brooklyn Trust Co. v. David Johnson, County Treasurer, et al.* Suit involving collection of taxes. Dismissed.
2. *Commonwealth v. Suffolk Drug Co., Inc., Bankrupt.* Registration fee and franchise tax. Before referee. Decided in favor of the Commonwealth.
3. *Commonwealth v. J. Fred Kernochan, Committee of Marie Marshall.* Proceeding for the collection of taxes. Removed from the State Court to the Federal Court on the ground of diversity of citizenship. Sent back to the State Court for trial.

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

1. *Corn Products Refining Co. v. Benjamin L. Purcell, Dairy and Food Commissioner.* Injunction Suit.

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

1. *Bare v. Commonwealth.* Violation of prohibition law. Writ of error. From the circuit court of Rockingham county. Reversed.
2. *Blair v. Commonwealth.* Violation of prohibition law. Writ of error. From the circuit court of Clarke county. Reversed.
3. *Cochran v. Commonwealth.* Violation of the prohibition law. From the circuit court of Rockingham county. Writ of error. Affirmed.
4. *Chesapeake & Ohio Railway Co. v. Commonwealth ex rel Ellison, et als.* Railroad crossing. From the State Corporation Commission. Dismissed on motion by the plaintiff-in-error.
5. *Commonwealth v. United States Cigarette Machine Co., Ltd.* Taxation. From the circuit court of Campbell county. Writ of error. Affirmed.
6. *Commonwealth of Virginia v. Ferries Company.* From the circuit court of the city of Richmond. Constitutionality of chapter 346 of the Acts of 1912. Appealed. Affirmed.
7. *Cooper's Admr. v. Commonwealth.* Taxation. From the circuit court of Roanoke county. Writ of error. Reversed.
8. *Harper v. Commonwealth*
9. *Hummer & Costello v. Commonwealth.* Unlawful cutting. From the circuit court of Clarke county. Writ of error. Reversed.
10. *Jeffries, et al. v. Commonwealth.* Dissolution of public service corporation by consent of stock holders. From the Corporation Commission. Reversed.
11. *Kennan v. Commonwealth.* Violation of prohibition law. From the circuit court of Clarke county. Writ of error. Reversed.
12. *Lewis v. Commonwealth.* Larceny. From the hustings court of the city of Richmond. Writ of error. Affirmed.
13. *Martin v. Commonwealth.* Use of the designation "Dr." by an optometrist. From the corporation court of the city of Roanoke. Writ of error. Reversed.
14. *Martin v. Commonwealth.* Use of the designation "Dr." by an optometrist. From the corporation court of the city of Roanoke. Writ of error. Reversed.

15. *McCandish v. Commonwealth*. Violation of license laws. From the circuit court of Buckingham county. Writ of error. Error confessed.
16. *Pine & Scott v. Commonwealth*. Violation of prohibition law. From the corporation court of the city of Roanoke. Writ of error. Affirmed.
17. *Spellman v. Commonwealth*. Larceny. From the circuit court of Princess Anne county. Writ of error. Error confessed.
18. *Stultz v. Commonwealth*. Violation of prohibition law. From the circuit court of Rockingham county. Writ of error. Affirmed.
19. *Tyler v. Commonwealth*. Burglary. From the corporation court of the city of Staunton. Writ of error. Reversed.
20. *Virginia Blue Ridge Railway Co. v. Kidd, Clerk*. Petition for mandamus. Writ granted.

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

1. *Allen v. Commonwealth*. Larceny. From the hustings court of the city of Petersburg. Writ of error.
2. *Artrip v. Commonwealth*. Violation of prohibition law. From the circuit court of Russell county. Writ of error.
3. *Bowling v. Commonwealth*. Forfeited bail bond. From the circuit court of Floyd county. Writ of error.
4. *Brooklyn Trust Co. et al. v. Booker, Commissioner of Revenue, et als.* Taxation. From the circuit court of Elizabeth City county. Writ of error.
5. *Burton v. Commonwealth*. Violation of the prohibition law. From the circuit court of Northampton county.
6. *Carter v. Commonwealth*. Violation of prohibition law. From the circuit court of Wise county. Writ of error.
7. *Calas v. Commonwealth*. Violation of prohibition law. From the hustings court of the city of Petersburg. Writ of error.
8. *Collins v. Commonwealth*. Violation of prohibition law. From the circuit court of Wise county. Writ of error.
9. *Commonwealth, et al. v. Tredegar Co.* Taxation. From the circuit court of the city of Richmond. Writ of error.
10. *Corby Baking Co. v. Commonwealth*. Taxation. From the circuit court of the city of Richmond. Writ of error.
11. *Derrick v. Commonwealth*. License tax. From the circuit court of of Lunenburg county. Writ of error.
12. *Flippo v. Commonwealth*. Misdemeanor. From the circuit court of Henrico county. Writ of error.
13. *Gottlieb v. Commonwealth*. Violation of prohibition law. From the corporation court of the city of Norfolk. Writ of error.
14. *Green v. Commonwealth*. Murder. From the circuit court of Charles City county. Writ of error.
15. *Hollywood Cemetery Co. v. Commonwealth*. Taxation. From the hustings court of the city of Richmond. Writ of error.
16. *Irvine v. Commonwealth*. Misdemeanor. From the corporation court of the city of Norfolk. Writ of error.
17. *Lane v. Commonwealth*. Violation of prohibition law. From the corporation court of the city of Hopewell. Writ of error.
18. *Lucchesi v. Commonwealth*. Violation of the prohibition law. From the hustings court of the city of Richmond. Writ of error.

19. *Main Street Bank v. Commonwealth, et al.* Taxation. From the hustings court of the city of Richmond. Writ of error.
20. *Pettus v. Commonwealth.* Violation of prohibition law. Corporation court of the city of Roanoke. Writ of error.
21. *Stuart, Governor, et al. v. Smith Courtney Co.* Lime grinding case. From the circuit court of the city of Richmond. Writ of error.
22. *Stuart's Executors v. Board of Sinking Fund Commissioners of Virginia.* Constitutionality of chapter 144 of the Acts of 1912. From the circuit court of the city of Richmond. Writ of error.
23. *Webb v. Commonwealth.* Larceny. From the circuit court of Giles county. Writ of error.
24. *Wilkerson v. Commonwealth.* Violation of prohibition law. From the corporation court of the city of Norfolk. Writ of error.
25. *Wise, et al. v. Commonwealth, et al.* Taxation. From the circuit court of Williamsburg. Writ of error.
26. *Taylor v. Commonwealth.* Malicious cutting. From the circuit court of Fairfax county. Writ of error.

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

1. *Smith-Courtney Co., Inc., v. Stuart, Governor, et als.* Lime grinding case. Decided in favor of plaintiff.
2. *Twohy's Executor v. Commonwealth.* In chancery. Decided in favor of the Commonwealth.
3. *Talbot, Thos., v. Commonwealth.* In chancery. Decided in favor of the Commonwealth.
4. *Withers, et als., v. Auditor of Public Accounts, et als.* In chancery. Decided in favor of Commonwealth.
5. *Tredegar Co. v. Commonwealth.* In chancery. Decided in favor of plaintiff.

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

1. *Commonwealth v. O. B. Thomas, Treasurer of Fluvanna Co., et als.* Official bond.
2. *Commonwealth v. G. P. Barr, Treasurer of Washington Co., et als.* Official bond.
3. *Commonwealth v. W. M. Gray and J. J. Geisler, Washington Co.* Official bond.
4. *Commonwealth v. O. D. Foster, Adm'rs R. D. Adams.* Official bond.
5. *Commonwealth v. A. D. Phillips, et als. sureties of Adams.* Official bond.
6. *Commonwealth v. D. Mott Robertson.* Official bond.
9. *Commonwealth ex rel Attorney General v. Virginia Railway & Power Co.* Taxation.
10. *Commonwealth ex rel Auditor v. A. M. Bowman, Jr., et als.* Official bond.
11. *Commonwealth v. Chesapeake & Ohio Railway Co.* Taxation.
12. *Commonwealth v. R. F. & P. Railroad Co.* Taxation.
13. *Commonwealth v. Southern Railway Co.* Taxation.
14. *Commonwealth v. A. C. L. Railway Co.* Taxation.
15. *Commonwealth v. S. A. L. Railway Co.* Taxation.
16. *Commonwealth v. Jas. V. Trehy.* Recovery of excess fees.
17. *Commonwealth v. Jno. T. Fitzpatrick, Treasurer of Nelson county.* Recovery of excess fees.

18. *Commonwealth v. W. B. Hamilton, Treasurer of Wise county.* Recovery of excess fees.
19. *Commonwealth v. John B. Evans, Sergeant of the city of Petersburg.* Recovery of excess fees.
20. *Commonwealth v. E. Thompson.* Recovery of excess fees.
21. *Commonwealth v. R. E. Glover, Sergeant of the city of Portsmouth.* Recovery of excess fees.
22. *Commonwealth v. Alvah H. Martin, Clerk of Norfolk county.* Recovery of excess fees.
23. *Commonwealth v. J. F. Richmond* (settled).
24. *Commonwealth v. Bowman, et als., examiners of records.* Official bond.
25. *County of Westmoreland v. Md. Del. & Va. Ry. Co.* Taxation.
26. *Seaboard Air Line Railroad Co. v. State Corporation Commission.* Taxation.

#### 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. Vandergrift, et als.*
7. *Commonwealth v. Sarah E. French.* Creditors bill.
8. *Commonwealth v. Illinois Surety Co.*
9. *Commonwealth v. Empire State Surety Co.*
10. *Commonwealth v. Empire State Surety Co.*
11. *Blue Ridge Overalls Co. v. State Penitentiary.*
12. *Talbot, Minton W., v. Commonwealth.*

#### Cases Decided in the Hustings Court of the City of Richmond.

1. *Hollywood Cemetery Co. v. Commonwealth.* Taxation. Decided in favor Commonwealth as to main issue.
2. *Woodward v. Commonwealth.* Taxation. Decided in favor of the plaintiff.
3. *Stephen Putney's Executor v. Commonwealth.* Taxation. Decided in favor of the Commonwealth.
4. *Hutzler, H. S., v. Commonwealth.* Taxation. Decided in favor of the plaintiff.
5. *Corby Baking Co. v. Commonwealth.* Taxation. Decided in favor of the Commonwealth.

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

1. *Arrington & Rose v. Commonwealth.* Taxation.

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

1. *Glinn, Brooks P., v. Virginia Home & Industrial School for Girls, Inc.* Notice of motion on alleged rent contract.

### Other Cases Decided in Various Courts.

1. *Moore, C. Lee, Auditor of Public Accounts v. Nuckolls & Phipps, Ex. of M. W. Cornett.* Inheritance tax. In the circuit court of Grayson county. Decided in favor of the Commonwealth.
2. *Commonwealth v. Shoot.* Gambling. In the circuit court of Elizabeth City county. Decided in favor of the Commonwealth.
3. *Commonwealth v. Samples.* Gambling. In the circuit court of Elizabeth City county. Decided in favor of the Commonwealth.
4. *Commonwealth v. Elderkin.* Gambling. In the circuit court of Elizabeth City county. Decided in favor of the Commonwealth.
5. *Commonwealth v. Sherrell.* Gambling. In the circuit court of Elizabeth City county. Decided in favor of the Commonwealth.
6. *Commonwealth v. Reams.* Gambling. In the circuit court of Elizabeth City county. Decided in favor of the Commonwealth.
7. *Commonwealth v. Fuller.* Gambling. In the police court of Phoebus. Nolle prosequi by the Commonwealth.
8. *Commonwealth v. Gouch.* Misdemeanor. In the police court of Phoebus. Plea of guilty.

### Other Cases Pending in Various Courts.

1. *Bonsack Machine Co. v. Auditor of Public Accounts, et als.* Motion for correction of erroneous assessments. In the circuit court of Roanoke county.
2. *Commonwealth of Virginia v. Kernochan, Committee.* Taxation. In the circuit court of James City county and the city of Williamsburg.
3. *Pollard, Jno. Garland, Attorney General, v. Woolf, Sheriff.* Writ of *quo warranto*. In the circuit court of Fauquier county.

### Portraits of Former Attorney Generals 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.
- Portrait of RUFUS A. AYRES, Attorney General, 1886-1890. Presented by his family.

# TABLE OF CONTENTS

|   | PAGE          |
|---|---------------|
| Attorneys General of Virginia (1775-1918).....  | 3             |
| Office of the Attorney General.....   | 4             |
| Letter of Transmittal.....  | 5             |
| Cases Handled by the Office of the Attorney General:                                    |               |
| In the Supreme Court of the United States.....  | 5             |
| In the District Court of the United States for the Eastern District of<br>Virginia..... | 6             |
| In the Supreme Court of Appeals of Virginia.....  | 6             |
| In the Circuit Court of the City of Richmond.....                                       | 8             |
| In the Chancery Court of the City of Richmond.....                                      | 9             |
| In the Hustings Court of the City of Richmond.....                                      | 9             |
| In the Law and Equity Court of the City of Richmond.....                                | 9, 10         |
| In various other courts.....  | 10            |
| List of Portraits of former Attorneys General now in the office.....                    | 10            |
| List of Books added to Attorney General's office since November 1, 1916.....            | 310           |
| Opinions .....  | 11 to 307     |
| Statements of Expenditures made by office.....  | 308, 309, 310 |
| Appendix:   |               |
| Case of <i>Virginia v. West Virginia</i> .....  | 311 to 318    |
| General Index.....  | 319 to 334    |
| List of Statutes referred to in Opinions.....   | 335 to 338    |

# TABLE OF OPINIONS

|  | PAGE     |
|--|----------|
| BARNEY, DR. J. N.—Registration of certificates to practice medicine.....                 | 233      |
| BOTTOM, DAVIS—Report of Commissioner of Game and Inland Fisheries.....                   | 248      |
| BRISTOW, A. B.—Salary of division superintendent of schools.....                         | 256      |
| BRYAN, GEORGE—State depositories.....  | 300      |
| CHANDLER, DR. J. A. C.—Appropriation for agricultural high schools.....                  | 263      |
| Public high schools.....   | 264      |
| COLEMAN, GEORGE P.—Condemnation of roads and highways.....                               | 249      |
| Proceeds of bond issued by local road authorities.....                                   | 254      |
| CRIGLER, D. J.—Collector of capitation taxes.....  | 286      |
| DRINKARD, A. W., JR.—Sale of products by public institution.....                         | 245      |
| FOSTER, DR. L. S.—Member of State Board of Charities State officer.....                  | 218      |
| HALL, A. B.—Reappointment of sheriffs and deputies for home guards.....                  | 224      |
| HANK, J. D., JR.—Appointment of notaries public.....                                     | 207      |
| HILLMAN, J. N.—Pensions of school teachers.....  | 267      |
| HINMAN, H. D.—Collateral inheritance tax.....  | 289      |
| HOLLADY, J. G.—Army canteen subject to merchants' license tax.....                       | 291      |
| HOWERTON, THOMAS H.—Increase of salary of Commonwealth's attorney.....                   | 220      |
| KOYNER, M. W.—Carrying of weapons by home guards.....                                    | 203      |
| KOINER, G. W.—Selling of farm products on commission.....                                | 199      |
| LINDSAY, J. H.—Increase of salary of superintendents of schools.....                     | 255      |
| MARTIN, DR. R. S.—Who entitled to certificates to practice medicine and surgery.....     | 231      |
| Examination of physicians and surgeons.....  | 233      |
| Reciprocity agreements with other States.....  | 233      |
| Revocations of certificates to practice medicine.....                                    | 234, 235 |
| MELlichAMP, MISS JULIA—Certificates issued by State Board of Examiners of Nurses.....    | 208      |
| MOOMAW, B. C., JR.—Railroad passes of public officers.....                               | 223      |
| MOORE, C. LEE—Collection of delinquent capitation taxes.....                             | 284, 285 |
| Refunding taxes on deeds not paid into the public treasury.....                          | 278      |
| Funds of Hollywood Cemetery Company.....   | 279      |
| Substitute elevator men in Capitol building.....   | 271      |
| Duty of the Commissioners of Revenue to obey Auditor.....                                | 275      |
| Omitted capital of Tredegar Iron Works.....  | 276      |
| Payment of mileage of judges out of State treasury.....                                  | 220      |
| License tax on food products.....  | 291      |
| Salaries of judges.....  | 221, 222 |
| Assessment of inheritance tax on annuities.....  | 287      |
| Payment of inheritance tax at termination of life tenancy.....                           | 288      |
| Exercise of powers of State and Federal governments.....                                 | 295      |
| Civil engineer not exempt from license tax.....  | 200      |
| Merchants license tax required of parties who combine to buy food for their own use..... | 291      |
| Tax on State seals.....  | 295      |
| Powers of Auditor.....   | 275      |

|   | PAGE     |
|---|----------|
| MUELLER, DR. N. C.—Practitioners of chiropody.....  | 235      |
| MC GUIRE, RIELY, BRYAN & EGGLESTON—Recordation of deeds.....  | 277      |
| Assessment of tax on real property.....   | 277      |
| PAGE, ROSEWELL—Interest on district school bonds.....   | 265      |
| Loans from literary fund.....   | 265, 266 |
| PARSONS, JOHN S.—Offices of sheriff and game warden.....  | 219      |
| Compatibility of office of Commissioner of Game and Inland Fisheries with<br>office under United States Government..... | 215      |
| PLECKER, DR. W. A.—Reports of vital statistics.....   | 241      |
| Birth and death certificates—forms.....   | 242      |
| POPE, DR. B. A.—Compensation of clerk of school board.....  | 258      |
| PRESTON, DR. J. W.—Certificates to practice chiropody.....  | 236      |
| Admission to practice of physicians and surgeons.....   | 228      |
| Who are entitled to certificates to practice medicine and surgery.....  | 229      |
| Fees chargeable for issuing certificates to practice medicine.....  | 230      |
| REPASS, R. C.—Failure of superintendents of schools to qualify.....   | 255      |
| RICHARDSON, F. W.—Judgment dockets.....   | 245      |
| RICHARDSON, JOHN W.—Standard barrel.....  | 305      |
| SALE, GEN. W. W.—Omitted taxes on military fund.....  | 292      |
| State officers under federal draft act.....   | 210      |
| Oath of Virginia State volunteers.....  | 201      |
| SCOTT, C. B.—Injury to roads and highways.....  | 251      |
| Title to material for roads and highways.....   | 251      |
| Law of eminent domain.....  | 252      |
| Liability for injury to roads and highways.....   | 253      |
| Contracts by State Highway Commissioner.....  | 253      |
| STEARNS, R. C.—Smith-Hughes act.....  | 303      |
| Appeals of teachers from decision of school authorities.....  | 268      |
| Commissions of school treasurers.....   | 260      |
| Compensation of county treasurer.....   | 261      |
| Disposition of tuition fees.....  | 262      |
| Public health rules and regulations.....  | 259      |
| SIMPSON, F. B.—Eligibility of school trustees.....  | 257      |
| STUART, HON. H. C.—Vocational education.....  | 304      |
| Printing of report of Prohibition Commissioner.....   | 247      |
| Remission of fines by pardon of Governor.....   | 224      |
| Power of Governor to pardon.....  | 227      |
| Appeals from decision of State Board Medical Examiners.....   | 239      |
| Report of Commission on Workmen's Compensation Law.....   | 224      |
| Boundary Commission, Virginia and West Virginia.....  | 271, 272 |
| Toll due miller for grinding wheat.....   | 206      |
| Members of State Board of Health.....   | 217      |
| Is deputy clerk State officer.....  | 212      |
| Leave of absence from military camp.....  | 214      |
| Establishment of boundary between Virginia and West Virginia.....   | 273      |
| Organization of home guards.....  | 201      |
| Visit of V. M. I. cadets to Governor.....   | 205      |
| Incompatibility of Federal and State offices.....   | 214      |
| Workmen's compensation law.....   | 305      |
| TAYLOR, T. RAMSAY—Incompatibility of school officers.....   | 258      |

|  | PAGE |
|--|------|
| TUNSTALL, B. GRAY—Payment of poll tax prerequisite to voting.....    | 277  |
| TURNER, L. E.—Collection of delinquent capitation taxes.....         | 283  |
| UPTON, JOHN—Tax on notary's seal.....                                | 294  |
| URNER, C. H.—Compensation of Treasurer.....                          | 300  |
| Bonds of insurance companies and United States liberty bonds.....    | 301  |
| Bonds of insurance companies.....                                    | 302  |
| Duty of Treasurer.....   | 303  |
| Bonds of State depositories.....                                     | 296  |
| Interest on State deposits.....                                      | 298  |
| VANDERSLICE, GEORGE KEESEE—Federal draft law.....                    | 204  |
| WATKINS, J. DOUGLAS—Practice of chiropody and optometry.....         | 237  |
| Licensing of chiropractors and optometrists.....                     | 237  |
| Filing by optometrist of application for exemption certificates..... | 238  |
| Granting of certificates to practice optometry.....                  | 238  |
| WOODRUM, C. A.—Attorneys for Commonwealth State officers.....        | 219  |

# OPINIONS

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AGRICULTURE—*Agricultural Seed Law—Rules and Regulations for Enforcement of—Duties and Powers of the Commissioner of Agriculture and Immigration—Of State Board of Agriculture and Immigration—Chapter 506, Acts of 1916.*—In addition to the duty of enforcing and carrying out the provisions of chapter 506 of the Acts of 1916, the Commissioner of Agriculture and Immigration is authorized by said act upon notice to the trade of the State with the approval of the State Board of Agriculture and Immigration to adopt such rules and regulations as may be deemed necessary in order to secure the efficient enforcement of the act.

*Same.*—In cases where it is necessary that in order that the requirements involving analysis may be efficiently enforced, that the same methods and rules of analysis should be adopted and used in all laboratories, the Commissioner of Agriculture and Immigration with the approval of the State Board of Agriculture and Immigration first obtained, has the authority to adopt such a seed test if deemed necessary in order to secure the efficient enforcement of chapter 506 of the Acts of 1916.

RICHMOND, VA., January 27, 1917.

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

DEAR SIR:

Acknowledgment is made of your communication, which is in the following terms:

Does section 10 of the agricultural seed law of Virginia, chapter 506, Acts 1916, authorize the Commissioner of Agriculture, with the approval of the State Board of Agriculture to define in the "Rules and Regulations" provided for in this section what seeds in a germination test shall and what seeds shall not be included in the "approximate percentage of germination" required in the act by section 2-E?

The technical point at issue is, whether the commissioner, by section 10, is given authority to designate in the rules and regulations for the enforcement of the act, what rules of testing shall be followed in the State laboratory in making analyses or tests of seeds collected by official State inspectors on the open market. The results of such tests to be used to determine whether the merchant concerned has given a correct analysis statement on tags attached to agricultural seeds as required by this act or whether he has violated the law by giving an incorrect analysis statement.

For example, one technical question involved is, whether the commissioner can lawfully, for the more efficient enforcement of the act, designate and define what seeds in a germination test shall be considered germinated, regardless of dictionary or botanical definitions of the term germination.

This question is governed by the provisions of sub-section E of section 2, chapter 506, Acts of 1916, which reads as follows:

Approximate percentage of germination, together with the month and year said seed was tested; provided, however, no seller shall be held responsible for the germination for the longer period than forty days from date of

delivery. If such shipment of seed is found to be more than a reasonable tolerance below the marks on the tags, such seed may be returned within the period as stated above, and the seller will be required to refund the purchase price of said seed together with freight charges to and from point of purchase.

And by section 10 of the same act, which reads as follows:

The duty of enforcing this act and carrying out its provisions and requirements shall be vested in the Commissioner of Agriculture and Immigration of this State. The said commissioner, upon notice to the seed trade of this State, through their official representative and through the agricultural bulletins of the Department of Agriculture and Immigration of Virginia, with the approval of the State Board of Agriculture and Immigration, shall be empowered to adopt such "rules and regulations" as may be deemed necessary in order to secure the efficient enforcement of this act; provided further, that the said commissioner, with the approval of the said Board of Agriculture and Immigration, shall maintain a laboratory with necessary equipment, and may appoint such analysts, inspectors and assistants as may be necessary for the proper enforcement and carrying out of the provisions and requirements of this act, and with the approval of said board, in his discretion, fix the salaries of said analysts, inspectors and assistants.

By section 2 of the act, it is provided:

Every lot of agricultural seeds as defined in section one of this act, except as herein otherwise provided, when in bulk, packages or other containers of ten pounds or more shall have affixed thereto, in a conspicuous place, on the exterior of the container of such agricultural seeds, a plainly written or printed tag or label in the English language, stating; provided, however, that no tag or label shall be required, unless requested, on seeds when sold directly to and in presence of the consumer and taken from container properly labeled in accordance with the provisions of this act; and further provided, that this shall in no way exempt the vendor from the analysis given on the bag or label attached to any container.

You will observe that section 10 of the act, in addition to placing the duty of enforcing the act and carrying out its provisions and requirements of the Commissioner of Agriculture and Immigration, provides that the commissioner shall upon notice to the seed trade of the State, with the approval of the State Board of Agriculture and Immigration, be empowered to adopt such rules and regulations as may be deemed necessary in order to secure the efficient enforcement of the act.

I note that you say in your communication that in order that the label requirements involving analyses may be efficiently enforced, that the same methods and rules of analysis should be adopted and used in all laboratories.

With this fact in view and in view of the very broad discretionary powers vested in you with the approval of the State Board of Agriculture and Immigration by section 10 of the act, I am of the opinion that with the approval of the State Board of Agriculture and Immigration first obtained that you have the authority to adopt such a seed test if you deem it necessary in order to secure the efficient enforcement of chapter 506 of the Acts of 1916.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

AGRICULTURE—*Crop Pest Law—Nursery Stock—Chapter 207, Acts of 1903.*—

Where several nurseries comprise one holding company registered for business in this State, all shipments from the several nurseries comprising the holding company, if shipped into this State in the name of the holding company and under its registration certificate, may be shipped into this State without the individual companies first procuring from the Auditor of Public Accounts a certificate of registration as provided for by section 12 of chapter 207 of the Acts of 1903. Where, however, the individual nurseries comprising the holding company each ship in its own name nursery stock to the State of Virginia, each company is required to register and pay an inspection fee.

RICHMOND, VA., *March 13, 1917.*

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

DEAR SIR:

Acknowledgment is made of your request to the Attorney General for the interpretation of section 12 of the crop pest law. It provides that it shall be unlawful for any person, firm or corporation to offer for sale, sell, deliver or give away within the bounds of this State nursery stock unless such person, firm or corporation shall have first procured from the Auditor of Public Accounts a certificate of registration.

You desire to be advised as to whether the inspection fee required for the issuing of the above mentioned certificate should be exacted from each of several nurseries comprising the American Nursery Company of New York, which is the holding company and is now registered for business in this State.

It is my opinion that if all of the shipments from the several nurseries comprising the American Nursery Company are shipped into this State in the name of the American Nursery Company and under their registration certificate that they have complied with the Virginia law. If, however, the F. & F. Nurseries, of Springfield, N. J., and the Bloodgood Nurseries, of Flushing, N. Y., each ship in its own name nursery stock in the State of Virginia, each company should be required to register and pay an inspection fee, provided for in section 12 of the crop pest law.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

AGRICULTURE—*Nursery Stock—Inspection of.*—The fact that nursery stock is shipped into this State to a Virginia consignee by a non-resident nurseryman at the risk of the Virginia consignee, does not exempt such nursery stock from inspection under the Virginia law, since the object of the law is to have inspected shipments into this State as well as shipments from one point in the State to another.

*Same—Crop Pest Law—Discrimination of.*—The Virginia crop pest law does not discriminate between resident and non-resident nurserymen and is a genuine exercise of an acknowledged State power.

*Same—Inspection tags.*—A Virginia nurseryman cannot place his tags upon the stock of a non-resident nurseryman and thus avoid the necessity of inspection for registering as required by the crop pest law.

RICHMOND, VA., March 16, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of the 8th to the Attorney General enclosing a letter recently received by your department from Mr. Curtis Nye Smith, counsel for the American Association of Nurserymen to the first and last paragraphs of which you invite the attention of this office.

In the first paragraph of the letter of the counsel for American Association of Nurserymen he quotes from a statement of the letter of the State Entomologist of Alabama to the State Entomologist of Wisconsin, as follows:

Replying to your letter of the 24th inst. asking for specific information in respect to the opinion of the Attorney General of Alabama, I can perhaps best make a quotation from the letter of the acting State Entomologist of Alabama to the State Entomologist of Wisconsin, as follows:

In regard to the \$10.00 license fee, I have consulted our Attorney General and was informed that we could charge a fee to all nurseries doing business in Alabama either by agent or in person. In case the transaction is done by mail or is completed in other States, the stock can be held up and the shipper charged for the cost of inspection.

This statement from the opinion of the Attorney General of Alabama coincides exactly with the opinion rendered you by me on May 5, 1916, and I think governs the proposition stated in the last paragraph of the letter of the counsel for the American Association of Nurserymen, which is as follows:

I am also awaiting with interest your opinion as to the authority of the State of Virginia practically to compel ex-State nurserymen selling and delivering their stock in other States, though consigned at the risk and as the property of the Virginia consignee to pay \$20.00 for a Virginia license fee.

The extract above quoted seems to indicate that it is the contention of the non-resident nurserymen that their stock can escape the necessity of inspection, and the nurserymen escape the necessity of registering and paying the inspection fee of \$20.00, by shipping their consignments at the risk of the Virginia consignee. I think it makes no difference how nursery stock is shipped into the State of Virginia, since the object of the law is to have inspected shipments into the State, as well as shipments from one point in the State to another. If the State of Virginia undertook to charge an inspection fee only as to nursery stock shipped into the State at the risk and cost of a non-resident, this might be determined a discrimination against non-resident nurserymen, and an attempt to regulate interstate commerce. Indeed, such a course would give color to the idea that the inspection fee was not a genuine exercise of an acknowledged State power to inspect, but a scheme to raise revenue, and to discriminate against the non-residents.

I assume, though it is not clear from this statement, that the contention is that Virginia nurserymen who have already registered under the crop pest law have the right to purchase from non-resident nurserymen, and ship into Virginia nursery stock under their own tags.

If the purpose of the law is to provide an inspection of nursery stock and to protect the trees, shrubs and plant life of the State from disease, I cannot see how the crop pest commission could sanction a course which would admit into the State from without, uninspected nursery stock, and it seems to me that if the tags of the

Virginia nurserymen have any force and effect they would have the effect of rendering unnecessary any inspection of stock from non-resident nurseries shipped into the State under those tags. As I have said before, the crop pest law does not discriminate between resident and non-resident nurserymen, and is a genuine exercise of an acknowledged State power. If a Virginia nurseryman can place his tags upon the stock of a non-resident nurseryman and thus avoid the necessity of inspection and registering, required by the crop pest law, there seems to be no reason why one Virginia nurseryman might not place his tags upon the stock of every other Virginia nurseryman, and thus avoid the necessity of other resident Virginia nurserymen registering and paying the proper inspection fees.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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AGRICULTURE—*Inspection of Nursery Stock—Chapter 207, Acts of 1903.*—Under section 2 of chapter 207 of the Acts of 1903, the Virginia Crop Pest Commission has authority to control nursery stock imported into this State from foreign countries as well as from other States of the American Union.

*Same—Words and Phrases.*—The words "entering this State from without" cover the articles mentioned in section 2 of chapter 207 of the Acts of 1903, whether imported from foreign countries or from States of the American Union.

RICHMOND, VA., November 2, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of October 30, 1916, in which you request the Attorney General to advise you whether under section 2 of chapter 207 of the Acts of 1903 the Virginia Crop Pest Commission has authority to control nursery stock imported into this State from foreign countries as well as from other States.

This section reads as follows:

The Board of Crop Pest Commissioners shall have power to provide quarantine rules and regulations concerning the sale and transportation of all plants, or parts of plants, commonly known as nursery stock, within the State. They shall also have power to provide like rules and regulations in regard to all plants or parts of plants commonly known as nursery stock *entering this State from without*, and these rules and regulations shall be enforced by the State Entomologist or his duly authorized assistants.

I am of the opinion that the words "entering this State from without" cover the articles mentioned in section 2 whether imported from foreign countries or other States of the American Union.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

**AUTOMOBILES—Licenses—Dealers—Chapter 522 of the Acts of 1916.**—The owner of a machine who demonstrates his machine to people and attempts to secure orders, comes within the meaning of section 3-b of chapter 522 of the Acts of 1916, and is required to take out a dealers license.

*Same.*—The fact that one has not yet succeeded in doing any business in such case is immaterial as the license tax prescribed by section 3-b of chapter 522 of the Acts of 1916, is not limited by the success or failure of the business.

RICHMOND, VA., *March 27, 1917.*

HON. R. E. L. WATKINS,  
*Franklin, Va.*

DEAR SIR:

The third question contained in your letter of March 12, 1917, on which you have requested an opinion is as follows:

There are two men in the county who have purchased machines of different makes. They demonstrate their machines to people and attempt to secure orders, but so far have not succeeded in doing any business. They claim that they are not agents, nor are they selling, but they are only demonstrating their machines, and will take orders if they can get them. Do they come within the purview of the statute as dealers?

It is provided by section 3-b, chapter 522, Acts of 1916, that every manufacturer, agent or dealer in automobiles before he commences to operate machines shall make application to the Secretary of the Commonwealth for a dealer's certificate of registration and license. It seems to me from the facts stated in your letter, that these men come within the meaning of section 3-b, and should be required to take out a dealer's license. The fact that they have not as yet succeeded in doing any business is immaterial, as the license tax prescribed by the foregoing section is not limited by the success or failure of the business.

As to your second question: the Secretary of the Commonwealth has already ruled on this question, and I am referring your letter to that officer with the request that he reply to the same.

Yours very truly,  
LESLIE C. GARNETT,  
*Assistant Attorney General.*

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**AUTOMOBILES—Town Ordinances—Conflict with State Law—Attorney General, Duties of.**—Where an ordinance of an incorporated town relating to automobiles conflicts with the State law relating to the same, the solution thereof is a question for the courts and not one on which the Attorney General should express an opinion.

*Same—Chapter 326 of the Acts of 1910, as amended by Chapter 522 of the Acts of 1916.*—Sections 7 and 11 of chapter 326 of the Acts of 1910, as amended by chapter 522 of the Acts of 1916, are apparently in conflict, the former permitting a greater rate of speed in built-up portions of cities, towns or villages than the latter. It is a question for the courts to determine which section prevails and the driver of an automobile violates either section at his own risk until the question is thus passed upon.

RICHMOND, VA., *December 6, 1916.*

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

DEAR SIR:

I acknowledge your letter of the 4th instant, enclosing a letter from W. H. Russell, Clarksville, Va., making inquiry as to whether or not the State law would apply to the operation of automobiles through the streets of an incorporated town when the local town ordinance is in conflict with the State law.

I beg to advise that this is a question which would come up in the criminal courts of the State and upon which the Attorney General should not express an opinion.

For your information, I beg to say that sections 7 and 11 of the automobile law seem to be somewhat in conflict, the former section providing that no one shall drive in the corporate limits of any city or town at a greater rate of speed than 15 miles, except where the local ordinance provides otherwise, while the latter provides that no one shall exceed a speed of ten miles per hour where the street or highway passes the built up portions of the city or town or village. Of course, the driver of an automobile violates either section at his own risk and as to which section will govern is a matter for the courts to determine.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

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BANKS AND BANKING—*Branch Banks—Assignment of Capital—Corporation Commission, Powers of—Chapter 207 of the Acts of 1908, Vol. 4, Virginia Code, p. 701.*—Under the provisions of chapter 207 of the Acts of 1908, the State Corporation Commission may, in its discretion, authorize banks having a paid up and unimpaired capital of \$25,000 or over, to establish branches, but the Corporation Commission has no authority to assign a definite proportion of capital to any branch.

RICHMOND, VA., *March 10, 1917.*

HON. C. B. GARNETT,  
*Chairman, State Corporation Commission,*  
*Richmond, Va.*

DEAR SIR:

I beg to acknowledge your letter stating that one of the banks in the town of Abingdon, Virginia, desired to establish a branch of said bank at a separate banking house in the same town, and to that end had adopted by the board of directors the following resolution:

Resolved, That the president of this bank be requested to make application to the State Corporation Commission for authority to establish a branch of this bank in the town of Abingdon, and to assign a definite proportion of capital to said branch.

You desire to be advised whether under the statutes of Virginia the State Corporation Commission has power to allow a bank when it establishes a separate branch "to assign a definite proportion of capital to said branch."

Chapter 207 of the Acts of 1908 (3), Vol. 4, Code of Virginia, p. 701, provides that your commission may in its discretion authorize banks having a paid up and unimpaired capital of \$25,000.00 or over to establish branches, but no authority is given in this statute nor in any other statute so far as I have been able to find to assign a definite proportion of capital to any branch. I am, therefore, of the opinion that your commission has no such authority.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

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BANKS AND BANKING—*Books of Banks—Inspection of.*—It would seem that a bank is bound to exhibit its books to a depositor on proper occasions.

*Same.*—Authorities relating to this question collected and reviewed.

RICHMOND, VA., May 29, 1917.

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

DEAR SIR:

Acknowledgment is made of your communication enclosing a copy of the letter from Frank Stuart, Esq., in which you request the Attorney General to advise you as to the question propounded in Mr. Stuart's letter. Mr. Stuart wishes to be advised on the following question:

Has the representative of a depositor whose account has been closed for about one year, and who surrendered his certificate of deposit about one year ago the right to examine his cancelled checks and his surrendered certificate of deposit? I am interested in making an examination of all cancelled checks, and particularly interested in the surrendered certificate of deposit.

This is a question which does not come under the jurisdiction of the Attorney General, but is purely a question between private litigants. As a matter of courtesy, however, I have examined the authorities on this question, and I am referring the same to you without, however, expressing an opinion thereon.

As is stated by Mr. Stuart in his letter, Michie on Banks and Banking on page 892, section 119 (4) states as the rule that a bank is bound to exhibit its books to a depositor in proper actions and the officials having charge of them are *quo ad hoc*, the agents of both parties. The same rule is stated in Angell & Ames on Corporations (10th Ed), section 247, p. 227, where it is said:

A bank is bound to exhibit its books to depositors on proper occasions, and the officers having them in charge are *quo ad hoc*, the agents of both parties.

To the same effect is a note to the case of *Shipman v. Bank of State of New York*, 12 L. R. A. 791, on the subject of relation between bank and depositor, where it is said:

It is elementary law that a bank is bound to exhibit its books to depositors, on proper occasions, and the officers having charge of them are *quo ad hoc*, the agents of both parties.

While it will be seen that the text writers are apparently united as to the correct rule, the only authority cited by each of the above text writers is the case of *Union Bank v. Knapp*, 3 Pick. (Mass.) 96, which is the case referred to, although the name is not given in Mr. Stuart's letter. I also desire to call your attention to the case of *Bank of Utica v. Hillard*, 5 Cowen, (N. Y.) 419, in which case it was held that in an action where a bank is a party, the opposing party cannot compel the cashier to produce the books or papers by a *subpoena duces tecum*. The opinion of the court in that case is very short and is as follows:

The motion must be denied. The course for proving the books or papers of a bank, where it is the adverse party, is to give notice to produce them; and on its non-compliance, to show the contents by inferior evidence as in other cases. The effect of this motion would be to compel a party to produce evidence against himself. True, the books are ordinarily in the possession of the cashier. How? He holds them as the officer, the agent or servant of the bank; in the same manner as an attorney holds the papers of his client. The cases in which the production of papers may be coerced by subpoena are, where they are the property of a competent witness; or, at least, where they do not belong exclusively to the adverse party. When he can say "*there are my papers*," we will not compel one who happens to have the temporary possession of them, in the right of the party to produce them on subpoena. The question is not now what order this court, or a judge of this court, might make upon the bank touching the production of these papers, within the cases cited from Campbell, Taunton and Anstuther. It relates to the effect of a *subpoena duces tecum*, and it is clear that by this a party cannot have his papers taken from his custody. (1 Phil. Ev. Am. Ed. 182; and the cases there cited at p. 11, 12, 335-6).

I am also calling your attention to 2 Starkie on Ev. 734 where the learned author says:

In general, the court will not compel a party to discover the evidence before the trial, by the production of his books or other private instruments (c); nor will they, it is said, grant a rule for the inspection of books or documents of a private nature in the hands of a third person (d).

The inspection of documents for the purposes of evidence is confined to civil cases where the party has an interest in the document (e). The same common principle applies to court-rolls and corporation-books. With respect to a tenant or member, the books are public books; they are common evidence which must of necessity be kept in some one hand, and then each individual possessing a legal interest in them has a right to inspect, and to use them as evidence of his rights; but with respect to a mere stranger, unconnected in interest, such books are to be considered as the books of a private individual, and no inspection can be compelled. This was decided, after much consideration, in the case of the *Mayor of Southampton v. Greeve* (f), notwithstanding several modern cases in which the granting such applications in the case of corporations seemed to have been considered as a matter of course (g). In that case the corporation brought an action against the defendant for tolls, and the court denied the application to inspect. A similar application had been refused in an action of trespass, where the defendant justified under the corporation of Ipswich, for distraining for a toll for repairing the quay (h), and in many other instances.

While the pressure of business of the office has prevented me from giving a very exhaustive examination to this question, I have run the case of *Union Bank v. Knapp*, *supra*, down in the American Digest System, and find the same to be digested in Vol. 6 Century Digest under the title of Banks and Banking, section 292, and it is the only case in point that appears in this digest. The key number under which cases in point will be similarly digested is section 119 under the title of Banks and Banking.

I have examined the digest paragraph of all of the cases digested in the Decennial and Century Digests under this section, but find none of them to be in point. Likewise I examined the digest paragraphs under this section in the several key number annuals, in which cases are digested under this section, but find none of them to be in point.

It will be, perhaps, well to add that *Union Bank v. Knapp* was cited in the recent Massachusetts case of *Varney v. Baker*, 194 Mass. 239, 241, a case involving the right of stockholders to examine the books of a corporation. It has also been cited in the case of *Huyler v. Cragen Cattle Co.* 40 N. J. Equity, 392, 398, which case also involved the right of stockholders to examine the books of the corporation. As having some slight bearing on this question, although not in point, I am calling your attention to the case of *Brown v. Lynchburg National Bank*, 109 Va. 530, 64 S. E. 950.

Yours very truly,

LEON M. BAZILE,

Law Assistant

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BILLS OF EXCEPTION—*Signing of same after time limit has expired*—Section 3385 of the Code of Virginia, as amended.—Counsel cannot, by consent, change the stipulations in regard to bills of exception, and where an order has been entered fixing the time for signing bills of exception, and the court has adjourned and the time so fixed has elapsed, counsel cannot, by consent, extend the time so as to make the bill of exception available. Therefore, where a consent order has been entered at the term at which the judgment excepted to was rendered and the time provided by the consent order has elapsed, even though counsel consented to allowing additional time for the signing of the bills of exception, they cannot be considered.

RICHMOND, VA., Sept. 24, 1917.

HUGH M. KERR, ESQ.,  
Commonwealth's Attorney,  
Staunton, Va.

DEAR SIR:

Your letter of September 18 has been received, in which you state that at the May term of your court, after conviction in a certain felony case, a consent order was entered giving the defendant seventy days from the rising of the court to file his bills of exception and that the time so granted elapsed before any attempt was made to file the same by his counsel, and requesting me to advise you of my construction of the act passed by the General Assembly in 1916 (Acts of 1916, p. 722) amending section 3385 of the Code as far as relates to your consenting to an extension of time for the filing of the bills of exception in this case.

In *Standard Peanut Co. v. Wilson*, 110 Va. 650, the court, in discussing section 3385, said:

The foregoing statute is mandatory, and unless the record affirmatively shows that bills of exception were signed in accordance with its provisions, they do not constitute part of the record. That is the tenor of our own decisions, which conform in that respect to the general rule of procedure on the subject.

In *Moore v. Harrison*, 114 Va. 424, it was held that bills of exception may be tendered to the judge and signed by him either during the term at which the opinion

is announced or to which exception is taken, or within thirty days thereafter, or in such other time as the parties by consent entered of record may agree upon, but if the time is extended by consent, such consent must be entered of record before the adjournment of the term at which the final judgment complained of was entered. It cannot be entered of record thereafter. Bills of exception cannot be filed except at the time and in the manner pointed out by said section. The matter is jurisdictional.

The act referred to by you amends section 3385 so as to provide for the entering of consent during any subsequent term, but I am of the opinion that where the consent order has been entered providing the time to be allowed for the signing of the bills of exception, the act does not contemplate the changing of this consent order at a subsequent term.

In *Battershall v. Roberts*, 107 Va. 269, it was held that the signing of bills of exception so as to make them a part of the record is a judicial act of purely statutory origin, and the provisions of the statute must be strictly observed.

In *Va. Dev. Co. v. Rich Patch I. Co.*, 98 Va. 700, the court held that it would not consider bills of exception signed contrary to the statute even though no exception or objection to the consideration of such bills was made by counsel for the defendant in error.

It will thus be seen that counsel, by consent, cannot change the stipulations in regard to bills of exception and where an order has been entered, fixing the time for signing bills of exception and the court has adjourned and the time so fixed has elapsed, I do not think counsel can, by consent, extend the time so as to make the bills of exception available.

In the case mentioned by you, the consent order having been entered at the term at which the judgment excepted to was rendered and the time provided by this consent order, having long since elapsed under the construction of the Court of Appeals of this State in regard to the section here under consideration, I am of the opinion that even though you consented to allowing additional time for the signing of the bills of exception they could not be considered by the Court of Appeals.

Yours very truly,

JNO. GARLAND POLLARD,  
Attorney General.

**CHILD LABOR—Employment of children in factories and workshops—Liability of parents, superintendents and employers—Chapter 339 of the Acts of 1914, Virginia Code, Vol. 4, p. 797.**—By section 1 of chapter 339 of the Acts of 1914, it is unlawful for any child under the age of fourteen years to be employed, permitted or suffered to work in any factory, workshop, etc. Therefore, it is unlawful to permit children within the prohibited age not on the pay roll of a concern, to assist their parents who are employees, for the purpose of adding to the income of the parents, where the work is done in an establishment owned and controlled by the employer and the only interest of the parent is the salary received for a given amount of work.

*Same.*—In such a case, the owner, superintendent, overseer, foreman or manager who knowingly permits such child to be employed in factories, workshops, etc. (assuming, of course, that the superintendent is connected with the establishment in which the work of the child is done) and the parents, are all subject to criminal prosecution.

RICHMOND, VA., October 6, 1917.

HON. JAMES B. DOHERTY,  
*Commissioner of Labor,  
City.*

DEAR SIR:

Acknowledgment is made of your communication in which you request my opinion on the following state of facts:

A concern in this State operates on a piece work system. Employees are permitting their children (under the age prescribed by the child labor law, chapter 339, Acts of 1914), to assist them.

These children are not on the pay roll of the firm, and their labor is for the purpose of adding to the income of the parent. The work is done in an establishment owned and controlled by a corporation and the only interest of the parent is the salary he receives for a given amount of work.

Kindly let me know if this is a violation of the child labor law of this Commonwealth.

It is provided by section 1 of chapter 339 of the Acts of 1914, Va. Code, Vol. 4, p. 707, as follows:

That on and after July first, nineteen hundred and fourteen, no child under the age of fourteen years shall be employed, permitted or suffered to work in any factory, workshop, mine, mercantile establishment, laundry, bakery, brick or lumber yard, or during school hours or after seven post meridian in the distribution, transmission or sale of merchandise.

It is provided by section 6 of the act, as follows:

Any owner, superintendent, overseer, foreman or manager, who shall knowingly employ or permit any child to be employed contrary to the provisions of this act, in any factory, workshop, mercantile establishment or laundry, with which he is *connected*, or any parent or guardian, who allows any such employment of his child or ward, shall upon conviction of such offense be fined not less than twenty-five dollars nor more than one hundred dollars.

But nothing in this act shall prevent a parent from working his or her child in any factory, workshop, mercantile establishment or laundry, or other place *owned or operated by said parent*, nor apply to persons employed in factories engaged exclusively in packing fruits and vegetables between July first and November first of each year.

In the case under consideration, such children do not come within the exception of the second paragraph of section 6 of the act, as the place of work is not owned or operated by the parent.

As section 1 of the act makes it unlawful for any child under the age of fourteen years to be "employed, permitted or suffered to work" in any factory, workshop, etc., I am of the opinion that the law is violated by the employment of children under the age of fourteen in the manner stated in your letter, and that, under the provisions of section 6 of the act, that the owner, superintendent, overseer, foreman or manager who knowingly permits such children to be employed in factories, workshops, etc., (assuming of course that the superintendent, etc., is "connected" with the establishment in which the work of the children is done) and the parent who allows such employment of his child, are subject to criminal prosecution for thus allowing the law to be violated.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

**CITIES AND TOWNS—Governor, Powers of.**—The Governor has no right by executive authority, to change the name of a town chartered by the General Assembly.

RICHMOND, VA., *April 27, 1917.*

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

DEAR SIR:

Acknowledgment is made of the communication of your secretary of April 21, 1917, which is in the following terms:

By direction of Governor Stuart, I hand you a communication from Mr. Charles E. Babcock, of Vienna, Virginia, requesting an opinion as to whether or not the Governor has a right by executive authority to change the name of a town chartered by the General Assembly during vacation of that body. Will you kindly advise the Governor in regard to this, returning Mr. Babcock's letter?

I can find no authorization in the Constitution or the laws of this State giving the Governor the right by executive authority to change the name of a town chartered by the General Assembly. In the absence of such direct authority, I am of the opinion that the Governor does not possess such power.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

**CITIZENSHIP—Naturalization—Enemy Aliens—Section 2171 of United States Compiled Statutes, 1901 (2 Stat. 153).**—Subjects of an alien enemy are not permitted to become citizens of the United States under section 2171 of the United States Compiled Statutes, 1901 (2 Stat. 153).

*Same.—Powers of courts to naturalize.*—While the State courts can pass upon applications for naturalization, none of the State courts in Virginia exercise this right, but leave it entirely to the United States court and therefore, persons desiring naturalization papers, should apply to a United States district court.

RICHMOND, VA., *April 3, 1917.*

MR. CROSBY THOMPSON,  
*West Point, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of April 2nd, to the Attorney General, saying that some twenty or thirty men of the Slavie race who three years ago bought property in King William county, and since that time have been living thereon, who have not taken out their first papers, now want to become citizens, and that some ten or twenty who have taken out their first papers but have never been naturalized now desire to become citizens.

From this state of facts you desire to be advised if it can be arranged so that these parties could secure their papers from some officer at West Point or whether the applications must be made to the United States court at Richmond.

As I understand the law, while the State courts can be designated to pass upon applications for naturalization, yet none of the State courts in Virginia exercise this

right, but leave it entirely to the United States courts. This being true, I know of no way by which these parties desiring naturalization can escape applying to the United States district court here.

I assume that these men of the Slavic race are not native citizens of Germany or subjects of the Emperor of Germany, for if they are, under section 2171 of the U. S. Compiled Statutes, 1901, (2 Stat. 153) their application could not be considered if the war which seems now inevitable between the United States and Germany should be declared.

It follows also that if the United States should at the time of the application of any of these men be at war with any country of which they are subject, no application for citizenship could be considered.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

NATURALIZATION—*Expatriation*—Article 14 of the United States Constitution—Section 39, Code of Virginia 1904; Section 40, Code of Virginia 1904; Section 41, Code of Virginia 1904; Section 1999 United States Compiled Statutes 1901.—Both the laws of the United States and of the Commonwealth of Virginia recognize and permit the right of expatriation.

*Same*—One born a citizen of the United States remains a citizen thereof unless he voluntarily expatriates himself, and the act of expatriation must be voluntary, therefore if one is compelled to take the oath of allegiance to a foreign government or ruler, against his will, he does not lose his citizenship.

RICHMOND, VA., April 18, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of April 10, 1917, enclosing letter of Geo. Kramig, of Sylvatus, Virginia, in which you request the Attorney General to advise you as to whether or not under the circumstances related by Mr. Kramig he is a citizen of Virginia. Mr. Kramig's letter is as follows:

I, Geo. Kramig, was born 13 Oct., 1886, in New York city, living in New York until I was about 13 years of age. My father at that time being a sick man, the doctors told him to leave this country to change the climate, it would be the only cure for him. My father being a born German, but a citizen of the U. S. of America, which I can prove, as I have my father's citizens papers.

He became citizen of U. S. America in the year April 30, 1886, before I was born. When I was about 13 years of age my father being sick, he decided to go back to Germany for his health with his family, but staying there quite some time, he thought the best for him to do is to take out his German citizens papers again, which he has done. But I always had American blood, and always claimed to be an American citizen at all times, because I was born in New York city.

In the year of 1908 I was forced to join the army in Germany. They had made me serve, which I refused to do. I have told them that I was born in U. S. America and was a citizen of U. S. America. The officers said it makes no difference what I am, I will have to do my duty in that country. I had no money to fight the case there, if so I would of flew the next day. Not having

the money, I thought then the best thing to do was to serve my time and then get up some money and go to the country where I was born.

I returned to U. S. America 12 Oct., 1911, being here ever since. Now I am here in Virginia about two years which would give me the right to vote the coming election.

Some people here say I have the right to vote the coming election, being born in U. S. A. Others say I have no right to vote, so kindly give me information, or better understanding what to do about this case. If I have the right to vote or not.

It is provided by Article 14 of the Federal Constitution that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

Section 39 of the Code of Virginia provides as follows:

All persons born in this State, all persons born in any other State of this Union, who may be or become residents of this State; all aliens naturalized under the laws of the United States, who may be or become residents of this State; all persons who have obtained a right to citizenship under former laws; and all children, wherever born, whose father, or, if he be dead, whose mother, shall be a citizen of this State at the time of the birth of such children, shall be deemed citizens of this State.

By section 40 of the Virginia Code, it is provided that whenever a citizen of this State by deed in writing, executed in the presence of and subscribed by two witnesses and by them proved in the court of the county or corporation where he resides, or by open verbal declaration made in such court and entered of record, shall declare that he relinquishes the character of a citizen of this State, and shall depart out of the same, such person shall, from the time of such departure, be considered as having exercised his right of expatriation, so far as regards this State, and shall thenceforth be deemed no citizen thereof.

By section 41 of the Code, it is provided:

When any citizen of this State, being twenty-one years of age, shall reside elsewhere, and in good faith become the citizen of some other State of this Union, or the citizen or subject of a foreign State or Sovereign he shall not while the citizen of another State, or the citizen or subject of a foreign State or Sovereign, be deemed a citizen of this State.

Your attention is also called to section 1999 U. S. Compiled Statutes 1901, which recognizes the right of expatriation.

From the above state of facts recited by Mr. Kramig, I conclude that he was born a citizen of the United States and unless he voluntarily expatriated himself, I am of the opinion that he is now a citizen of the United States and of the State of Virginia, unless during his residence in Germany he voluntarily expatriated himself. On this point his letter does not state sufficient facts to enable me to express an opinion, as I am not advised as to whether persons who are made to serve in the German army are required to take the oath of allegiance to the Emperor or the German government.

The act of expatriation, however, must be voluntary and even though Mr. Kramig should have taken the oath of allegiance to the Emperor or the German government at the time he was required to serve in the German army, if he was made to do this against his will, I am of opinion that he did not lose his citizenship.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

**COMMISSION MERCHANTS—Words and phrases—Chapter 77, Acts of 1916.**—The term "commission merchant" as used in section 1 of chapter 77 of the Acts of 1916, includes every person, firm, exchange, association and corporation authorized to receive, sell or offer for sale on commission within this State, any kind of farm produce except where such farm products are sold for consumption and not for resale.

*Same—License.*—No one is permitted to sell or offer for sale on commission within this State any kind of farm produce without first having obtained from the Commissioner of Agriculture a certificate of registration.

*Same—Transactions between merchants and commission merchants.*—Chapter 77 of the Acts of 1916 controls the business between a merchant and a commission merchant, provided the merchant ships farm produce to a commission merchant to be sold on commission.

*Same—License.*—A commission merchant who receives farm produce on commission shipped into Virginia from out of Virginia, is required to take out the certificate of registration provided for in chapter 77 of the Acts of 1916.

RICHMOND, VA., April 20, 1917.

S. T. BEVERIDGE, ESQ.,  
1217 E. Cary St.,  
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of the 19th instant to the Attorney General in regard to the law covering the sale of farm produce on commission.

You inquire first as to whether this is a law to control business between the farmer and commission man or if it also includes business between merchant and commission merchant, and, second, whether the law is intended to cover business from other States as well.

Section 1 of chapter 77 of the Acts of 1916, page 123, provides that the term "commission merchants" shall include every person, firm, exchange, association and corporation authorized to receive, sell or offer for sale on commission within this State any kind of farm produce except where such farm produce is sold for consumption and not for resale.

Section 2 provides that on and after the first day of May, 1917, no person, firm, exchange, association or corporation shall receive, sell or offer for sale on commission within this State any kind of farm produce without first having obtained from the Commissioner of Agriculture a certificate of registration.

It is my opinion, therefore, that this law controls the business between the merchant and commission merchant provided the merchant ships farm produce to the commission merchant to be sold on commission.

I am further of the opinion that any commission merchant who receives farm produce on commission shipped into Virginia from out of Virginia is required to take out the certificate of registration as provided in the above law.

You will understand that the Attorney General is the legal adviser of the officers at the seat of government and, therefore, this opinion is not to be regarded as official, but is written as a courtesy to you and is in accordance with the opinion I have heretofore given the Commissioner of Agriculture.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

COMMISSION MERCHANTS.—It is unnecessary for a commission merchant selling peanuts only, or only timber products, floricultural products, tea and coffee, to obtain the certificate of registration required by chapter 77 of the Acts of 1917.

RICHMOND, VA., May 18, 1917.

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

DEAR SIR:

I acknowledge reference to this office by you of the letter of Holland & Lee Company, Inc., with regard to the construction of the commission merchants law, chapter 77, Acts of 1916. In my letter to you of April 17, 1917, I advised you as follows:

I am of the opinion that corporations or others acting as commission merchants receiving and selling or offering for sale on commission peanuts or cotton are required to apply for and receive a certificate of registration as provided in this act

You will note that so far as this case is concerned the term "farm produce" includes all agricultural products except among other things peanuts or cotton when sold under the supervision of a chartered exchange.

In the letter of the Holland & Lee Company, Inc., it is set out as follows:

We believe that the opinion of the Attorney General given heretofore must have been with the view and under the impression that peanuts were sold under the supervision of a chartered peanut exchange, just as cotton is sold under the supervision of a chartered cotton exchange; but there has never been, nor, in our judgment, could there very well be a peanut exchange—at least, the industry has never been conducted through such an exchange.

In addition to this, I am in receipt of a letter from the Hon. J. E. West, a member of the Senate from the 30th District, advising me that when this bill was considered by the committee, it was understood that the sale of timber products, floricultural products, tea, coffee and peanuts, should be exempt from the operation of the bill, but that cotton should be exempt only when sold under the supervision of a chartered exchange. Senator West also calls attention to the fact that after the word "peanuts" there is inserted a comma, and that the insertion of this comma by the framers of the bill was intended to show that all the products named in the exemption but cotton should not come within the provisions of the bill in any circumstances.

In your conference with me in the matter it was understood between us that there were no chartered exchanges in Virginia selling any of these products, so far as we were advised. I am now advised that there are chartered exchanges in Virginia, selling cotton, but none selling timber products, floricultural products, tea, coffee or peanuts.

Looking to the terms of the law as written, the statute is unquestionably susceptible to the construction placed upon it by me in my letter to you of the 17th of April, as quoted above; but in consideration of the facts set out in the letter of Holland & Lee Company, Incorporated, and especially in view of Senator West's explanation setting out clearly the fact that cotton is the only product mentioned in the section which is sold under the supervision of a chartered exchange, I feel it my duty to adopt a strict construction of the section in question in favor of the taxpayer, and, therefore, to reverse my former holding, and to now hold that it is unnecessary for a commission merchant selling peanuts only to obtain the certificate

of registration under the commission merchants law. Of course, this will also be true of commission merchants selling only timber products, floricultural products, tea and coffee, as well as peanuts.

I am sending you duplicate copies of this opinion, in order that you may send same to the Holland & Lee Company, Inc., if you desire.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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**COMMISSION MERCHANTS—Buyer and seller.**—One who purchases farm produce at an agreed price which produce is shipped with a bill of lading attached, and the amount to be remitted to the shipper does not depend on the market price but is a matter of contract between the parties, is not a commission merchant and therefore does not come within the meaning of chapter 77 of the Acts of 1917.

RICHMOND, VA., May 4, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of the 30th ultimo to the Attorney General, enclosing correspondence with Wm. R. Hill & Co., of Richmond, Va., as to whether or not they are required to take out the registration certificate provided for in the law in relation to the sale of farm produce on commission.

It is quite evident that Wm. R. Hill & Co. are merchandise brokers and are not commission merchants who handle farm produce on commission, within the meaning of the act in question.

The goods consigned to these parties would be classed rather as merchandise than farm produce, but in addition to this they are real purchasers at an agreed price and the goods are shipped to them with bill of lading attached, and the amount to be remitted by them to the shipper does not depend upon the market price, but is a matter of contract.

Under these circumstances I am of opinion that the law in relation to the sale of farm produce on commission does not contemplate merchants doing this class of business.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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**CONFEDERATE MILITARY RECORDS—Military fund—Section 375-a, Code of Virginia 1904, Section 376 of the Code of Virginia 1904, as amended—Chapter 520 of the Acts of 1916.**—The military fund of Virginia is appropriated for the support, maintenance and instruction of the Virginia volunteers, therefore, the Adjutant General is not warranted in employing out of the military fund someone to discharge the duties discharged by the Secretary of Confederate Military Records for the year ending March 1, 1917.

**Same—Statutes—Construction of.**—Where the legislature makes a direct appropriation for the salaries and expenses of a department only for one year, of a

biennial period, the inference is that there should be no special funds available for this purpose after the expiration of the special appropriation. Such act on the part of the legislature shows an intent that no further remuneration should be given for such purpose.

RICHMOND, VA., *February 26, 1917.*

COLONEL JOSEPH V. BIDGOOD,  
*Secretary Confederate Military Records,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of the 24th instant, to the Attorney General, making inquiry as to whether the Adjutant General, under whose jurisdiction the Department of Confederate Military Records continues after March 1, 1917, has authority to employ someone to take charge of the same and discharge the duties now being done and pay for such service out of the funds of his office.

By reference to the appropriation bill, passed by the last General Assembly, approved March 24, 1916, Acts of 1916, page 890, it appears that the legislature directly appropriated for the salaries and expenses of your department only for the year beginning March 1, 1916. The clear inference from this is, of course, that there should be no special funds available for this purpose after March 1, 1916.

Section 375-a Code Va. 1904 provides:

(1) The sum of one-half of one per centum of all receipts into the treasury derived from regular sources of income, except the school fund, be, and the same is hereby, appropriated for the support, maintenance, and instruction of the Virginia Volunteers.

(2) The said sum shall be known as the military fund, and shall be controlled, expended, and disbursed by the military board, as provided in section three hundred and seventy-seven of the Code of Virginia.

Section 376 of Va. Code, Vol. 4, as amended by the Acts of 1912, page 622, provides that for carrying into operation the provisions of this chapter, it shall be the duty of the Auditor of Public Accounts to set aside, annually, to the credit of the Adjutant General, one and one-half per centum of all receipts into the treasury derived from regular sources of income, except the school fund, which sum so set aside shall constitute and be known as the "military fund," which is hereby appropriated to the uses and purposes set forth in this chapter.

Reading sections 375-a and 376, it would seem clear that the military fund is appropriated for the support, maintenance and instruction of the Virginia Volunteers.

I cannot, therefore, conclude that the Adjutant General would be warranted in employing out of the military fund someone to discharge the duties now being discharged by your department for which the legislature especially appropriated for the year ending March 1, 1917.

This construction is also sustained by the fact that it was evidently the intent of the legislature that no further remunerations should be given for the collection, filing and preserving of the Confederate military records.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

**CONCEALED WEAPONS—Carrying of—Unconcealed weapons.**—One has a right to carry a revolver provided the same is not concealed about his person.

*Same—Permits for the carrying of concealed weapons—Section 3780 of the Code of Virginia 1904.*—One desiring to carry a revolver concealed, must apply in writing to the judge of the circuit or corporation court and upon satisfactory proof of good character and the necessity of carrying such weapon concealed, the judge may grant permission therefor for one year.

RICHMOND, VA., June 18, 1917.

MR. FRANK R. PITT,  
*Supervisor of Telephone Lines,  
U. S. Coast Guard, Virginia Beach, Va.*

DEAR SIR:

I beg to acknowledge receipt of your letter of the 16th inst. to the Attorney General of Virginia, in regard to your right to carry a revolver in the State of Virginia.

There is no provision in the Virginia law denying your right to carry this revolver, so that the same is not concealed about your person.

If you desire to carry this revolver as a concealed weapon, you will have to apply in writing to the judge of the circuit court of some county, or the judge of the hustings court of some city; and upon satisfactory proof of your good character and the necessity of carrying this weapon, concealed, such judge may grant permission therefor for one year, as provided by section 3780 of the Code of Virginia.

I am,

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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**CONCEALED WEAPONS—Carrying of—Conservators of the peace—Section 2912 of the Code of Virginia 1904; Section 3780 of the Code of Virginia 1904, as amended.** A justice of the peace being a conservator of the peace, comes within the meaning of the exception contained in section 3780 of the Code of Virginia 1904, as amended, and is permitted, while in the discharge of his official duties, to carry concealed weapons.

*Same—Jurisdiction in which carried.*—While no limitation as to time is placed upon the carrying of concealed weapons by the officers named in section 3912, Code of Virginia 1904, except collecting officers, such officers are permitted to carry concealed weapons only in the jurisdiction in which they are by law declared to be conservators of the peace.

*Same—Territorial jurisdiction of a justice of the peace.*—The jurisdiction of a justice of the peace as a conservator of the peace, is limited by the provisions of section 3912 of the Code of Virginia 1904, to his county or corporation and therefore he is entitled to carry a concealed weapon only within his county or corporation.

RICHMOND, VA., October 1, 1917.

JNO. M. SMITH, ESQ.,  
*Justice of the Peace,  
Newport, Giles Co., Va.*

DEAR SIR:

Acknowledgment is made of your letter of September 29, in which you request an answer to the following question:

Please let me know if a justice of peace has right to carry a pistol anywhere in this State.

It is provided by section 3780 of the Code, as amended, 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 collecting officer while in the discharge of his official duty. \* \* \*

It is provided by section 2912 of the Code of Virginia, 1904, as follows:

Every judge throughout the State and every justice, commissioner in chancery, notary, and county surveyor while in the performance of the duties of his office within his county or corporation shall be a conservator of the peace, and may require from persons not of good fame security for their good behavior for a term not exceeding one year.

A justice of the peace, being a conservator of the peace, comes within the meaning of the above-quoted provision of section 3780 of the Code of Virginia, 1904, as amended.

It was held by the Court of Appeals in *Wilthers v. Commonwealth*, 109 Va. 837, (1909) that commissioners in chancery, being conservators of the peace, as such, may carry concealed weapons, although not at the time acting within the discharge of official duty, and that the words, "while in the discharge of his official duty" used in section 3780 of the Code, as amended, apply only to the next antecedent class of officers, to wit: collecting officers, and not to the other officers named in the statute.

While, therefore, no limitation as to time is placed upon the carrying of concealed weapons by the officers named in section 3912, Code of Virginia, 1904, except collecting officers, I am of the opinion that such officers are permitted to carry concealed weapons only in the jurisdiction in which they are, by law, declared to be conservators of the peace.

The jurisdiction of a justice of the peace as a conservator of the peace being limited by the provisions of section 3912 of the Code of Virginia, 1904, to his county or corporation, it follows that I am of the opinion that he is entitled to carry a concealed weapon without violating the law only within his county or corporation.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

CONVICT LIME BOARD—*Chapter 308 Acts 1914*.—Under the law creating the Convict Lime Board, the same is not made a body corporate, therefore property conveyed for the purposes of this act should be conveyed directly to the Commonwealth of Virginia.

*Same*.—Form of deed to Convict Lime Board suggested.

RICHMOND, VA., *February 16, 1917.*

*His Excellency, H. CARTER STUART,*  
*Richmond, Virginia.*

DEAR SIR:

I beg to return herewith deed from the Taft Fish Co. Inc., to the Lime Grinding Board and the abstract of title, and the other papers therewith, which you forwarded with the request for my opinion in regard thereto.

I have carefully examined the abstract of title and original deed to this property, and I am of the opinion that the title thereto is good.

An examination of the deed from the Taft Fish Co., Inc., to the Convict Lime Board, however, discloses that the Convict Lime Board is described as a "corporation duly established by the General Assembly of Virginia by an act approved March 27, 1914, as amended and re-enacted by an act approved March 18, 1916." The act creating the board provides in section 1:

Be it enacted by the General Assembly of Virginia, That the Governor, Superintendent of the Penitentiary and the Commissioner of Agriculture shall constitute a board, of which the Governor shall be chairman, to be known as the convict lime board, for the purpose of carrying into effect the provisions of this act.

There is no provision that the Lime Grinding Board shall be a corporation, and I would suggest that this deed be reformed, showing that the grantee therein shall be the Commonwealth of Virginia.

I would suggest that the deed be made to read as to the granting part thereof as follows:

This deed made this twenty-seventh day of January in the year one thousand nine hundred and seventeen between the Taft Fish Co., Inc., of Taft, Virginia, party of the first part, and the Commonwealth of Virginia, party of the second part.

That whereas the General Assembly of Virginia, by its acts approved March 14, 1912, March 27, 1914, and March 18, 1916, constituted the Governor of Virginia, Superintendent of State Penitentiary and Commissioner of Agriculture of Virginia a convict lime board, and authorized said board to acquire suitable lands or quarries for the purpose of the said acts.

Now, therefore, this deed witnesseth, etc.

It would seem that the deed already executed by the Taft Fish Co., Inc., conveys this property to a grantee that does not exist under the law.

Very respectfully,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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*CORONERS—Appointment and jurisdiction of—Section 891 Code of Virginia, 1904, as amended.*—The coroner for the city of Richmond is appointed by the judge of the hustings court of the city of Richmond, which is the corporation court of that city, and the coroner is appointed not for a part of said city, but for the whole city.

*Same.*—Under the provisions of section 891 of the Code of Virginia, as amended, if the court is of the opinion that one coroner is not sufficient it may appoint as many other coroners as it may deem proper. The statute, however, places no limitation upon the jurisdiction of coroners appointed and such additional coroners have jurisdiction in their respective city or county coextensive with the jurisdiction of the first coroner appointed.

*Same—Appointment of—Powers of judge appointing.*—Additional coroners provided for by section 891 of the Code of Virginia, 1904, as amended, are appointed by the judge of the corporation court of a city or the judge of a circuit court of a county and the only limitation placed upon the power of the judge in making the appointment is that the person appointed shall be a physician.

*Same.*—Additional coroners appointed as provided for by section 891 of the Code of Virginia, as amended, are coroners the same as the coroner first appointed and their duties and responsibilities are the same.

*Same—Duties of coroner of the city of Richmond.*—The coroner of the city of Richmond, or one of the additional coroners, upon notice of the same, must investigate all sudden, violent, unnatural or suspicious deaths occurring in whatever portion of the city whether it be in the jail, penitentiary or otherwise.

RICHMOND, VA., July 7, 1917.

DR. JAMES M. WHITFIELD,  
City Coroner,  
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your communication addressed to the Attorney General, in which you request him to advise you on the following questions:

1. What are my duties, rights and privileges as coroner of the city of Richmond in cases requiring the attention of a coroner and which occur within the city limits south of the river?
2. Does the State law require the appointment of an assistant coroner who shall act instead of the coroner of the city in cases occurring on the south side of the river?
3. Does the coroner have any voice in the appointment of this assistant coroner? Who appoints him?
4. To whom is this assistant coroner responsible and to whom does he report?
5. Is the coroner of this city required to investigate all deaths of inmates of the city jail and State penitentiary?

Your first question is answered by the provisions of section 891 of the Code of Virginia, 1904, as amended by the Acts of 1910, page 344 (Virginia Code, Vol. 3, page 118), which section reads as follows:

The judge of each corporation court and of each circuit court of a county of the State shall, on the first day of January, nineteen hundred and twelve, and every four years thereafter, appoint for his city or for each county in his circuit, respectively, as the case may be, one physician, who shall be the coroner of such city or county, who shall qualify according to law and serve until his successor is appointed and qualified. If the court shall be of the opinion that one coroner is not sufficient, he may appoint as many more as to him may seem proper. Coroners may be removed from office as provided in section eight hundred and twenty-one of this Code for the removal of certain officers.

You will therefore see that the coroner for the city of Richmond is appointed by the judge of the hustings court of the city of Richmond, which is the corporation court of that city. You will also see from the above statute that a coroner for a city is appointed not for a part of his city, but for the city.

Your second question is likewise answered by the provisions of section 891 of the Code of Virginia, as amended, which, as you will note, provides that if the court shall be of the opinion that one coroner is not sufficient, he may appoint as many more as may seem proper. The statute, however, places no limitation upon the jurisdiction of coroners appointed, and I am of the opinion that such additional coroners would have jurisdiction in their respective city or county co-extensive with the jurisdiction of the first coroner appointed.

Your third question is also answered by the provisions of section 891 of the Code of Virginia, as amended. Such additional coroners, as I have said, are appointed by the judge of the corporation court of a city or the judge of the circuit court of the county. The only limitation placed upon the power of the judge in making the appointment is that the person appointed shall be a physician.

In reply to your fourth question, I am of the opinion that the additional coroner or coroners appointed, as provided by section 891 of the Code of Virginia, as amended, are coroners the same as the coroner first appointed, and that their duties and responsibilities are the same.

The fifth question is governed by the provisions of section 3938 of the Code of Virginia, 1904, as amended by the Acts of 1910, page 338 (Virginia Code, Vol. 3, page 391.) This section provides that, upon notice of a sudden, violent, unnatural or suspicious death, the coroner of the city of Richmond, if the dead body be in the penitentiary and in any other case, the coroner of the county or corporation in which the dead body is, shall view the body and make inquiry into the circumstances of the said death, and after an inquiry, as aforesaid, if facts are revealed sufficient to create in the mind of the coroner a reasonable belief that the person whose body he shall view came to his or her death by murder or manslaughter, or by the contrivance, aiding, procuring, or other misconduct of any person or persons, he shall issue a warrant addressed to the sheriff or sergeant or any constable of the county or corporation, requiring him to summon six jurors of the county or corporation to attend before him, as coroner, at a designated place in said county or corporation, to inquire upon the view of the body of the deceased, when, how and by what means he came to his death.

You will therefore see that, upon notice of the same, you or one of the additional coroners, if such there are in existence, in this city, must investigate all sudden, violent, unnatural or suspicious deaths occurring in whatever portion of the city, whether it be in the jail, penitentiary, or otherwise.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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CORONERS—*Additional coroners for the city of Richmond—Section 891 of the Code of Virginia, 1904, as amended.*—Under the power conferred upon the corporation court of the city of Richmond to appoint one or more coroners, Dr. John W. Broadnax is properly a coroner of the city of Richmond.

RICHMOND, VA., July 18, 1917.

DR. JAMES M. WHITFIELD,  
*City Coroner,*  
*Richmond, Va.*

DEAR SIR:

Supplementing my letter to you of July 7, 1917, answering the several queries contained in your communication to the Attorney General with regard to the appointment of city coroners in the city of Richmond, I beg to advise that, upon further investigation, I find that on Jan. 7, 1916, Dr. John W. Broadnax was, by the judge of the hustings court, Part 2, appointed coroner for the city of Richmond, for a period of four years with jurisdiction limited to the south side of the James river unless directed to perform the duties of his office by Dr. Wm. H. Taylor, then coroner.

I also find that on Jan. 12, 1916, the order of the judge of the hustings court, Part 2, appointing Dr. Broadnax coroner, was ratified and confirmed by Judge D. C. Richardson, judge of the hustings court.

I am, therefore, of the opinion that under the power conferred upon the corporation court of the city of Richmond to appoint one or more coroners, that Dr. Broadnax is properly a coroner for the city of Richmond.

I am writing this in order to make clear and supplement my former letter on this subject after a fuller knowledge of the facts in the matter.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

**CORONERS—Autopsy.**—A coroner may order an autopsy to be made when in his judgment that is an appropriate means of ascertaining the cause of a person's death and the consent of the family of the deceased is not necessary.

*Same.*—It being the duty of a coroner to inquire into and ascertain the cause of all sudden, violent, unnatural and suspicious deaths, in such cases he has authority to perform an autopsy even against the wishes of the family of the deceased, provided the circumstances require the same in order to permit him to perform the necessary duties of his office. As to whether the autopsy is necessary must depend upon the facts of each individual case.

RICHMOND, VA., *July 9, 1917.*

DR. JAMES M. WHITFIELD,

*City Coroner,*

*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication in which you request the Attorney General to advise you on the following question:

In event the coroner thinks an autopsy necessary and the friends or family object and protest against it, has the coroner the authority (a) to exhume the body; (b) to make an autopsy, against the wishes of the family or friends?

The general rule seems to be that a coroner may order an autopsy to be made when, in his judgment, that is an appropriate means of ascertaining the cause of a person's death, and the consent of the family of the deceased seems to be unnecessary. The general rule is thus stated in 9 Cyc. page 988-9:

A coroner may order an autopsy to be made, when in his judgment that is the appropriate means of ascertaining the cause of a person's death; and this he may do without the consent of the family of the deceased, for such power is incident to the coroner's official duty. And a surgeon who makes a post mortem examination of a body at the request and in pursuance of the authority of the coroner is not liable in an action for damages by the family of the deceased for the mutilation of the remains. At the post mortem examination the coroner has a discretion to determine whether any persons, and what persons, may be present besides the surgeons.

In the case of *Young v. College of Physicians and Surgeons of Baltimore City, et als*, 81 Md. 358, 31 L. R. A. 540, it was held that a coroner could lawfully order a post mortem examination without the consent of the family of the deceased where death has followed an injury which seems to him insufficient alone to produce death, and that such an examination made by medical examiners in the exercise of their duties when required by the coroner, does not render him liable for mutilation of the

body without the consent of the family of the deceased if the work is done with ordinary decency without wantonly disfiguring the body.

In this case it appeared that the coroner was required to issue a certificate within a certain time, showing the cause of death, and the coroner testified that he could not be satisfied as to the cause of death in the particular case without performing or having performed an autopsy upon the body of the deceased. The court said:

The causes of death must be ascertained, so that means may be adopted for the prevention of other deaths from the same sources. The evidence before us exhibits the case of a public officer whose duty it is to find out and certify the cause of a death which is brought to his notice. The accident preceding his death, and disabling him, is not, in his opinion, sufficient to cause the death of a healthy person. There must, therefore, as he thinks, be some diseased condition of the injured man, which contributed to bring about this result. His opinion is shared by other reputable physicians who have testified in the case. He could not honestly and conscientiously give the certificate which the law required him to give, unless he made proper inquiry into the case. In his judgment, and in the judgment of the professional witnesses, proper and sufficient inquiry could not be made without an autopsy. So far as the evidence in the case shows, or any rational inference from it, the coroner did simply his plain and positive duty in ordering the autopsy. \* \* \*

It being your duty to inquire into and ascertain the cause of all sudden, violent, unnatural or suspicious deaths, I am of the opinion that in such cases you would have authority to perform an autopsy even against the wishes of the family of the deceased, provided the circumstances required the same in order to permit you to perform the necessary duties of your office. As to whether the autopsy is necessary, must depend upon each individual case.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

*CORPORATIONS—Charters—Forfeiture of—Taxation—Virginia Tax Bill—Section 41.*—Aside from any question as to the validity of the provisions of section 41 of the Virginia Tax Bill relating to the forfeiture of corporate charters as applying to corporations chartered prior to the enactment of this statute, in no case would the charter of a corporation which has not been assessed with the registration fee imposed by section 41 of the Virginia Tax Bill, be forfeited by the failure of such corporation to pay a tax which has never been assessed

*Same.*—The provision of section 41 of the Virginia Tax Bill providing for the forfeiture of a corporate charter for the failure of the corporation to make the report required means the report mentioned in the next preceding paragraph of the statute, namely: the report to be made at the time of paying the registration fee and on the forms prescribed by the Corporation Commission consisting of the status, business or condition of the corporation as is required by the Corporation Commission, and not to the report provided for in the second paragraph of section 41 of the Virginia Tax Bill as originally enacted.

*Same.*—A corporation which has never been assessed for taxation by the State Corporation Commission does not come within the terms of section 41 of the Virginia Tax Bill and therefore cannot be subjected to the penalty provided for its failure to comply with the same.

*Same.*—In the absence of the requirement of the State Corporation Commission that a corporation file the report required by section 41 of the Virginia Tax

Bill, the failure of such corporation to do so cannot be construed so as to work a forfeiture of the corporate charter *ipso facto* even though the terms of section 41 of the Virginia Tax Bill, as amended, be broad enough for that purpose when a corporation has been guilty of the defaults therein specified.

*Same.*—Where no registration fee has been assessed against a corporation, it cannot be in default as to the payment of the same until assessed, and therefore does not come within the meaning of the forfeiture clause of section 41 of the Virginia Tax Bill, as amended.

RICHMOND, VA., *September 13, 1917.*

HON. C. B. GARNETT, *Chairman,*  
*State Corporation Commission,*  
*Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of the communication of Fitzhugh Elder, Esq., in reference to the present status of a charter of Elliott's Knob Iron, Steel and Coal Company, a Virginia corporation, which was referred to this office for consideration.

The facts in this matter are thus stated by Mr. Elder in his communication to you of April 10, 1917:

The Elliott's Knob Iron, Steel and Coal Company was incorporated by the circuit court of Augusta county, Virginia, June 13, 1890. Under the provisions of the charter "the capital stock of the company is to be not less than one million dollars in shares of the par value of one hundred dollars each and not more than ten million dollars in shares of the par value of one hundred dollars each."

The corporation has been a dormant concern practically ever since its incorporation. It holds title to some twenty-six thousand acres of mountain land in the western portion of Augusta county on which it has always paid the taxes assessed thereon.

Some years ago, to be exact, on ..... 1908, it sold the timber growing on twenty-five thousand acres of its land to the Augusta Wood Products Corporation—a foreign corporation—which has ever since paid the taxes on said timber. So the corporation is now the owner of twenty-five thousand acres of mountain land, on which the timber has been sold and conveyed, and is the owner of an additional tract of about one thousand or eleven hundred acres on which the timber, although not sold, is of little or no value.

The corporation has practically agreed to sell the twenty-five thousand acres, from which the timber has been sold as above stated, at one dollar an acre. However, before making a deed to the purchaser, and to the end that the purchaser may get an absolutely clear title, free from any claim for taxes by the State of Virginia, I, as counsel for E. K. I. S. & C. Co., desire to come to some equitable adjustment—with the proper State authorities, of all taxes which the State can rightfully claim, if, indeed, it can claim any.

The State Corporation Commission, so I am informed by Mr. R. T. Wilson, clerk to the commission, has never taken any affirmative action looking to the forfeiture of the charter of the corporation and so, whether the charter of the corporation is now forfeited or not depends upon the proper construction of the provisions of our law, relative to the forfeiture of charters.

I am informed by your office that a registration fee and franchise tax has never been assessed against this corporation. From an examination of the charter of this company, I find that it contains no provision as to its duration and nothing relating to forfeiture.

It is the contention of Mr. Elder that under the provisions of section 41 of the

Virginia Tax Bill, which was not in existence at the time of the creation of this corporation, that the franchise of the Elliott's Knob Iron, Steel and Coal Company has been forfeited, and that the property which belonged to this corporation cannot be subjected to the payment of the registration fees and franchise taxes, which should have been assessed by the Corporation Commission against the corporation.

In view of the fact that the laws of this State contained no provision providing for the forfeiture of a corporate charter for the non-payment of taxes assessed against it, it is doubtful if the forfeiture clause of section 41 of the Virginia Tax Bill should be construed as applying to corporations chartered prior to its existence, if this statute is to be construed as working a forfeiture of a corporation *ipso facto* upon its failure for two successive years to pay its annual registration fee. Morawetz on Private Corporations, 2nd Edition (1886), section 1048.

I am of the opinion, however, that aside from any question as to the validity of this provision of section 41 of the Virginia Tax Bill, as applying to corporations chartered prior to the enactment of this statute, that in no case could the charter of a corporation, which has not been assessed with the registration fee imposed by section 41, be forfeited by the failure of such corporation to pay a tax which has never been assessed. Section 41 of the Virginia Tax Bill, as originally enacted, which is found in Vol. 2 of the Code of Virginia, 1904, page 2217, provided that:

Every corporation shall obtain from the State Corporation Commission a blank form upon which to report the amount of its maximum capital stock as of the first day of each year, and shall file its report made upon such blank form to the State Corporation Commission by the first day of February of each year.

It was provided by the next paragraph of section 41, as is provided by section 41 as it at present exists, that the State Corporation Commission shall assess against each corporation the registration fee imposed by said section, and that a certified copy of the assessment when made should be immediately forwarded by the clerk of the State Corporation Commission to the Auditor of Public Accounts, and each of such corporations. It will, therefore, be seen that prior to the amendment of section 41 of the Virginia Tax Bill, it was the duty of every corporation to make the report to the Corporation Commission, upon which such assessment was based, and for this period, at least, it cannot be contended, I think, that the failure of a corporation to have the tax provided for by section 41 assessed could so operate as to deprive the State of the right to the tax which should properly have been assessed and which would have been assessed but for the default of the corporation in making the report required by law.

Since the amendment of section 41 of the Virginia Tax Bill, it will be observed that the State Corporation Commission is required to ascertain from its records the amount of the authorized maximum capital stock of each of the corporations mentioned in section 41, as of the first day of January of each year, and to assess against each corporation the registration fee imposed by this section, and to forward a certified copy of the assessment before the 15th day of February to the Auditor of Public Accounts and to each corporation. It would, therefore, seem that under the law as amended, it is the duty of the Corporation Commission to make such assessment from information ascertained from its own records. I am of the opinion, however, that the failure of the State Corporation Commission to assess a registration fee against this corporation would not operate so as to relieve a corporation from the payment of the tax which should have been assessed.

It will be observed that section 41 of the Virginia Tax Bill, as originally enacted, which is found in Vol. 2 of the Code of Virginia, 1904, p. 2217, contained the following provision:

The failure of any corporation for two successive years to pay its annual registration fee or to make such report, shall, when such failure shall have been continued for ninety days after the expiration of such two years, operate as a revocation and annulment of the charter of such corporation if it be a domestic corporation. \* \* \*

The report referred to is the report mentioned in the next preceding paragraph of the statute, which reads as follows: "Every domestic and foreign corporation, at the time of paying such registration fee, shall make to the State Corporation Commission, on the forms prescribed by it, such report of its status, business or condition as the State Corporation Commission shall require," and not to the report provided for in the second paragraph of section 41 of the Virginia Tax Bill as originally enacted.

The corporation, never having been assessed by the Corporation Commission, never came within the terms of this latter requirement and therefore could not be subjected to the penalty provided for its failure to comply with this paragraph of the statute as originally enacted.

It is to be observed that it is provided by section 41 of the Virginia Tax Bill, as amended, that:

The State Corporation Commission may require every domestic and foreign corporation, in the month of January in each year and within such time as it may prescribe, to make to the commission, on forms prescribed by it, such reports of the status, business and condition of each such corporation as the commission may call for.

There is nothing, however, in the facts before me showing that the Corporation Commission has ever required the corporation under consideration to make the report referred to, and I infer from the fact that the corporation seems to have been overlooked by the State Corporation Commission that no such report from the corporation has ever been called for by the State Corporation Commission in the exercise of the discretion vested in it by the above-quoted paragraph of section 41 of the Virginia Tax Bill, as amended.

In the absence of the requirement of the State Corporation Commission that the corporation under consideration file the report, its failure to do so could not be construed so as to work a forfeiture of its charter *ipso facto*, even though the terms of section 41 of the Virginia Tax Bill, as amended, be broad enough for that purpose when a corporation has been guilty of the defaults therein specified.

I therefore conclude that no registration fee having been assessed against this corporation, that it cannot be in default as to the payment of the same until assessed, and, therefore, this corporation does not come within the meaning of the forfeiture clause of section 41 of the Virginia Tax Bill, as amended.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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CORPORATIONS—Words and phrases—Doing business in this State—Sections 1104 and 1105 of the Code of Virginia, 1904, as amended.—The phrase "doing business in this State" as used in sections 1104 and 1105 of the Code of Virginia, 1904,

as amended, means doing the business or character of business for which the corporation was organized and therefore the selling and issuance of stock of a corporation does not constitute a transaction of business within the State as contemplated by these statutes.

RICHMOND, VA., May 3, 1917.

HON. C. B. GARNETT,  
Chairman, State Corporation Commission,  
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of April 21, 1917, in which you request my opinion on the following state of facts:

A foreign corporation has been organized to do business in Virginia, of manufacturing automobiles, and said corporation comes to this State and opens an office for the sale of its stock, but has not yet manufactured any automobiles in Virginia, but in the sale of its stock advertises that it is establishing a factory at Norfolk, Virginia, for that purpose.

Can such a corporation be required to comply with the terms of sections 1104 and 1105, Virginia Code, 1904. An early answer will be appreciated to this question. In this connection my brief in the General Railway Signal Company case might be of some assistance to you.

The authorities seem to hold that the phrase "doing business" in this State, as used in statutes similar to sections 1104 and 1105 of the Code of Virginia, 1904, as amended, means doing the business or character of business for which the corporation was organized. *People Ex. Rel. Stead v. Chicago I. & L. L. Co.*, 79 N. E. 144, 146, 223 Ill. 581, 7 Ann. Cas. 1, and authorities there cited. It likewise seems to be settled that the selling and issuance of stock of a corporation subscribed for does not constitute a transaction of business within the State as contemplated by such statutes.

*Southworth v. Morgan*, 128, N. Y. S. 598.

*Union Trust Co. v. Sickles*, 125 N. Y. App. Div. 105, 389.

*Galena M. & S. Co. v. Frazier*, 20 Pa. Sup. Ct. 394.

See also *Payson v. Withers*, 5 Biss. (U. S. C. C. Ind.) 269, 271-273.

*Pavilion Co. v. Hamilton*, 15 Pa. Sup. Ct. 389.

In *Southworth v. Morgan*, *supra*, an action was brought by the plaintiff to recover from the defendant the sum of \$150.00, being unpaid balance upon two shares of stock of a New Jersey corporation, sold in Ilion, N. Y. The defendant moved for the dismissal of the plaintiff's complaint upon the ground of the failure to allege and prove a compliance with the provisions of section 15 of the General Corporation Laws of the State of New York. (Consol. Laws, 1909 C. 23). The statute provided that "no foreign stock corporation, other than a moneyed corporation shall do business in this State without first having procured \* \* a certificate, that it has complied with all the requirements of the law \* \* \*" and prohibited any such corporation from maintaining any action in that State upon any contract made by it in the State unless prior to the making of such contract it should have procured such certificate. In passing on this question the court said:

The procuring of such a certificate was a condition precedent to the right to do business in this State, and if the transaction in issuing the stock in question could be considered a transaction of the business of the corporation, then there would be much force in defendant's contention that the complaint should have contained an allegation that such certificate had been procured. But I do not think under the meaning of the statute that the transaction

relative to the subscription and issuance of the stock in question was a transaction of business by the corporation contemplated by the statute quoted above (*Union Trust Company v. Sickles*, 123 App. Div. 105, 109 N. U. Sup. 262), and therefore it does not seem to me that the defendant's objection above referred to is tenable.

Discussing the same general subject the Appellate Division of the Supreme Court of New York in *Union Trust Company v. Sickles*, *supra*, speaking through Robson, J., said:

What the expression "doing business" or "to do business" within this State, as used in the statute, really means has received judicial attention in many cases; but, except in the present case, it does not seem to have been yet held that a foreign corporation was doing business in this State, within the meaning of the statute, when it had done no business therein beyond presenting for sale and selling to individual purchasers, or floating on the market either its stock or its bonds. (*Payson v. Withers*, 19 Fed. Cas. 29, 30.) The plain reading of the statute shows that it was intended to prevent a foreign stock corporation from doing in this State the business for the doing of which it was organized until it had procured the required certificate and that it does not contemplate a prohibition, either of the sale of its stock or borrowing money on its obligations. It obviously relates only to the regular and customary business operations of the corporation. (*Potter v. Bank of Ithaca*, 5 Hill, 490; *People v. Horn Silver Mining Co.*, 105, N. Y. 76; *Beard v. Union & American Pub. Co.*, 71 Ala. 60, 62.)

In *Galena M. & S. Co. v. Frazier*, *supra*, it was held that a subscription to the capital stock of a foreign corporation is not a doing of business by that corporation within the Commonwealth of Pennsylvania within the meaning of a statute somewhat similar to the Virginia law. The reason upon which this decision was based was that a subscription to stock is not incident to the doing of that business for which incorporation is effected, and that the law intended to forbid only the prosecution of the corporate business without compliance with the statute.

Such statutes relate, it was said in *Payson v. Withers*, *supra*, "to the usual business done by a corporation, and by its agents and does not refer to obtaining subscription to its stock."

Yours very truly,  
LEON M. BAZILE,  
Law Assistant.

CORPORATIONS—*Corporate charters—Consolidation or merger.*—Virginia cases relating to reviewed.

RICHMOND, VA., March 19, 1917.

HON. WILLIAM L. MARTIN,  
Attorney General,  
Montgomery, Ala.

DEAR SIR:

Belated acknowledgment is made of your letter of March 3rd to the Attorney General of Virginia in regard to the contention of the Atlantic Coast Line Railroad Company that by virtue of the law of Virginia, found in the Acts of 1899-1900, page 24, this company was denied the right to become a corporation of any other State by merger or consolidation, and requesting that I advise you if there has been any litigation in our courts growing out of the company's charter, and if so that I give you a list of the authorities containing the history of such litigation.

So far as I can find the company's charter has never been the subject of litigation in Virginia, and I am advised by the State Corporation Commission that there has been no controversy before that body with regard to this charter. I am also advised that the Atlantic Coast Line Railroad Company has never taken advantage of sub-division 6 paragraph 1105-b of the Code of 1904, and it is practically certain that it will not surrender any of its present exemptions by taking advantage of this paragraph.

There are very few Virginia cases which have dealt with the subject of consolidation or merger, and the only case I find on this subject since the adoption of the act concerning corporations (in which is contained section 1105-e of the Code, 1904) is the case of *Winfree v. Riverside Cotton Mills*, 113 Va. 717, 75 S. E. 309. I very much doubt that this will be of any service to you.

On the general subject of consolidation and its affect on property and liabilities you might consult *Langhorne v. Richmond R. Co.* 91 Va. 369, 22 S. E. 159.

The Attorney General has been so very much engaged with the litigation between Virginia and West Virginia, and other very pressing public matters, that he has been unable to give attention to your letter. I desire on his behalf to present his assurances of high appreciation of your personal references, and to say that if it is possible for him to be present at the meeting of the Attorneys General to be held in New Haven, Conn., in August, he will greatly enjoy renewing his acquaintance with you there. In the meantime, if this office can be of any further assistance to you in this matter do not hesitate to call upon us.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

*COSTS—Criminal prosecutions—Intoxicating liquor laws—Fees of Commonwealth's attorney to be taxed as costs.*—Commonwealth's attorneys are allowed a taxed fee of \$5.00 for all indictments for misdemeanors, and \$10.00 for all indictments for felonies under the Virginia Prohibition Law where the cases are actually tried.

*Same—Crimes—Misdemeanors and felonies—Offenses under the Virginia Prohibition Law—Chapter 146 of the Acts of 1916.*—An indictment charging the accused with having liquor in his possession in violation of chapter 146 of the Acts of 1916, and an indictment charging the accused with drinking whiskey in a public place only charges a misdemeanor whether the crime charged be a first or second offense. Therefore, the Commonwealth's attorney is allowed in such cases a taxed fee of \$5.00.

*Same.*—By section 55 of chapter 146 of the Acts of 1916, the fees of officers for services rendered in connection with violations of the statute are placed upon the same basis as fees of officers in other cases of felony and misdemeanor other than the violations of the revenue laws.

RICHMOND, VA., May 12, 1917.

CAMPBELL & AINSWORTH,  
Attorneys at Law,  
Lexington, Va.

GENTLEMEN:

Your letter of May 10th to the Attorney General, requesting a ruling on the fees of Commonwealth's attorneys, to be taxed as costs in cases arising under the prohibition law, is before me for attention.

We have advised the Auditor of Public Accounts that the Commonwealth's attorney is allowed to tax a fee of \$5.00 for all indictments for misdemeanors and \$10.00 for all indictments for felonies under the prohibition law, where the cases are actually tried.

In the two indictments mentioned in your letter, one for having liquor in his possession and another for drinking whiskey in a public place, both are misdemeanors, whether or not they are the first or second offense, and, therefore the Commonwealth's attorney is allowed to tax in the costs as his fee in each case the sum of \$5.00; indeed the provisions of section 55 of the prohibition law providing for the fees of officers for services rendered in connection with violations of the act places such fees upon the same basis as fees of these officers in other cases of felony and misdemeanor other than violations of the revenue laws.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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*COSTS—Clerk's fees to be taxed by justices of the peace in criminal cases—Sections 718, 719, 730, 731, 732, 733 of the Code of Virginia, 1904.*—Where a justice of the peace imposes a fine in a criminal proceeding, the clerk of court is entitled to two fees which aggregate the sum of \$1.25, which fees must be included in the costs of such prosecution by the justice of the peace.

*Same.*—The statutes relating to this question collected and reviewed.

RICHMOND, VA., *October 2, 1917.*

M. G. DAVIS, ESQ., J. P.,  
*Toano, Va.*

DEAR SIR:

Acknowledgment is made of your letter of October 1, addressed to the Attorney General, in which you request him to advise you whether clerks of courts are entitled to a fee of \$1.25 when a justice of the peace imposes a fine in criminal cases.

Under section 718 of the Code of Virginia, 1904, justices of the peace are required to certify all fines to the clerk of court. Under section 719 of the Code of Virginia, 1904, the clerk is required to enter all certificates of fines in a suitable book for which service, it is provided, he shall receive a fee of 25 cents for each such certificate, payable out of the public treasury.

Under section 730 of the Code of Virginia, 1904, the clerk is required, on or before the 15th day of October of each year, to return to the Auditor of Public Accounts a list of fines, among which list is to be included those imposed by a justice of the peace and recorded in the clerk's office as provided for by law.

It is provided by section 733 of the Code of Virginia, 1904, that for his services under this section and under sections 731-2 of the Code of Virginia, 1904, which relate to the same subject, that the clerk shall receive a fee of \$1.00 upon every such fine, which fee shall be included in the execution for costs or retained by him when collected.

You will therefore see that under the provisions of the above-quoted statutes, the clerk is entitled to two fees which aggregate the sum of \$1.25, which fees are to be included in the costs of criminal prosecutions before justices of the peace.

Yours very truly,

LEON M. BAZILE,  
*Law Assistant.*

*COSTS—Crimes—Fees of officers—Proceedings on complaint to put under bond to keep the peace—Sections 3527-8 of the Code of Virginia, 1904, as amended; Sections 3915 and 3917 of the Code of Virginia, 1904.*—A proceeding to place one under bond to keep the peace is not a criminal prosecution, but merely a proceeding for preventing the commission of a crime.

*Same—Payment of costs out of the treasury.*—The Auditor can pay claims out of the State treasury only in pursuance to express statutory direction.

*Same—Fees of Commonwealth's attorney to be taxed as costs—Sections 3527 and 3528 of the Code of Virginia, 1904, as amended.*—Under the provisions of the Virginia Code, the compensation of attorneys for the Commonwealth, payable out of the public treasury, is provided for only in two classes of cases, namely: (1) felonies; (2) misdemeanors; therefore, attorneys for the Commonwealth are not entitled to compensation out of the public treasury for services rendered in a proceeding to place one under bond to keep the peace as the same is neither a felony nor a misdemeanor, nor is it in any sense a prosecution for a crime.

*Same—Witness fees—Section 3534 of the Code of Virginia, 1904, as amended—Section 3915 of the Code of Virginia, 1904; Sections 2949 of the Code of Virginia, 1904.*—While section 3534 of the Code of Virginia, 1904, relating to the fees of witnesses, is a general statute and was amended and re-enacted subsequent to the enactment of section 3915 of the Code of Virginia, 1904, it was not intended to repeal the provisions of section 3915 of the Code of Virginia, 1904, therefore, witnesses summoned on behalf of the prosecution in a proceeding to place one under bond to keep the peace are not entitled to witness fees out of the public treasury for their attendance.

RICHMOND, VA., July 3, 1917.

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

DEAR SIR:

Acknowledgment is made of the file containing correspondence between you and Hon. Alex. H. Light, Commonwealth's attorney for Campbell county, with your request that you be advised on the following questions:

*First.*—Whether the attorney for the Commonwealth is entitled to a fee out of the public treasury for representing the Commonwealth in a proceeding against a party on a complaint to put him under bond to keep the peace, and

*Second.*—Whether you can pay out of the treasury the fees of witnesses summoned as witnesses on behalf of the prosecution.

While, as Mr. Light says, proceedings of this nature are found in the Code under the title, "Proceedings in Criminal Cases," a proceeding of this kind is not a criminal prosecution, but merely a proceeding for preventing the commission of a crime. As is said in 5 Cyc. 1028, under the title, "Nature of Proceedings:"

The requirement of surety of the peace is a preventative justice and consists in obliging those persons of whom there is a probable ground to suspect future misbehavior to stipulate with and to give full assurance to the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace. It is, however, to be observed that, strictly speaking, such proceedings are not criminal or even quasi-criminal in their character, and that the rules governing criminal proceedings are not applicable to them.

Discussing the nature of a proceeding of this kind, the Supreme Court of Alabama, speaking through Tyson, J. in *Howard v. The State*, 121 Ala., 21, 22, (1898); said:

\* \* \* It is a preventative measure which the magistrate is authorized to set in motion to restrain the defendant from the commission of an offense against the person or property of another, and not a proceeding to try the person charged with the commission of a criminal offense. To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, as we have said, he may be restrained from so doing by proper proceedings, but not punished by fine or imprisonment. True, should the defendant fail to give the security required by the magistrate, it is the duty of the magistrate to commit him to jail until he enters into the undertaking with sufficient sureties for the time he is required to keep the peace, not more than twelve nor less than six months. But this commitment to jail is predicated upon his failure or refusal to give the security required by the order of the magistrate, and not as the punishment for the commission of an offense.

In *Ford v. State*, 96 Miss., 85, 89 (1909), it is said in discussing the nature of such a proceeding:

\* \* \* It cannot be said, in strictness, that this is either a civil or criminal proceeding; but is more in the nature of a criminal proceeding, \* \* \*

To the same effect, see also *Weisselman v. The State*, 95 Wisc., 274, 275 (1897). *Arnold v. The State*, 92 Ind. 187 (1883). In the latter case it is said that such a proceeding "is a criminal proceeding to prevent the commission of a crime but is not a prosecution for a crime." The court stresses the point, however, that while such a proceeding "is a prosecution to prevent the commission of a crime, it is not a prosecution for a crime."

In *re Mitchell*, 39 Kans. 762 (1888), it was held that the defendant in such a proceeding could not be imprisoned in default of the payment of costs adjudged against him in such a proceeding. Section 251 of the Kansas Criminal Code provided that "when the defendant is adjudged to pay any fine and costs, the court shall order him to be committed to the jail of the county until same are paid." The court said:

\* \* \* This section is found among the provisions relating to the prosecution and conviction of persons charged with the commission of an offense, and has no reference to a proceeding to prevent persons from committing an offense. The power there given can be exercised where there has been a conviction and the defendant has been adjudged to pay a "fine and costs;" but in a proceeding to prevent the commission of an offense, no conviction is had and no fine can be imposed, and hence the section quoted does not apply nor furnish any authority for the order of imprisonment. \* \* \*

As you have been frequently advised, the Auditor can pay claims out of the State treasury only pursuant to express statutory direction. Under the provisions of sections 3527 and 3528 of the Code of Virginia, 1904, as amended, the Code sections relating to the payment of officers out of the treasury in criminal cases, the compensation of attorneys for the Commonwealth payable out of the public treasury is provided for only in two classes of cases, namely (1) felonies and (2) misdemeanors. It therefore follows that attorneys for the Commonwealth are not entitled to compensation out of the public treasury for services rendered in such cases, unless such proceedings come under one of these two heads. As I have before indicated, while such a proceeding partakes of the nature of a criminal prosecution, it

is in no sense a prosecution for a crime, and therefore, by no construction could be classified as a felony or misdemeanor, and, therefore, I am of the opinion that attorneys for the Commonwealth are not entitled to fees out of the public treasury for services rendered in the prosecution of such a proceeding. That the legislature of Virginia never intended such a proceeding to be treated as a prosecution for a crime is clearly indicated by the provisions of sections 3915 and 3917 of the Code of Virginia, 1904, the former providing that "the person giving judgment under this section for costs may issue a writ of *fiери facias* thereon, if an appeal be not allowed; and proceedings thereupon may be according to sections twenty-nine hundred and forty-nine and twenty-nine hundred and fifty-one"; which sections relate to proceedings for the enforcement of judgments rendered on civil warrants before justices of the peace, while section 3917 of the Code of Virginia, 1904, provides that in the case of an appeal from the judgment rendered by a conservator of the peace in such a proceeding, that if costs be awarded against the appellant, the recognizance which he may have given shall stand as security therefor, thus clearly indicating that so far as the costs of the proceeding are concerned, the law regards them as being the subject of enforcement by proceedings of a civil nature and not by proceedings of a criminal nature.

As to the second question. It is true that section 3534 of the Code, as amended, provides that all witnesses summoned for the Commonwealth shall be entitled to receive for each day's attendance 50 cents with all necessary ferriage and tolls and certain mileage traveled in going and returning to the place of trial or before the grand jury. This is a general statute, however, and while amended and re-enacted subsequent to the enactment of section 3915 of the Code of Virginia, 1904, I am of the opinion that it was not intended to repeal the provisions of the latter section, which reads as follows:

When such person appears, if the conservator, on hearing the parties, consider that there is not good cause for the complaint, he shall discharge the said person, and may give judgment in his favor against the complainant for his costs. If he consider that there is good cause therefor, he may require a recognizance of the person against whom it is, and give judgment against him for the costs of the prosecution, or any part thereof; and, unless such recognizance be given, he shall commit him to jail by a warrant, stating the, sum and the time in and for which the recognizance is directed. The person, giving judgment under this section for costs, may issue a writ of *fiери facias* thereon, if an appeal be not allowed; and proceedings thereupon may be according to sections twenty-nine hundred and forty-nine and twenty-nine hundred and fifty-one.

As I have heretofore pointed out, sections 2949 and 2951 of the Code are found in chapter 140 of the Code, which chapter relates to warrants for small claims, or civil proceedings before justices of the peace. Therefore, it appears that it was the legislative intent that a judgment should be given for costs of the prosecution against the person who is required to enter into a recognizance to keep the peace, which judgment is to be collected as in civil cases.

I therefore conclude that witnesses summoned on behalf of the prosecution in such a case, are not entitled to witness fees out of the public treasury for their attendance.

Yours very truly,

LESLIE C. GARNETT,

Assistant Attorney General.

COUNTIES—*Boundary lines*.—Jurisdiction of courts over waters bounding counties and cities in this State discussed.

RICHMOND, VA., November 13, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of November 4, 1916, in which you ask the following question:

Does the county line of one county extend to the other side of the river, or only half way?

As to jurisdiction of courts in matters of this kind, see section 3110 of the Code of Virginia, 1904, as amended, which section reads as follows:

Where any river, water course, or bay lies between any counties or any cities, or any county and city in this State, the circuit courts for the counties and the circuit or corporation courts of the cities, on each side, respectively, shall have concurrent jurisdiction over so much thereof as shall be opposite to said counties and cities. And the circuit courts for counties and the circuit or corporation courts of the cities lying on the waters bounding the State shall have jurisdiction respectively over such waters opposite said counties and cities, as far as the jurisdiction of this State extends, provided that this section shall not apply to the cities of Richmond and Norfolk.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

COUNTIES—*District road bonds—Opinion of Attorney General*.—The validity and the effect of an election held with reference to the issuance of district road bonds is not a question which comes within the jurisdiction of the Attorney General, but is a matter which comes under the jurisdiction of the county authorities and the courts, and therefore, is not a question proper for the Attorney General to express an opinion on.

RICHMOND, VA., May 29, 1917.

L. L. WILLIS, ESQ.,  
*R. F. D. 2,*  
*Jonesville, Va.*

DEAR SIR:

Acknowledgment is made of your letter of May 18, 1917, addressed to the Attorney General, in which you request him to advise you on the following state of facts:

Please advise me after taking the sense of qualified voters of any magisterial district in the State for the purpose of issuing bonds to build roads as to whether it is left to the county vote or the magisterial district?

Or in other words if the said district voting against the bond issue and it carries by the county would this vote it upon the district?

This is not a question which comes within the jurisdiction of the Attorney General, who is by law made the legal adviser of the officers and the executive departments located at the seat of government. The same question was asked the

Attorney General last summer by Hon. George P. Coleman, Highway Commissioner, and the Attorney General at that time declined to answer the question, even when requested by this official, on the ground that it was a matter which came under the jurisdiction of the county authorities and the courts and it would, therefore, be improper for him to express his views thereon.

Regretting our inability to advise you, I am,

Very truly yours,

LEON M. BAZILE,

*Law Assistant.*

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CRIMES--*Venue*.—The venue of a criminal prosecution for an offense committed on waters in this Commonwealth is governed by section 3110 of the Code of Virginia, 1904.

RICHMOND, VA., June 8, 1917.

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

DEAR SIR:

Acknowledgment is made of the communication of your assistant secretary, dated May 28, 1917, enclosing letter and clipping from Rev. J. S. Gresham, of City Point, Virginia, together with a copy of your reply thereto, with the request that the Attorney General advise you what can be done to regulate boats running up and down the river, passing through various counties, in the event that regulation should become necessary.

Rev. Mr. Gresham's letter, so far as is applicable to the question here under consideration, is as follows:

The dance halls of Hopewell have served heretofore as a place where the prostitutes of the city could meet the young men of the Du Pont Company, excite their passions amid the whirls of lewd dances, and then make engagements with them. It was a great day for Hopewell when they were closed.

I have heard it rumored that skating rinks would open to take their place. Moreover, as you will see from the enclosed clippings from the Hopewell Daily Press, the cancer is still here. I know, of course, that moonlight excursions are perfectly legal, but you will see at once that these excursions, or drifting parties, are a pure and simple substitute for the dance halls. The dance hall is also a legal institution, but just as the privilege of dancing has been abused in Hopewell, so the privilege of moonlight excursions is being abused at City Point, and I trust there is some way by which they can be stopped. The Hopewell authorities have no control on the river, and I do not look for any help from the county government, so I am appealing to you.

He enclosed a number of clippings from the Hopewell Daily Press, which announced the fact that the dance halls which were closed in Hopewell by order of the authorities would be re-opened on a vessel or vessels permanently anchored at the mouth of the Appomattox river.

Of course, it will be necessary to obtain evidence showing that the law is being violated before the operators of such places can be criminally prosecuted. When evidence of the violation of the law has been obtained, the venue of the prosecution is governed by section 3110 of the Code of Virginia, 1904, which section reads as follows:

Where any river, water course, or bay lies between any counties in this State, the courts for the counties on each side, respectively, shall have con-

current jurisdiction over so much thereof as is opposite to said counties. And the courts for counties lying on the waters bounding the State shall have jurisdiction, respectively, over such waters opposite said counties so far as the jurisdiction of this State extends.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

DEPARTMENTS OF GOVERNMENT—*Co-operation between.*—Where the object of co-operation between the departments of the State government will carry out the purposes for which the departments were designed, and at the same time reduce the cost of bringing to the attention of the people the work of these departments, there can be no objection to such co-operation. If each department has any funds not specifically appropriated by law to some other purpose, such case calls for the exercise of the discretion vested in the executive heads of the various departments of the State government unless there is some direct inhibition in the laws creating the department.

RICHMOND, VA., June 14, 1917.

HON. R. C. STEARNES,  
*Superintendent of Public Instruction,*  
HON. GEO. W. KOINER,  
*Commissioner of Agriculture,*  
HON. GEORGE P. COLEMAN,  
*State Highway Commissioner,*  
DR. ENNION G. WILLIAMS,  
*Health Commissioner,*  
REV. J. T. MASTIN, *Secretary,*  
*State Board of Charities and Corrections,*  
*Richmond, Virginia.*

GENTLEMEN:

Acknowledgment is made of your request for an opinion as to whether your several departments may co-operate in the manner herein indicated in presenting the activities of your departments to the people of the State.

You inform me that there exists in Virginia 1,179 community leagues having for their purpose the advancement of the interests which, under the law, it is your duty to promote, and that these organizations afford you the best and most economical method of reaching the people of Virginia with information necessary to the advancement of the work of your departments; that it would be very expensive, if indeed at all practicable, for your departments by independent action to reach the individual members of the leagues or to have representatives present at their meetings; that it is important for the advancement of the work of your department for you to know and reach the individuals in the State who are interested in the work being done by your department and you desire to know whether the law would permit co-operation between your departments in bearing the expenses of reaching the people in the following manner:

1. In paying the expense of preparing and distributing literature pertaining to your departments.
2. In paying the salary and expenses of representatives to attend the meetings of the leagues and present the work of your departments.

In the very great press of business to which the Attorney General's office has been subject it has been impossible for me to analyze fully the various statutes and appropriations pertaining to your several departments, and I shall have to give you only generally my views in regard to the question which you propound.

The general object to be obtained by the co-operation between your departments in bearing the expenses of preparing and distributing literature and in paying the salary and expenses of representatives to present the work of your departments before the 1,179 community leagues of the Co-operative Education Association is to more clearly and more strongly, as well as more economically, put the activities of your departments before the people. For instance, one of the chief duties of the State Board of Health is to educate the people as to the cause and prevention of disease, and the activities of the Board of Health could hardly be effectively conducted if it were not for these community leagues.

The Dairy and Food Division is authorized to prepare, print and distribute bulletins and other information relating to the adulteration of food and dairy products, and to foster and encourage the dairy industry of the State so as to procure a uniform and standard quality of dairy products. The activities of this department could probably be put before the people of Virginia very much better by the co-operative plan than any other.

These instances will serve to show that the object of the co-operation between the departments is very desirable, and if this co-operation will carry out the purposes for which the departments were designed and at the same time reduce the cost of bringing to the attention of the people the work of these departments, I can see no objection to such co-operation if each of your departments has any funds not specifically appropriated by law to some other purpose.

In other words, this would seem to be a case calling for the exercise of the discretion vested in you as executives, unless there is some direct inhibition in the laws creating your departments. I have found no such inhibition, but my search has been by no means thorough. On the other hand, I am very sure if there is such an inhibition each of you know of its existence.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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ELECTIONS—*Voters—Registration of—Sections 78 and 80, Code of Virginia, 1904.*—Under the provisions of sections 78 and 80 of the Code of Virginia, 1904, registration books must be closed thirty days prior to the general spring election and thirty days prior to the general election held in November. These sections relate, however, only to regular elections, and have no application to special elections, therefore, a person who is duly qualified in all other respects may register on the day before a special election, provided the special election is not held within the prohibited periods preceding a general election.

RICHMOND, VA., *June 1, 1917.*

J. S. RASNICK, ESQ.,  
*St. Paul, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of May 11, 1917, to the Attorney General, in which, among other questions, you ask him to advise you if a man who

is duly qualified in every other way can register in a special election the day before the election and vote the next day on a bond issue in an incorporated town.

This question was passed on by this office in an opinion given Honorable J. C. Arnett, Mayor of Mineral, Virginia, on May 31, 1917, in which it was held that, under the provisions of sections 78 and 80 of the Code, registration books must be closed for thirty days prior to the general spring election, and thirty days prior to the general election held in November. These sections relate, however, only to the regular elections, and have no application to special elections. Therefore, I am of the opinion that a person who is duly qualified in all other respects may register on the day before the special election, provided the said special election is not held within the prohibited periods preceding a general election.

The other question asked by you in your letter will take some little time to investigate. As soon as this is done, I will write you.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

*ELECTIONS—Voters—Registration of—Residence—Sections 78 and 80, Code of Virginia, 1904.*—The registration books must be closed for thirty days prior to the general spring elections, and thirty days prior to the November election, therefore a voter who fails to register on the town books thirty days before the election cannot be permitted after that time to register and vote in the election.

RICHMOND, VA., *May 31, 1917.*

HON. J. C. ARNETT,  
*Mayor of Mineral,  
Mineral, Virginia.*

DEAR SIR:

Your letter to the Attorney General, submitting the question as to who can vote in the coming town election, to be held in your town on June 12, 1917, for mayor and councilmen, is before me.

Your questions are as follows:

1. Can a citizen who has resided in the town for 90 days and has failed to register on the town registration books, get a transfer within 30 days from the election, from his precinct in the county, and vote in the town election?

I find from an examination of the reports of the office that this question has been held both ways by former Attorneys General. In an opinion rendered by Attorney General Montague, November 15, 1898, to the registrar at Lebanon, Virginia, he held that a registrar has no right to issue a transfer on the day of election, nor has a registrar the right to register the name contained in the transfer on the day of election.

Attorney General Anderson held in an opinion to the registrar at Harrisonburg, Virginia, on May 5, 1906, that a voter registered in a precinct in Rockingham county would have a right to have a certificate by which he would be transferred to his precinct in the town of Harrisonburg after he has moved into that town, at any time; he also holds that the voter would have a right to be registered on such transfer in the town of Harrisonburg at any time between the 15th of May to June 12th.

You can see from the above statements that this matter has been held both ways by the predecessors of the present Attorney General, but in my view of sections

78 and 80 of the Code, the registration books must be closed for 30 days prior to the general spring election and 30 days prior to the November election. This being true, I do not see how a voter who fails to register on the town books 30 days before the election can be permitted after that time to register and vote in the election.

A transfer is not necessary for a citizen of the town to register on the town books. He is entitled under section 80 to a certificate from the registrar of the precinct in his county and upon this certificate to be registered upon the town books. This is manifestly true, as you suggest, in order to prevent the voter from being swapped from town precinct to county precinct in order to vote in both.

Your personal references to Mr. Pollard will be presented to him for his consideration, and I beg to thank you therefor.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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ELECTIONS—*Voters—Registration of.*—Registration books must be closed for the November election thirty days previous thereto, therefore one cannot register for such election on October 20th of any year.

RICHMOND, VA., October 25, 1917.

MR. C. R. HOWARD, *Treasurer,*  
*Fredericksburg, Va.*

DEAR SIR:

Yours of October 24th received.

Under a ruling of Attorney General Anderson (see his report 1906, page 72), registration book must be closed for the November election thirty (30) days previous thereto.

The young man of whom you speak could not therefore register on October 20th.

In the above mentioned ruling of Attorney General Anderson, his successors, so far as I am informed, have concurred.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General*

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ELECTIONS—*Voters—Residence.*—The provision of the Virginia Constitution that no soldier shall be deemed to have gained a residence as to the right of suffrage in this State by reason of being stationed here, does not prevent a retired soldier from taking up his actual residence in Virginia and thereby gaining the right of suffrage.

*Same.*—Soldiers of the United States on furlough from the National Soldiers' Home at Hampton, Virginia, cannot be deprived of the right to establish a *bona fide* residence in any State of the Union. After these furloughed soldiers have established *bona fide* homes in Virginia and have complied with other requirements of the election laws, they have a right to vote in this State. Their right to vote under such circumstances would not exist by reason of their location or sojourn in the National Soldiers' Home, but by reason of their taking up a *bona fide* residence in Virginia.

*Same.*—A soldiers' home is not an almshouse, and the inmates thereof do not stand on the same basis with the inmates of almshouses.

RICHMOND, VA., April 19, 1917.

MR. H. M. HAAS,  
Box 273,  
Phoebus, Va.

DEAR SIR:

Acknowledgment is made of your letter of the 9th instant to the Attorney General, requesting his opinion as to the right of retired United States soldiers in the town of Phoebus to vote.

You say that these men are retired by reason of thirty years' service and that they are still subject to the orders of the Secretary of War and he can assign them to any duty he sees fit.

You say that this question was laid before a former Attorney General and he decided that this class of men were not entitled to the ballot.

The provision of the Constitution involved is section 24, which reads as follows:

Sec. 24. No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof, by reason of being stationed therein; nor shall an inmate of any charitable institution or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution.

I am of opinion that the provision that no soldier shall be deemed to have gained a residence as to the right of suffrage in this State by reason of being stationed here does not prevent a retired soldier from taking up his actual residence in Virginia and thereby gaining the right of suffrage, but this question has not been passed upon by any former Attorney General, so far as I am advised.

It is true that Attorney General Anderson held (see opinions of Attorney General, 1902, page 25) that the inmates of the soldiers' home at Richmond could not vote in the county where this institution was located unless the inmate was a resident of that county before and at the time of taking up his abode in such institution. This, however, does not cover the first inquiry propounded by you.

Your second inquiry is as to whether or not United States soldiers who are inmates of the soldiers' home in Hampton but live outside of the home by reason of a furlough which has to be renewed every ninety days and who are still carried on the rolls as inmates of the home are entitled to vote.

This is not the exact question presented to Attorney General Anderson in the matter of the Confederate Soldiers' Home in Richmond. If these soldiers are only under the necessity of reporting every 90 days to have their furloughs renewed, there would be nothing to prevent such soldiers from acquiring a residence elsewhere than in Virginia and returning every 90 days to the home for the renewal of their furloughs. I cannot believe that under the Constitution soldiers of the United States on furlough from the National Soldiers' Home could be deprived of the right to establish a *bona fide* residence in any State of the Union, and if these furloughed soldiers have established *bona fide* homes in Virginia, and have complied with the other requirements of the election laws, it would seem that they would have a clear right to vote. Under such circumstances their right to vote would not exist by reason of their location or sojourn in the National Soldiers' Home but of their reason of taking up a *bona fide* residence in the town of Phoebus or elsewhere in Virginia.

I might add that there have been a number of decisions in the various courts of the United States touching this subject, and perhaps the best considered case is that of *Cory v. Spencer* (Kansas) 63 L. R. A. 275, where a number of cases are cited, criticised, approved and disapproved.

The California courts considered the question in the cases of *Budd v. Holden*, 28 Cal. 123, and *Stewart v. Kayser*, 105 Cal. 459. Also in point are the cases of *Saunders v. Getchell*, 76 Me. 158, *Lankford v. Gebhart*, 130 Mo. 637 and *Darragh v. Bird*, 3 Oregon 229.

In *Cushman v. Garrett Co.*, 153 Ind. 302, it was held that the soldiers' home was not an almshouse as set out in the Indiana Constitution.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

**ELECTIONS—Voters—Residence of—Words and phrases.**—Residence is largely a question of intention. If a man leaves his original residence with no intention of returning and occupies another, with the intention of remaining there permanently, his first residence is lost, but if he leaves his original residence with the intention to return, the original residence continues in law notwithstanding his temporary absence. Therefore, a resident of the city of Richmond who moves therefrom to the county of Henrico with the intent to build on a lot in the city of Richmond and return thereto to live and who makes his tax returns in the city of Richmond, is a resident of such city within the meaning of the Virginia Election Laws.

*Same.*—Where a man has two places of living, he can select either place he desires as his legal residence.

RICHMOND, VA., July 3, 1917.

MR. H. WATKINS ELLERSON,  
City.

DEAR SIR:

I acknowledge your request for an opinion as to whether or not Mr. Arthur M. Cannon is eligible to membership on the local board of exemption under the law which requires such a member to be a resident of the area in which he acts.

My information is that Mr. Cannon claims legal residence on Park avenue, where he has heretofore usually spent a part of the year, and where he now has some of his effects, although he is at present temporarily domiciled in a rented house at Westhampton. Mr. Cannon states his ultimate purpose to build on a lot in the city limits, and on the area where his father-in-law has now acreage property. Mr. Cannon makes his tax returns in the city of Richmond and has his place of business here.

It is very difficult to define "residence," and it is largely a question of intention. If a man leave his original residence with no intention of returning and occupies another with the intention of remaining there permanently, his first residence is lost, but if he leave his original residence with the intention to return, the original residence continues in the law, notwithstanding his temporary absence.

Where a man has two places of living, it would seem that he can vote at either place he desires.

The facts in this case are not unlike those in the case of *Williams v. Commonwealth*, 116 Va. 272, where a member of the city council moved to his cottage outside of the city limits, but stated at the trial that his going to and residing there was

temporary, and it was his intention to return to the city. The court held that there was nothing in his actions to contradict his intention, and that he was entitled to hold office as a member of the city council of Alexandria.

I am, therefore, of the opinion that Mr. Cannon is eligible to membership on this board.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

**ELECTIONS—Voters—Residents—Section 62 of the Code of Virginia, 1904—Section 18 of the Virginia Constitution.**—In addition to other qualifications it is necessary that a person offering to vote at an election be (1) a resident of the State for two years; (2) of the county, city or town for one year, and (3) of the precinct in which he offers to vote, thirty days next preceding the election.

**Same—Political sub-divisions—Cities.**—A city is a separate and distinct political sub-division and is not in a county, therefore, the same rule should apply in the case of a voter moving from the county to a city as is applied in the case of a voter who removes from one county in the State to another county.

RICHMOND, VA., June 1, 1917.

HON. W. P. LIPSCOMB,

*Commonwealth's Attorney,*

*Suffolk, Virginia.*

DEAR SIR:

Acknowledging receipt of your letter to the Attorney General of May 10, 1917, in which you requested opinion as to the following state of facts:

I have been asked whether or not a qualified voter moving from Nansemond county to the city of Suffolk, but who has not lived in the city one year, can vote for a candidate for city treasurer in the August primary, and in this connection my attention has been directed to page 18 of the compilation of the election laws, issued by the Secretary of the Commonwealth, where it is reported that you had ruled that "It is not necessary for a person to reside in a town twelve months in order to vote in a general election, but only that he has resided in the county in which the town is situated twelve months and in the precinct thirty days.

Section 62 of the Code requires a residence in the State two years, in the county, city or town, one year, and in the precinct thirty days. I do not think the fact that the city of Suffolk is in Nansemond county justifies the assumption that the voter in question can move from the county to the city and vote here before he has resided here a year, for a city is not an integral part of a county as is a town, and I take it that in the instant case the rule should be the same as if the voter should have come from Norfolk county or city to this city. Section 80 seems to bear out this construction, in that it provides for certificates for voters changing their places of residence "from one election district to another in the same county or city." Surely it cannot be contended that Suffolk, with its four voting precincts, is an election precinct in Nansemond county.

Of course, you will appreciate the fact that this is a matter which does not come within the prescribed duties of the Attorney General, and, therefore, what is said here is unofficial. This question is governed by section 18 of the Constitution of Virginia, which provides as follows:

Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city, or town one

year, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city, or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

And by section 62 of the Code of Virginia, 1904, as amended, which prescribes the same qualifications of persons offering to vote at an election.

It will be seen from an examination of section 18 of the Constitution, and section 62 of the Code, as amended, that, in addition to other qualifications, it is necessary that a person offering to vote at an election be (1) a resident of the State for two years, (2) of the county, city or town one year, and, (3) of the precinct in which he offers to vote, thirty days next preceding the election. In Virginia, a city is a separate and distinct political sub-division from a county, and there is nothing in common between the two. Therefore, I am of the opinion that in determining the question propounded in your letter, the same rule should apply as is applied in the case where a voter removes from one county in the State to another county; in which case it would be necessary for him to reside therein for one year preceding the election in which he offers to vote.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

**ELECTIONS—Voters—Residence.**—One who has lost his residence in Virginia, in order to acquire a residence here for the purpose of voting, must actually reside in the State two years and pay all poll taxes assessable against him before he can vote.

*Same.*—If a person moves to Virginia after February 1 of any year there are no poll taxes assessable against him for that year.

*Same.*—A man who once lived in Virginia and acquires a sufficient residence in another State to exercise there the right of suffrage, cannot vote in this State until he has again resided in this State for two years next preceding the election at which he desires to vote.

RICHMOND, VA., *June 4, 1917.*

H. H. HOLT, ESQ.,

*Clerk Elizabeth City County Court,  
Hampton, Va.*

DEAR SIR:

I beg to acknowledge your letter to the Attorney General, setting out the following case:

Application was made to you as clerk to pay delinquent poll taxes by a young man who resided in this State from childhood to September, 1914. On this date he left the State for Oklahoma and went from there to Maryland, having lived in Oklahoma for one year, then in Maryland for over a year, in which latter place he voted. The commissioner of revenue did not assess him the poll taxes for 1915 and 1916. You desire to know whether such a person would be eligible to vote in Virginia if he were assessed and paid the 1915 and 1916 poll taxes.

Residence is a very hard thing to define, even under the suffrage laws, but where a man leaves the State and stays out of the State sufficiently long to exercise the right

of suffrage in another State and there exercises that right, it would seem to me to be pretty well concluded that he voted in the latter State on the theory that he was then a resident thereof; that being true he has lost his domicile in Virginia, and in order to acquire a residence here for the purpose of voting he will actually have to reside in the State two years and will have to pay all of the poll taxes assessable against him for that period before he can vote. If he came to Virginia after February 1st of any year, there are no poll taxes assessable against him for that year. For instance, a party coming to Virginia after February 1st, in 1915, would be entitled to vote in November, 1917, but the only poll tax which would be assessable would seem to be the taxes for 1916, which he would have to pay six months prior to the election in 1917.

I do not think that a man who leaves Virginia and acquires a sufficient residence in another State to exercise there the right of suffrage can vote in this State until he has again resided in the State for two years next preceding the election at which he desires to vote.

If this is not clear to you, I shall be very glad to write you more fully in this behalf.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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ELECTIONS—*Voters—Qualification of—Payment of capitation tax—Section 21 of the Constitution of Virginia.*—The provision of the Constitution requiring as a prerequisite to vote the payment of poll taxes at least six months prior to the election is inflexible. No officer has the right to make any extension of the time no matter how small.

*Same.*—Poll taxes are not paid when the sum necessary therefor is deposited in the mail, but only when it is actually received by the treasurer. Therefore, it would not be proper for a treasurer to list among those eligible to vote in the June election, 1918, any citizen the payment of whose poll taxes did not reach him until December 11, 1917, although the same was posted on December 10, 1917, or prior thereto.

RICHMOND, VA., *December 12, 1917.*

HON. B. GRAY TUNSTALL,

*City Treasurer,*

*Norfolk, Va.*

DEAR SIR:

Acknowledgment is made of yours of December 11th, in which you advise me that the fact was widely advertised that December 10th was the last day for the payment of poll taxes as a prerequisite to voting in the coming June election, and that you kept your office open on the night of the 10th until 6:30 o'clock and until citizens ceased to present themselves for the payment of poll taxes. You state further that you received through the United States mail on December 11th, about a dozen letters enclosing \$1.58 in payment of poll taxes and that the envelopes enclosing these letters in each instance were post marked "Norfolk, Virginia, December 10th." Under this state of facts you ask my advice as to whether the citizens thus enclosing their taxes should be listed among the qualified voters for the coming June election.

The provision of the Constitution (sec. 21) requiring as a prerequisite to vote the payment of poll taxes "at least six months prior to the election" is inflexible.

No officer has the right to make any extension of the time no matter how small. Poll taxes are not paid when the sum necessary therefor is deposited in the mail, but only when actually received by the treasurer.

I am, therefore, of the opinion that it would not be proper for you to list among those eligible to vote in the June election any citizen the payment of whose poll taxes did not reach you until December 11th.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

*ELECTIONS—Voters—Words and phrases—"Qualified voters"—Chapter 307, Acts of 1912.*—The words "qualified voters" as used in section 9 of chapter 307 of the Acts of 1912, as amended, mean those persons who are qualified to vote in the primary in which the petitioner is a candidate.

*Same—Petitions of candidates for House of Delegates.*—The original of the petition of a candidate for the House of Delegates is to be filed with the county chairman and a certified copy of the same with each of the chairmen of the district, and certified copies of the petition should be sent to the chairman of each county in the district, and if there is no county chairman the petition of candidacy can be filed with a vice-chairman and if the committee cannot be made to elect a chairman, or vice-chairman, it should be filed with any member of the committee.

*Same.*—While there is no limitation as to the time when signatures may be obtained to a candidate's petition, the petition must be filed along with the declaration of candidacy, which declaration must be made and filed at least sixty days before the primary in which the person is a candidate.

*Same.*—The fact that the names of more than fifty qualified voters are signed to a petition of a candidate for the House of Delegates does not affect its validity.

*Same.*—Where the candidate's district consists of more than one county at least fifty qualified voters of his home county must sign his petition, although qualified voters of other counties or cities of his district may sign the same in addition thereto.

RICHMOND, VA., December 27, 1916.

C. I. TAYLOR, ESQ.,

*Allens Level, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter in which you request certain information as to the proper construction to be placed on section 9 of chapter 307 of the Acts of 1912, as amended.

Your first question is as to the qualification of the voters who signed the petition of a candidate for office, your question being: "Does this mean qualified voters who did or could have voted in the last election held in the month for presidential electors and members of Congress?"

The words of the statute are that the petition shall be signed by "qualified voters of the congressional district or county for House of Representatives and of the State at large, with respect to a candidate for United States Senate or any State office." I am of the opinion that the words "qualified voters" means those persons who are qualified to vote in the primary in which the petitioner is a candidate.

Your second question is: "Should this petition be made to the chairman of the committee of the Democratic party of the county or counties when the candidacy is declared for member of the House of Delegates of Virginia?"

I am enclosing you, under separate cover, copy of the Virginia Election Laws. You will find in the annotations to section 9 of chapter 307 of the Acts of 1912, as amended, pages 95, 96, 97 and 98, that it has been held by this office that the original of the petition is to be filed with the county chairman, and a certified copy of the same with each of the chairmen of the district, that certified copies of the petition should be sent to the chairman of each county in the district, and that if there is no county chairman the petition of candidacy can be filed with the vice-chairman, and if there is no vice-chairman and the committee cannot be made to elect a chairman or vice-chairman, it shall be filed with any member of the committee.

Your next question is: "Is there any specific time when this petition should be obtained so as to be before the proper authority in the proper time for the primary to be held next August?"

There appears to be no limitation as to the time when you may obtain signatures to your petition, except that the same must be filed along with the declaration of candidacy, which declaration must be made and filed at least sixty days before the primary in which the person is a candidate.

Your next question is: "If there should be more than fifty qualified voters signed to this petition, would this affect its being valid?"

No.

Your next question is: "Where there are two counties in the legislative district, should all of these names signed to the petition be from one of the counties or both counties?"

It has been held in a prior opinion, as follows:

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

I am also sending you, under separate cover, copy of the report of the Attorney General for 1915. If you will examine the same, pages 25 to 28, you will find this subject very fully covered.

Of course, you understand that the Attorney General is by law made the legal adviser of the departments at the seat of government only, and this opinion, therefore, is unofficial.

Very truly yours,

JNO. GARLAND POLLARD.

*Attorney General.*

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**ELECTIONS—Electoral boards—Judges and clerks of elections—Registrars—Appointment of—***Section 117, Code of Virginia, 1904.*—The electoral board has not only the privilege, but the duty of electing judges of election every year and may name any qualified persons as judges, regardless of whether or not they were heretofore judges.

*Same—Section 67 of the Code of Virginia, 1904.*—It is the duty of the electoral board to appoint registrars every alternate year after 1904, therefore registrars should be appointed in 1916 to hold office until the first day of May, 1918.

*Same—Election clerks.*—At the same time that the electoral board appoints judges of election, the board must appoint two clerks for each place of voting whose

terms of office shall be coincident with the term of the judges. The electoral board has the privilege of electing new men each year as clerks of election.

*Same—Election officials—Removal of—Section 69, Code of Virginia, 1904.*—The electoral board can remove from office any judge of election, registrar or clerk upon notice upon their failure to discharge their duties according to law. Such officers, it would seem, cannot be removed from office save for failure to discharge their duties according to law.

RICHMOND, VA., July 17, 1917.

MR. A. J. KENNARD,  
*Chairman of the City Electoral Board,  
Roanoke, Virginia.*

DEAR SIR:

Your letter of the 14th inst. to the Attorney General, with reference to the appointment of judges, clerks and registrars, is before me for consideration, and I shall reply to the inquiries therein in their order.

1st. Has the Board the privilege of electing all new men for the above named offices?

I beg to advise that under section 117 of the Code, it is the duty of the electoral board of each city and county in each year to appoint three competent citizens as judges of election for the term of one year. Therefore, the board has not only the privilege but the duty of electing judges every year, and may name any qualified persons as judges, regardless of whether or not they were heretofore judges.

By section 67 of the Code, it is made the duty of the electoral board to appoint registrars in the year 1904, and every alternate year thereafter. Therefore, it would seem that registrars appointed in 1916 hold office until the first day of May, 1918.

Section 117, above referred to, also provides that the board shall, at the same time that they appoint judges of election, appoint two clerks for each place of voting, whose terms of office shall be coincident with the judges. I am, therefore, of the opinion that the board has the privilege of electing new men each year as clerks of election, if they be so advised.

2nd. Are they compelled to use the same men who have heretofore been appointed, and have been serving in the various capacities?

This question is fully answered above in the answer to your first inquiry.

3rd. Has the board the privilege of removing judges, clerks or registrars without having charges preferred against them?

Section 69 of the Code provides, so far as pertinent to this issue, as follows:

The board shall also have power, after the first of March, nineteen hundred and four, to remove from office any and every judge of election, registrar, or clerk, upon notice, who fails to discharge the duties of his office according to law.

You will see from the above that the board can remove these officers only upon notice and upon failure to discharge their duties. In this connection, I beg to advise that Attorney General Montague, on November 1, 1899, held that a judge of election cannot be removed from office save for failure to discharge his duties according to law. (Reports of Attorney General, 1900, page 9.)

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

*ELECTIONS—Candidates—Town council—Qualification—Section 1021 of the Code of Virginia, 1904, as amended—Section 32 of the Virginia Constitution.*—A person who is not qualified to vote at a town election is not qualified to offer for office at the same.

RICHMOND, VA., June 1, 1917.

HON. JAS. P. TAYLOR,  
Mayor, Town of Clarksville,  
Clarksville, Va.

DEAR SIR:

Acknowledgment is made of your letter of May 31st, addressed to the Attorney General, in which you request him to answer the following question:

Is a party qualified to run for office of councilman at an election to be held on the 12th of June who has not paid his State capitation tax for year 1916. If he runs for office of councilman and not having paid his State tax for the year 1916, and is elected, can he qualify when the new council goes into office in September?

This question is governed by section 1021 of the Code of Va., 1904, as amended\* which section reads as follows:

In every town there shall be elected every two years, on the second Tuesday in June, one elector of the said town, who shall be denominated the mayor, and not less than three nor more than nine other electors, who shall be denominated the councilmen of said town. The mayor and councilmen shall constitute the council of said town.

And by section 32 of the Virginia Constitution, which provides that every person qualified to vote shall be eligible to any office of the State or of any county, city or town or other sub-division of the State wherein he resides, except as otherwise provided in this Constitution.

I am of the opinion that under these provisions of law, in order for a person to offer for office at a town election he must be qualified to vote at the election, and the Attorney General has so ruled in a former opinion.

Your first question having been answered in the negative, the same, of course settles your second question.

Very truly yours,  
LESLIE C. GARNETT,  
Assistant Attorney General.

*ELECTIONS—Primary elections—Fees of candidates—Chapter 307, Acts of 1912.*—The compensation of the Secretary of the Commonwealth and the State Treasurer is paid in part by salary and in part by commissions, but they do not receive fees. Therefore, under section 24-a of chapter 307 of the Acts of 1912, as amended, the candidates for such office are required to pay a fee equal to two per cent. of one year's salary.

RICHMOND, VA., March 9, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of March 8, 1917, to the Attorney General requesting his opinion as to how you should determine the amount to be

paid by candidates in the primary election for the offices of Secretary of the Commonwealth and State Treasurer, since the Secretary of the Commonwealth receives an annual salary of \$2,800.00 and 10% of the amount of sales of publications from his office, and the State Treasurer an annual salary of \$2,000.00 and the commissions allowed by law.

Section 24-a, chapter 307, Acts of 1912, as amended, Code of Virginia, Vol. 4, p. 883, provides as follows:

Every candidate for any office at any primary shall, before he files his declaration of candidacy as provided in the foregoing sections pay, a fee equal to two per centum of one year's salary attached to the office for which he is a candidate.

In case of a candidate whose compensation is paid in whole or in part by fees, the amount to be paid by such candidate as his contribution for the payment of the expenses of the primary shall be fixed by the proper committee of the respective parties.

The compensation of two State offices named above is paid in part by salary and in part by commissions, but they do not receive fees.

Under this section the State committees of the respective parties are required to determine the amount to be contributed by candidates for offices whose compensation is paid in whole or in part by fees. Since the Secretary of the Commonwealth and State Treasurer receive compensation by salaries and commissions, and not by fees, the only provision relating to candidates for those offices is that which requires such candidates to pay a fee equal to 2% of one year's salary.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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**ELECTIONS—Primary elections—Chapter 307 of the Acts of 1912, as amended.**—In order for a candidate for Governor to have his name printed on the official ballot used at a primary, such candidate must at least sixty days before the primary, make and file a written declaration of candidacy in substantially the form set out in section 90 of chapter 307 of the Acts of 1912, as amended, which declaration must be acknowledged before some officer who has authority to take acknowledgments to deeds or be attested by two persons who can write, signing as witnesses. With this declaration must be filed a petition signed by two hundred and fifty qualified voters of the State at large, each signature to which has been witnessed by a person whose affidavit to that effect is attached to the petition.

*Same.*—Such declaration of candidacy and petition must be filed only with the chairman of the party holding the primary.

*Same.*—**Primary fees—Payment of.**—Each candidate before he files his declaration of candidacy is required to pay to the Auditor of Public Accounts a fee equal to two per cent. of one year's salary attached to the office for which he is a candidate,

*Same.*—**Candidates names on ballots—State chairman—Duties of.**—It is the duty of the chairman to furnish the electoral boards charged with the duty of preparing and printing the primary ballots, the names of candidates to be printed thereon.

*Same.*—The law does not require that the petition filed with the declaration of candidacy shall request that the candidate's name be printed upon the official ballot to be used in the State primary.

RICHMOND, VA., May 25, 1917.

J. TAYLOR ELLYSON,  
Richmond, Va.

MY DEAR SIR:

I acknowledge your letter of the 22d instant, requesting my opinion as to what is necessary for a full compliance with the statute concerning the primary to be held on the 7th day of August next, for nomination for Governor and other State officers in which you say:

If I correctly interpret the provisions of the law, it requires the payment of an entrance fee to the Auditor of Public Accounts, the declaration of candidacy and a petition of 250 qualified voters requesting the person petitioned to become a candidate and asking that his name be printed upon the official ballot to be used at the State primary; the receipt of the Auditor, the petition and the declaration of candidacy to be filed with the State chairman of the Democratic party. Is there anything further that a candidate should do?

1. In order for a candidate for a State office to have his name printed upon the official ballot used at the primary, such candidate must at least sixty days before the primary make and file a written declaration of candidacy in substantially the form set out in section 9 of chapter 307 of the Acts of 1912, as amended, known as the primary law. This declaration must be acknowledged before some officer who has authority to take acknowledgments to deeds, or be attested by two persons who can write, signing as witnesses.

2. The candidate must file along with his declaration of candidacy a petition, signed by 250 qualified voters of the State at large, each signature to which has been witnessed by a person whose affidavit to that effect is attached to the petition.

3. Such declaration of candidacy and petition of 250 qualified voters must be filed only with the chairman of the party holding the primary.

4. Each candidate before he files his declaration of candidacy shall pay to the Auditor of Public Accounts of Virginia a fee equal to two per cent. of one year's salary attached to the office for which he is a candidate.

There is nothing in the law providing that the petition filed with the declaration of candidacy shall request that the candidate's name be printed upon the official ballot to be used in the State primary, but section 10 of the primary law makes it the duty of the State chairman to furnish the electoral boards charged with the duty of preparing and printing the primary ballots the names of the candidates to be printed thereon.

From the above, you will see that your interpretation of the provisions of the law is correct.

JNO. GARLAND POLLARD,  
*Attorney General.*

**PRIMARY ELECTIONS—Candidates—Chapter 307, Acts of 1912, as amended.**—Under the provisions of the Virginia primary law, candidates for nomination are required to file their declaration of candidacy with the chairman or chairmen of the several counties of the respective parties, and it is the duty of such chairman or chairmen to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots, the names of the candidates to be printed thereon. Such declaration of candidacy must in all cases be accompanied by a receipt for the payment of the entrance fee, which receipt must be attached to the declaration of

candidacy, otherwise the same cannot be received or filed. Therefore, a candidate for the House of Delegates from a district composed of more than one county, does not comply with the law where he files his declaration of candidacy with the chairman of one county together with the petition and treasurer's receipt, but fails to accompany his declaration to the chairman of the other county with a copy of the petition or the treasurer's receipt for the payment of his fee.

*Same.*—Where only one candidate complies with the law in filing his declaration of candidacy, the person filing such declaration shall be declared to be the nominee of the party.

RICHMOND, VA., *June 13, 1917.*

HON. J. WM. DANIEL,  
*Nohead, Middlesex Co., Va.*

MY DEAR MR. DANIEL:

In the absence of the Attorney General from the city, I am replying to your letter of June 11, 1917, requesting his opinion as to whether or not you had complied with the primary law in filing your declaration of candidacy for nomination for the House of Delegates.

From your letter it appears that you filed with the county chairman of Middlesex county such declaration of candidacy, together with the petition and treasurer's receipt; that you sent a copy of the declaration to the chairman of the Democratic committee of Mathews county and paid the fee to the treasurer of that county, but that you did not accompany your declaration of candidacy to the chairman of the Democratic committee of Mathews county with a copy of the petition or attach thereto the treasurer's receipt for the payment of said fee.

Section 10 of the Primary Law provides that the candidates for nomination shall file their declaration with the chairman or chairmen of the several committees of the respective parties and it shall be the duty of such chairman or chairmen to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots, the names of the candidates to be printed thereon.

Section 24-a of the Primary Law provides as follows:

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; provided that when for district officers of more than one county the fee shall be divided equally between the counties comprising such district and paid to the respective treasurers thereof.

Under these sections, it would seem that the county chairman of Mathews county had no right to receive or file your declaration of candidacy for the reason that you did not attach to the same a receipt from the treasurer for the payment of the fee.

I enclose, under separate cover, an annotated copy of the Virginia Election Laws and call your attention to pages 98 and 107, where the opinions of the Attorney General on these provisions are fully set out.

In response to your inquiry that in event you are unable to have your name printed on the official ballot, whether or not you can have it written or stamped with rubber stamp on the ballot at the polls, I beg to advise that this question has not been passed upon by the Attorney General. Certainly if only one candidate complied with the law in filing his declaration of candidacy the name of such person filing such declaration shall be declared the nominee of his party, as provided by section 22 of the Primary Law.

However, I am not prepared to say that a Democratic voter in a primary has not the right to erase the names printed on the official ballot and vote for any other Democrat who is qualified to hold the job whom he prefers.

There is a general provision in the primary law that all the election laws which are not inconsistent with the primary laws shall be applicable to primary elections, and the Attorney General has held that in general elections a voter may erase any name on the official ballot and insert any name that he prefers.

I am sending a copy of this letter to the chairmen of the Democratic party in Mathews and Middlesex counties for their consideration.

You will understand that while this matter does not seem to come under the official duties of the Attorney General's office, the Attorneys General have, as a courtesy to inquirers, undertaken to answer all questions with regard to the right of franchise.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

ELECTIONS—*Primary elections—Candidates—Legislative district composed of two counties—Declaration of candidacy by candidates.*—Where a legislative district is composed of two counties, the chairman of the party in the two counties must unite and certify to the electoral boards of the two counties the names of the candidates to be printed thereon and unless the candidate has complied with sections 9 and 24 of the Virginia Primary Election Law, the chairman of the counties comprising the district cannot certify to the electoral boards charged with the duty of preparing and printing the primary ballots the names of such candidates.

RICHMOND, VA., July 11, 1917.

HON. WM. D. EVANS, *County Chairman,*  
*Saluda, Va.*

MY DEAR WILLIE:

I have your letter of July 10 informing me that Mr. J. Wm. Daniel has qualified himself in Middlesex county as a candidate for nomination for the House of Delegates by filing with you as chairman of the party his declaration of candidacy, accompanied by the proper petition and receipts of the treasurer, but that he has failed to comply with the requirements of the law by not filing with the chairman of Mathews county, which, together with Middlesex county, comprises a legislative district, the requisite papers.

The primary in your legislative district is conducted as one primary, although the district comprises two counties, each having its own party chairman. Section 10 of the Primary Law provides that it shall be the duty of such chairman or chairmen to furnish to the electoral boards charged with the duty of preparing and printing the primary ballots the names of the candidates to be printed thereon. Section 9 provides that the name of no candidate shall be printed upon any official ballot and used in any primary unless the provisions of this section are complied with.

I am of the opinion that where a legislative district is composed of two counties, that the chairmen of the party in the two counties must unite and certify to the electoral boards of the two counties the names of the candidates to be printed thereon, and unless the candidate has complied with section 9 and with section 24 (b), (the latter providing that the fee required of the candidates shall be divided equally

between the counties and paid to the respective treasurers thereof and a receipt for the payment of said fee must accompany and be attached to said declaration of candidacy), the chairmen of the counties comprising the district cannot certify to the electoral boards charged with the duty of preparing and printing on the primary ballots the names of such candidates.

Your friend,

JNO. GARLAND POLLARD,

*Attorney General.*

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ELECTIONS—*Candidates—Ballots—Primary act, Chapter 307, Acts of 1912, as amended; Section 122-a, Code of Virginia, 1904.*—Section 122-a of the Code of Virginia, 1904, must be read and construed in connection with the provisions of the Virginia Primary Law and the provision of the Primary Law requiring that the names of candidates nominated at the primary shall be printed on the official ballots used in the election for which the primary was held must be read as an exception to the general provision of section 122-a requiring persons to file notice of their intention to be candidates thirty days before the general election. Therefore, officers having charge of the printing of ballots for the general election must take official notice of the results of the primary which are required to be officially ascertained and published, and the name of a candidate nominated at a legalized primary must be printed on the ballots at the general election, although he has not filed the notice of candidacy required by the statute governing general elections.

RICHMOND, VA., *October 19, 1917.*

MR. FRANK STUART,  
*Montrose, Va.*

MY DEAR MR. STUART:

Yours of October 15th received. On account of frequent changes in the office force, I have been unable to place my hands on letter containing the opinion that the name of a candidate, nominated at a legalized primary, should be printed on the ballots at the general election although he has not filed the notice of candidacy required by the statute governing general elections.

I am confident, however, that my opinion was based on Sec. 5 of the primary act, appearing in Acts 1914, p. 513, and in Vol. IV of Code, p. 872. By reference to that section you will find that it is provided as follows:

Any candidate for party nomination of any office who receives a plurality of the votes cast by his party shall be the nominee of his party for such office and his name shall be printed on the official ballots used in the election for which the primary was held.

It is true that under section 122-a of the Code, 1904, it is provided that any person who intends to be a candidate shall at least thirty (formerly twenty) days before the election give notice in writing of his intention, etc., to certain designated officers; and further provides that no person not thus announcing his candidacy shall have his name printed on the ballots. But the section above referred to must be read and construed with the provisions of the Primary Law above quoted; and the provision of the Primary Law requiring that the names of candidates nominated at

the primary "shall be printed on the official ballots used in the election for which the primary was held," must be read as an exception to the general provision of section 122-a requiring persons to file notice of their intention to be candidates thirty days before the general election. It would seem entirely reasonable to make this exception inasmuch as the primary elections are no longer held by party authorities, but are held by officers of the law and the results of primary elections are ascertained in the manner prescribed by law and announcement of results made in pursuance of law.

I think, therefore, that it may be reasonably concluded from the Primary Law that it was the intention of the General Assembly that the officers having charge of the printing of ballots for the general election should take official notice of the results of the primary, which are required to be officially ascertained and published. (See section 20-b, Primary Law.)

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

**VOTERS—Democratic primary—Who may vote.**—A voter who did not vote in the last general election can vote in a Democratic primary upon making the required promise that he will support the party nominees in the following general election. If a man voted in the last preceding general election any other than the Democratic ticket, he is not entitled to vote in the succeeding Democratic primary.

RICHMOND, VA., August 6, 1917.

MR. W. W. ROBERTSON,

*Emporia, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of August 4, 1917, addressed to the Attorney General, in which, as one of the judges of election in the primary to be held Tuesday, you ask the Attorney General to advise you who is a Democrat according to the party ruling. You say that you have some men at your precinct who vote the Republican ticket in National elections regularly and who want to participate in the Democratic primary, and that they may or may not support the nominees of the party if their party nominates an opposition candidate.

The Attorney General has ruled in a previous opinion that if a voter did not vote in the last general election, he can vote in the Democratic primary upon making the required promise that he will support the party nominees in the following general election. If, however, a man voted in the last general election any other than the Democratic ticket, he is not entitled to vote in the succeeding Democratic primary.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

**ELECTIONS—Candidates—Expenses of—Primary elections.**—The law requires the declaration of candidacy of a candidate to be acknowledged before an officer authorized to take acknowledgments and this officer is entitled to his fees for such acknowledgment, therefore, this expense is a necessary and legitimate expense and comes within the purview of the Primary Election Law.

RICHMOND, VA., *April 19, 1917.*

MR. R. C. HART,  
*Pendleton, Va.*

DEAR SIR:

Your letter to the Attorney General, inquiring as to whether or not a fee paid to a justice of the peace or notary public for taking the acknowledgment to a declaration of candidacy is a proper expense to be borne by the candidate, under the provisions of the Primary Law, is before me for reply.

The law requires the declaration of candidacy to be acknowledged before an officer authorized to take acknowledgments and this officer is entitled to his fees for such acknowledgment. I, therefore, think that this expense is a necessary and legitimate expense and comes within the purview of the Primary Law.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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ELECTIONS—Candidates—Statement as to campaign expenditures—Section 145-a, Code of Virginia, 1904; Section 122-a, Section 122-h, Code of Virginia, 1904.—One may be voted for for a public office whose name does not appear on the ballot, and therefore one may be a candidate for office without having his name on the ballot.

*Same.*—Any man who expends money to bring about his election or whose friends or adherents expend money for the same purpose with his knowledge and consent is a candidate within the meaning of the law and must, therefore, file a statement of his expenditures, and for failure to do so, is subject to the penalties prescribed by law. Therefore, candidates nominated by the Socialist party must file their expense accounts as required by statute notwithstanding the fact that the names of such candidates did not appear on the ballot.

RICHMOND, VA., *November 30, 1917.*

MR. C. S. ROTH,  
*State Secretary, pro-tem, Socialist Party in Virginia,  
76 Poplar Ave., Norfolk, Va.*

DEAR SIR:

Yours of November 26th this day received. You ask whether the regularly nominated candidates of the Socialist party whose names were not printed on the ballots used in the recent election owing to certain irregularities in their method of filing notice of candidacy, but whose names were written on the ballots by a number of voters, are required by law to submit statements as to campaign expenditures.

In reply thereto I call your attention to subsection 3 of section 145-a, Va. Code, 1904, where it is provided as follows:

Every person who shall be a candidate before a caucus or convention, or at any primary election or at any election \* \* \* shall, within thirty days after the election, caucus, convention or primary election \* \* \* make out and file with the officer or board empowered by law to issue certificates of election to such office or place, and a duplicate thereof with the clerk of the county or corporation court for any county or city in which such candidate resides, a statement in writing, etc.

I have not quoted the provision in full because it is not necessary to answer your question, and because I am sending you under separate cover a copy of the Election Laws containing the statute in full.

Section 122-a of the Code provides that any person who intends to be a candidate for any office shall, at least thirty days before such election, notify certain officers therein named, and further provides as follows:

No person not announcing his candidacy as above shall have his name printed on the ballots, provided for such election.

Section 122-h of the Code provides that:

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

It therefore appears that one may be voted for for public office whose name does not appear on the ballot; and that, therefore, one may be a candidate for office without having his name on the ballot. A notable example of this was in the first election of our present Secretary of the Commonwealth. The regular nominee of the Democratic party for that office died shortly before the election and the present Secretary of the Commonwealth was nominated in his stead too late to have his name printed upon the ballot. Rubber stamps were made containing the name of the new nominee and distributed to the polling places and there used, and the election resulted in the choice of a candidate whose name was not printed on the ballot.

Any man who expends money to bring about his election, or whose friends or adherents spend money for the same purpose with his knowledge and consent, is a candidate within the meaning of the law and must therefore file a statement of his expenditures and for failure to do so is subject to the penalties prescribed by statute.

Answering, therefore, your question specifically, I am of opinion that the candidates nominated by your party must file their expense statements as required by statute, notwithstanding the fact that the names of said candidates did not appear on the ballot.

Yours very truly,

JNO. GARLAND POLLARD.

*Attorney General.*

*ELECTIONS—Special elections—Names to be printed on ballots—Sections 122-a, 122-b and 115 of the Code of Virginia, 1904—Section 62 of the Code of Virginia, 1904, as amended.*—Sections 122-a and 122-b of the Code of Virginia, 1904, do not apply to a special election held to fill a vacancy in the State Senate existing because of the death of a member of the Senate, therefore it is not necessary, in order to have their names placed on the ballot, for candidates in such elections to have filed their notice of candidacy thirty days before such election.

*Same.*—Printed ballots must be used at such election upon which must be printed the names of all candidates who file their notice within the proper time, and any candidate is entitled to have his name printed on the ballot at any time before such ballots are actually printed, and the ballots must not be printed sooner than is absolutely necessary to have them ready for use in the election.

*Same—Voters at such election—Qualification of.*—Poll taxes, which an elector must pay six months prior to an election are the ones due and payable at the time of such election, therefore in the case of a special election held in January, 1918, the only poll taxes which are due and payable six months prior to that date are the poll taxes for the years 1914, 1915, 1916, the poll taxes for 1917 not being due and payable until November, 1917, which is less than six months prior to January, 1918.

*Same.*—An election to fill a vacancy in the State Senate is an election provided for by the Constitution and therefore chapter 73, p. 83 of the Acts of 1908 does not apply, and as the certified list used in the November election contains all the names of those who have paid the taxes which were due and payable for the three years prior to January 8, 1918, it is the proper list to be used in an election held on that day.

RICHMOND, VA., *December 20, 1917.*

B. RICHARDS GLASCOCK, ESQ., *Secretary,*  
*Fauquier Electoral Board,*  
*Warrenton, Va.*

DEAR SIR:

Referring again to your letter of December 14, you state that, on the 8th day of December, the Governor issued a writ of election, appointing the 8th day of January, 1918, as the day for holding a special election to fill the vacancy in the State Senate existing because of the death of the Honorable T. C. Pilcher, and asking whether the electoral board is permitted to print any names on the ballot under section 122-a or any other section of the Code, and whether the board is required under section 122-b or any other section of the Code, to provide any ballots for the election. You call attention to the fact that it was a physical impossibility for the candidates to comply with section 122-a of the Code which provides that candidates must file their notices thirty days before the election.

You also ask my opinion as to the list of voters to be used in said election.

Acknowledgment is also made of your letter of December 18 in which you call attention to the second paragraph of section 62 of the Virginia Code which was passed by the General Assembly in 1908 (Acts of Assembly, 1908, p. 83) and better known as the Ward act.

It is true that section 122-a of the Code provides that no person who fails to give notice at least thirty days before such election to the clerk of court shall have his name printed on the ballot provided for such election. In the present election, as the writ of election was only issued thirty days prior to the day appointed for such election, it would be, as you say, a physical impossibility for those who propose to be candidates in such election, to comply with this section of the Code, and it can hardly be doubted that the legislature never intended to require a candidate in an election to do an impossible thing. It must be concluded, therefore, that there was no intention on the part of the legislature that sections 122-a and 122-b should apply to an election such as is now under discussion. This is especially apparent when we read this section in connection with section 115 of the Code, which provides that when a special election is ordered by the Governor, he shall issue a writ of election and transmit it to the sheriff to be posted at least *ten days* before such election. I am, therefore, of the opinion that it is not necessary in order to have their names placed on the ballot for candidates in the election to which you refer, to have filed their notice thirty days before such election.

Section 122 of the Code provides that every elector shall vote by ballot, which shall be of white paper and contain on one side the name of the candidates and the office to be filled. It is further evident, from all of the provisions of the chapter in regard to general and special elections, that it was intended that there should be ballots used. I am therefore of the opinion that you should provide ballots upon which you should print the names of all the candidates who file their notices within the time herein mentioned.

Your letter of December 18 asks in regard to the limit of the time for filing the notices of candidacy. As the legislature has not passed any act for guidance in such

matter, I am of the opinion that such notices may be filed and any candidate have his name printed on the ballot at any time before such ballots are actually printed, and that the ballots should not be printed sooner than is reasonably necessary to have them ready for use in the election. In other words, there being no statutory provision governing such cases, the act of the electoral board in this regard cannot be subject to successful attack so long as such board acts with reason and fairness. This unfortunate omission in the statute should be supplied by an early amendment.

In this connection, I will call your attention to a well considered opinion by Judge Haas, of the circuit court of Page county, contained in 19 Va. Law Reg. p. 746, *in re Local Option Election Contest*, in which it was held that certain Code provisions as to general elections do not apply to local option elections.

In regard to the list of voters to be used, it is true that the second paragraph of section 62 of the Virginia Code (Acts of Assembly, 1908, p. 83) provides:

The qualifications of voters at any special election or any local option election shall be such as are hereinabove prescribed for voters at general elections; provided, that at any such special or local option election held on or before the second Tuesday in June in any year any person shall be qualified to vote who is otherwise qualified and has personally paid at least six months prior to the second Tuesday in June of that year, all poll taxes assessed, or assessable, against him during the three years next preceding that in which such special or local option election is held; and, 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. The term, special election, as used in this section, shall be construed to include such elections as are held in pursuance of a special law as well as such as are held to fill a vacancy in any office, whether the same be filled by the qualified voters of the State or of any county, corporation, magisterial district or ward.

Section 21 of the Constitution provides that as a prerequisite to voting, an elector shall personally pay at least six months prior to the election all State poll taxes assessed or assessable against him during the three years next preceding that in which he offers to vote. It is evident, under this section, that the poll taxes which the elector must pay six months prior to the election, are the ones due and payable at that time. Therefore, under this section, in the present case, the only poll taxes which were due and payable six months prior to January 8, 1918, were the poll taxes for the years 1914, 1915 and 1916, the poll taxes for 1917 not being due and payable until November, 1917, which, of course, is less than six months prior to January, 1918. This section is unquestionably, to a certain extent, in conflict with the Ward act, but fortunately the matter has been passed on by the Supreme Court of Appeals of Virginia in the case of *Willis v. Kalmbach*, 109 Va. 475 (1909), in which case the constitutionality of the Ward act was attacked. In that case, the court very thoroughly discussed at some length the effect of the Ward act and reached the conclusion that this act, prescribing the qualifications of voters in special and local option elections was a valid exercise of legislative power insofar as it referred to elections not provided for by the Constitution, and that the legislature might fix the qualifications of the electorate for all special elections except for officers elected by the people.

Section 18 of the Constitution of Virginia provides that persons otherwise qualified, who have paid their poll taxes in accordance with section 21, shall be entitled to vote for members of the General Assembly and all officers elected by the people.

Section 41 of the Constitution of Virginia provides that the members of the Senate shall be elected by voters of senatorial districts.

It will thus be seen that the election under discussion is an election for an officer elected by the people and is also an election provided for by the Constitution. Therefore, it clearly appears that, under the decision in *Willis v. Kalmbach*, *supra*, the Ward act does not apply, and as the certified list used in the November election contains all the names of those who have paid the taxes which were due and payable for the three years prior to January 8, 1918, it is the proper list to be used in the election on that day.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

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**ELECTIONS—Advertisements.**—It is unlawful for the newspaper owner or editor, etc., to take, accept, receive or agree to take, accept or receive any money for such newspaper supporting or advocating the election or defeat of any candidate at any primary election. This does not prevent, however, such paper publishing for compensation such articles if the same when published or printed have at the beginning thereof, in black face Roman capitals, in a conspicuous place, the statement, "Paid advertisement."

RICHMOND, VA., *April 20, 1917.*

MR. HARVEY L. WILSON,  
*Norfolk Ledger-Dispatch,*  
*Norfolk, Va.*

DEAR SIR:

I acknowledge your letter of the 19th instant, to the Attorney General, requesting that he write you briefly what is required under the law as to the publication of political advertisements.

I beg to transmit under separate cover copy of the Virginia Election Laws, annotated, where on page 99, section 12, you will find the law relating to publications in newspapers and periodicals.

From this section you will see that it is unlawful for the newspaper owner, editor, etc., to take, accept, receive or agree to take, accept or receive any money for such newspaper supporting or advocating the election or defeat of any candidate at any primary election. Nothing in the act prevents a person or corporation engaged in the publication of a newspaper from receiving matter or articles advocating the election or defeat of any candidate and receiving therefor compensation, if such articles published or printed have placed at the beginning thereof in black face Roman capitals in a conspicuous place the statement "Paid advertisement."

I know of no national law affecting this question.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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**ELECTIONS—Presidential electors—Section 145-a, Code of Virginia, 1904.**—Presidential electors are State officers and should therefore file statements of their expense accounts as provided by section 145-a, Code of Virginia, 1904, subsection 3.

RICHMOND, VA., November 16, 1916.

HON. CARTER GLASS,  
Lynchburg, Virginia.

DEAR MR. GLASS:

I beg to confirm my telegram to you of yesterday, as follows:

Telegram received just as leaving city. At present inclined to advise filing of statements as a matter of precaution. Am having question investigated. Time not up until December seventh. Will answer fully Friday.

As suggested therein, I have had the matter investigated and find that the law seems well settled that presidential electors are State officers, and should, therefore, file statements of their expense accounts, as provided by section 145-a of the Virginia Code, 1904, subsection 3.

The question of whether or not presidential electors are State officers was before the Supreme Court of Kentucky in the case of *Todd, Mayor, v. Johnson, County Clerk*, 33 L. R. A. 399. In considering this question, the court said:

This brings us to consider the only serious question in this case. There will be elected the electors for President and Vice-President and these, say counsel for the appellees, are "State officers" and such they undoubtedly are.

The court goes on to say that the Kentucky statute provides for their election by the people; that they are required to convene at the capitol of the State on the second Monday in January after their election, cast their votes and make due return thereof according to law; and for each day an elector so attends he is entitled to the same per diem and mileage as may be allowed to a member of the General Assembly, to be paid out of the State treasury.

And further:

He would seem, therefore, to be no more converted into a federal officer, because he is elected by the people to cast his vote for a presidential candidate than a member of the General Assembly would be considered a federal officer because, when elected, he casts his vote for a Senator of the United States; for while the latter is supposed to do more than that, he does that much and his status as a State officer is not affected.

The Kentucky court quotes *Re Green*, 134 U. S. 379, where Mr. Justice Gray said:

The sole function of presidential electors is to cast, certify and transmit the vote of the State for President and Vice-President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress.

In this case, *Re Green*, which arose in the State of Virginia, Green was incarcerated in jail in Manchester, under a judgment of the hustings court of the city, imprisoning him upon his conviction on an indictment for unlawful voting at an election for electors for President and Vice-President. It was contended that the electors for President and Vice-President were United States officers and that the State court had no jurisdiction. The matter came up upon petition for writ of habeas corpus, the Circuit Court of Appeals deciding that the State court was

without jurisdiction, and the Supreme Court of the United States reversed this judgment on the ground that presidential electors were not federal officers.

In *McPherson v. Blacker*, 146 U. S. 1, Mr. Chief Justice Fuller, in delivering a very exhaustive opinion upon the question of the appointment and mode of appointment of electors, quotes the opinion of Mr. Justice Gray above set out, and says:

Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same date throughout the United States, otherwise the power and jurisdiction of the State is exclusive with the exception of the provisions as to the number of electors and the ineligibility of certain persons.

Finally, the law in regard to the choosing of electors for President and Vice-President is now practically uniform in the United States and the law of Virginia provides that the electors shall be allowed the sum of \$4.00 per day while actually engaged in the discharge of their official duties and the same mileage as may be allowed to members of the General Assembly. Indeed the provisions of the Virginia law are at least similar to the provisions of the Kentucky statute in which State its Supreme Court held that presidential electors were State officers.

The matter would seem to be quite well settled by the decisions above quoted, which are certainly sufficiently conclusive to suggest that the presidential electors in Virginia lose no time in filing the statement of their expenses, as required by the Virginia Election Laws.

I am sending a copy of this opinion to each of the twelve electors in the State, with the suggestion that they at once file the required statement.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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**EMPLOYMENT AGENTS—Regulation of—Inducing employee to leave his employment—Chapter 168, Acts of 1916.**—The provisions of chapter 168 of the Acts of 1916 prohibiting any licensed person or agency by himself, itself, agent or otherwise from inducing or attempting to induce any employee to leave his employment with a view to obtaining other employment through such agency, applies as well to all licensed labor agents whether soliciting laborers wholly within their office, or outside, and whether paying a license tax of \$500.00 or \$25.00.

**Same—Duties of Commissioner of Labor.**—Under section 4 of chapter 168 of the Acts of 1916, the duty is imposed upon the Commissioner of Labor of enforcing this act and when informed of any violation thereof it is the duty of the Commissioner of Labor to institute criminal proceedings for the enforcement of its penalties before any court of competent jurisdiction.

RICHMOND, VA., April 16, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter to the Attorney General of April 13th, propounding the following inquiry:

Can an employment agent who has paid the special license tax of five hundred (\$500) dollars provided by law, solicit persons in the employ of one firm to leave their employment for the purpose of taking another employment?

You call attention to the fact that there are two acts of the General Assembly which bear upon this question. The first is chapter 168 of the Acts of 1916, page 325, being an act to regulate employment agencies and bureaus and to provide for the violation thereof. As quoted in your letter, this act contains the following general provision:

Any licensed person or agency shall not by himself or itself, agent, or otherwise induce or attempt to induce any employee to leave his employment with a view of obtaining other employment through such agency.

The act approved March 17, 1916, Acts of 1916, page 880, being sections 128 and 129 of the Tax Laws, impose a license tax of \$500.00 on labor agents, but it is provided that those labor agents who keep a regular office in cities and towns of the Commonwealth and transact all their business in such office and who do not solicit, hire or contract with laborers outside of such office except by written, telegraphic or telephonic communication, are required to pay only \$25.00 license tax for such purpose.

I am of the opinion that the provisions of chapter 168 of the Acts of 1916, prohibiting any licensed person or agency by himself, itself, agent or otherwise from inducing or attempting to induce any employee to leave his employment with a view to obtaining other employment through such agency applies as well to all licensed labor agents, whether soliciting laborers wholly within their office or outside and whether paying a license tax of \$500.00 or \$25.00.

I quote from your letter also as follows:

I should also be glad if you would inform me, in case it is your opinion that the second act does not extend this privilege to the one paying the special license tax, would it be competent for the Commissioner of Labor to maintain a prosecution against the employment agent who has paid the special license tax of five hundred (\$500) dollars, and who induces the employees of one concern to leave their employment with a view of obtaining other employment?

Section 4 of chapter 168 of the Acts of 1916 imposes upon you the duty of enforcing this act, and provides that when informed of any violation thereof it shall be your duty to institute criminal proceedings for the enforcement of its penalties before any court of competent jurisdiction. It would seem very clear from this that if you have information of the violation of this act that it is your duty to maintain a prosecution against the labor agent violating this provision.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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EMPLOYMENT—*License tax—Supervisors, board of—Powers as to license tax.—*

The boards of supervisors of the counties of this State are not authorized by law to license labor agents nor have they any legislative functions except such as are especially conferred upon them by the law. The legislature not having conferred upon boards of supervisors authority to pass any rules or regulations which would prevent labor agencies from soliciting, hiring or contracting with laborers to be employed outside of Virginia, nor having granted to the boards of supervisors the right to license labor agents, no such power is vested in the boards of supervisors.

*Same—City councils.*—The power of a city council to pass license laws or other prohibitive measures which would prevent labor agents from soliciting, hiring, or contracting with laborers to be employed outside of Virginia, depends upon whether or not this is a valid exercise of the police power of the corporation or its incidental powers to protect and provide for the public welfare.

*Same—Police power—Public welfare.*—The right of a city council to pass license laws or other prohibiting measures which would prevent labor agents from soliciting, hiring or contracting with laborers to be employed outside of Virginia, depends on whether the prohibited act is such an act against the public welfare as to become the subject of regulation by the city under its police power, conceiving that the police power extends over the lives, limbs, health, comfort, morals and quiet of all persons. Under certain conditions such ordinance would be a reasonable restriction placed upon labor agents and would, therefore, be valid.

RICHMOND, VA., April 13, 1917.

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

DEAR SIR:

I beg to acknowledge your request for an opinion from the Attorney General as to the power of city councils and boards of supervisors of the counties to pass license laws or other measures which would prevent employment agencies from soliciting, hiring or contracting with laborers to be employed out of Virginia.

The boards of supervisors of the counties are not authorized by law to license labor agents, nor have they any legislative functions, except such as are especially conferred upon them by the law. The legislature of Virginia has not conferred upon boards of supervisors authority to pass any rules or regulations which would prevent labor agencies from soliciting, hiring or contracting with laborers to be employed outside of Virginia, nor have they granted to the boards of supervisors the right to license labor agents.

As to whether or not city councils have a right to pass license laws or other prohibiting measures which would prevent labor agents from soliciting, hiring or contracting with laborers to be employed outside of Virginia, depends upon whether or not this is a valid exercise of the police power of the corporation or its incidental powers to protect and provide for the public welfare.

I have been unable to find any decisions holding that the business of soliciting laborers to be employed outside of the State is a business of such a character as to be violative of the public welfare; nevertheless it would seem to me that especially when the nation is at war the business of soliciting in Virginia laborers to be employed in other jurisdictions necessarily interferes with and militates against the general welfare of the public.

If the courts shall take this view, it would seem under the decisions in the Supreme Court of Appeals of Virginia in *Elsner Brothers v. Hawkins*, 113 Va. 47; and *Hopkins v. Richmond* and *Coleman v. Ashland*, 117 Va. 692, that a municipal corporation has, if expressed in its charter (as in the case of the city of Richmond), or as an incidental municipal power (as in the case of town of Ashland), the right to pass an ordinance prohibiting labor agents from soliciting laborers to be employed outside of Virginia.

In the case of *Elsner Brothers v. Hawkins* it was held that the city of Richmond had a right under the very broad and comprehensive police powers delegated to it by the legislature to prohibit pawn brokers from dealing in pistols, dirks and other

weapons of like character, although section 140 of the Tax Laws authorized the licensing of persons for the privilege of selling such weapons. The court said, page 50:

The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances. Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of courts, except in clear cases, to interfere with the exercise of the powers vested in municipalities for the promotion of the public safety. *McQuillin on Ordinances*, section 186; 2 Dillon on Mun. Cor. (5th ed.) sec. 649; *California Red Co. v. Sanitary Red Works* 199 U. S. 306, 319, 26 Sup. Ct. 100, 50 L. Ed. 24; *Wagner v. Bristol Belt Line Co.*, 108 Va. 594, 598, 62 S. E. 391, 25 L. R. A. (N. S.) 1278.

In the case of *Hopkins v. Richmond*, 117 Va. 692, the court said, at page 710:

In *Polglaise v. Commonwealth*, 114 Va. 850, at p. 860, 76 S. E. at p. 900 a case in which the question of the reasonableness of a resolution of the board of supervisors of the county of Spotsylvania, looking to the protection of the improved roads of the county, passed under the police power of the county, was raised, Cardwell, J., said: "The General Assembly is a co-ordinate branch of the State government, and so is the law-making power of municipal corporations within their prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. Where, therefore, municipal corporations or their officers are acting within well-recognized powers, or exercising discretionary power, the courts are wholly unwarranted in interfering, unless fraud is shown, or the power of discretion is being manifestly abused, to the oppression of the citizen. *Wagner v. Bristol Belt L. Co.*, 108 Va. 594, 62 S. E. 391, 25 L. R. A. (N. S.) 1278.

It has been repeatedly decided by this court, and well recognized by text-writers and in the decided cases in other jurisdictions, as settled law, that courts can interfere only to prevent a fraudulent and manifestly abusive or oppressive exercise of the powers conferred upon the council of a city by its charter or the general law, since the discretion of municipal corporations, within the sphere of their powers, is as wide as that possessed by the government of a State. *Wagner v. Bristol B. L. Co.*, *supra*; *Elsner Bros. v. Hawkins*, *Com.* 113 Va. 47, 73 S. E. 479, Ann. Cas. 1913, D. 1278.

The court in this case also says, page 716:

In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, C. J. Waite, in commenting upon the definition of police powers by C. J. Taney in the license cases to the effect that they are nothing more or less than the powers of government inherent in every sovereignty—that is to say, the power to govern men and things—said: "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good.

In the *Hopkins Case* and the *Coleman Case*, above, the question came up as to the right of the cities to pass ordinances segregating the places of residence of white and colored citizens, a distinction was attempted to be drawn between the right of the town of Ashland to pass such an ordinance and the city of Richmond by virtue of the fact that the city of Richmond had very broad powers delegated to it by the legislature in its charter, while no such powers were delegated to the town of Ashland in its charter. The court held that the power was incident to the town of Ashland and the police powers conferred by section 1038 of the Code.

It would, therefore, seem that the question in this case turns as before said on whether or not the prohibition by ordinance of the soliciting of labor by labor agents

to be employed outside of Virginia is such an act against the public welfare as to become the subject of regulation by the city under its police power.

Conceiving that the "police power extends to the lives, limbs, health, comfort, morals and quiet of all persons" (Chief Justice Shaw in *Commonwealth v. Olger*, 7 Cush. 85), I am of opinion that at this time such an ordinance would be a reasonable restriction placed upon the labor agents, and, would, therefore, be valid.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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EMPLOYMENT AGENTS—*Regulation of—License tax.*—Chapter 168, Acts of 1916, must be read in connection with section 128 of the Virginia Tax Bill, Virginia Code, Volume 4, p. 129, which imposes a license tax on any person who solicits, hires, or contracts with laborers, male or female, to be employed by persons other than himself.

*Same—Words and phrases—Laborers.*—While the word "laborers" has sometimes been construed as including other than manual laborers, the word "laborers" as used in section 128 of the Virginia Tax Bill, which must be given a strict construction, was intended to apply to manual laborers only, therefore, a business college which obtains positions for its former pupils, charging a fee for the service, does not come within the provisions of section 168 of the Acts of 1916.

RICHMOND, VA., May 29, 1917.

HON. JAMES B. DOHERTY, *Commissioner,*  
*Bureau of Labor and Industrial Statistics,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of May 24th, addressed to the Attorney General, which is in the following terms:

A business college, dealing with a former pupil, who is at the time holding a position, obtains a position with another firm for the pupil and charges a considerable fee for the service.

The question is, whether dealings of this sort make the business college an employment agency under chapter 168 of the Acts of 1916.

From an examination of the provisions of chapter 168 of the Acts of 1916, I am of the opinion that this act must be read in connection with section 128 of the Virginia Tax Bill, Va. Code, Vol. 4, page 129, which imposes a license tax on any person who solicits, hires or contracts with laborers, male or female, to be employed by persons other than himself.

While the word "laborers" has sometimes been construed as including others than manual laborers, I am of the opinion that the word as used in section 128 of the Tax Bill, which must be given a strict construction, was intended to apply to manual laborers only, and am of the opinion that the provisions of section 168, Acts of 1916, are to be construed in the light of section 128 of the Virginia Tax Bill. I am, therefore, of the opinion that the transaction mentioned in your letter would not come within the provisions of section 168 of the Acts of 1916.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

EXAMINERS OF RECORDS—*Appointment—Term of—Section 3326-a, Code of Virginia, 1904, as amended.*—The terms of examiners of records declared satisfactory by the State Tax Board under the terms of section 3326-a, subsection 2, expire May 1, 1920. As to such acceptable examiners the act did not create for them a new term beginning May 1, 1916, but simply extended the term they were then serving under court appointment for four years from such date.

RICHMOND, VA., *December 22, 1917.*

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

DEAR SIR:

Confirming the verbal opinion expressed to you some weeks ago, will say I have come to the conclusion that under subsection (2) of section 3326-a, Vol. 4 of Code, the terms of the examiners of records declared satisfactory by the State Board, expire May 1, 1920. As to such acceptable examiners I am of the opinion that said act did not create for them a new term beginning May 1, 1916, but simply extended the term they were then serving under court appointment for four years from said date.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

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EXAMINERS OF RECORDS—*Term of—Section 3326-a, Code of Virginia, 1904, as amended—Chapter 352, Acts of 1914.*—The terms of the examiners of records declared satisfactory by the State Tax Board under the provisions of subsection 2 of section 3326-a of the Code of Virginia, 1904, as amended, expires May 1, 1920. The amended statute did not create for such examiners a new term beginning May 1, 1916, but simply extended the term they were then serving under court appointment for four years from said date.

*Same.*—Chapter 352 of the Acts of 1914 does not apply to the office of the examiners of records for the Tenth Judicial Circuit and will not apply to such office until May 1, 1920.

RICHMOND, VA., *December 22, 1917.*

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

DEAR SIR:

Confirming the verbal opinion expressed to you some weeks ago, will say I have come to the conclusion that under subsection 2 of section 3326-a, Vol 4 of the Code, the terms of the examiners of records declared satisfactory by the State Tax Board, expire May 1, 1920.

As to such acceptable examiners, I am of the opinion that said act did not create for them a new term beginning May 1, 1916, but simply extended the term they were then serving under court appointment for four years from said date.

As Major Sands was one of the acceptable examiners, I am of the opinion that by this act his term has been simply extended, and that the term of office which he was holding when the act of March, 1914, in regard to the commission of examiners of records was passed (Acts of Assembly 1914, p. 707) expires May 1, 1920.

As the Supreme Court of Appeals of this State in the case of *Sands v. Moore*, 119 Va. 744, held that section 10 of this act applies to the office of examiners of records of the tenth judicial circuit, which office is held by Major Sands, I am of the opinion that the provisions of the act do not apply to the office held by him until May 1, 1920.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

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EXAMINERS OF RECORDS—*Reports by—To whom made—Section 3326-a and Section 3326-b of the Code of Virginia, 1904.*—Under sections 3326-a and 3326-b of the Code of Virginia, 1904, examiners of records are directed to ascertain the taxable value of fiduciary and certain boat property, and report to the commissioner of revenue, who extends the values ascertained by the examiners of records upon the books of his office.

*Same—Local board of review—Chapter 215, Acts of 1916.*—While under chapter 215 of the Acts of 1916 it is provided that it shall be the duty of the local board of review to review the fiduciary and other reports of the examiners of records required to be made to the board and to report to the commissioner of revenue the values ascertained on intangible personal property, money and income, which power of review is limited to reports required to be made to the board, there is no duty imposed on examiners of records to report fiduciary property to the local boards of review, therefore, the local boards of review are without authority to review the reports of the examiner of current or omitted property under the control of fiduciaries.

RICHMOND, VA., *March 13, 1917.*

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

DEAR SIR:

I beg to acknowledge your letter of March 12th, to the Attorney General, in which you propound the following inquiry:

I desire to be advised if an examiner of records must make report of the values ascertained by him under the act of March 4, 1896 (chapter 705, p. 773, Acts 1895-6), and act of February 11, 1898 (Chap. 301, p. 335, Acts 1897-8), to the local board of review.

Under the statutes referred to in your inquiry, being sections 3326-a and 3326-b, Code of Va., the examiner of records is directed to ascertain the taxable value of fiduciary and certain boat property and to report to the commissioner of revenue who extends the values ascertained by the examiner of records upon the books of his office.

By chapter 215, Acts of 1916, page 418, it is made the duty of the local board of review "to review the fiduciary and other reports of the examiner of records, required to be made to the board and to report to the commissioner of revenue the values ascertained on intangible personal property, money and income," etc. The question, therefore, is whether or not the examiners of records in ascertaining and reporting current and omitted property under the control of fiduciaries of the courts and certain boats as required by the above-mentioned sections of the Code of Virginia by which sections the reports are to be made directly to the commissioner of revenue, are required under the provisions of the Acts of 1916 creating a local

board of review, to report this class of property to the local board of review, or should they follow the provisions of the Code above set out.

It will be noted from the above quotation from chapter 215 of the Acts of 1916, that the duty is conferred upon the local board of review to review the fiduciary reports of examiners of records, *required to be made to the board.*

Evidently the draftsman of the act creating the local boards of review was under the misapprehension that the examiner of records was charged with the duty of reporting property under the control of fiduciaries and of the courts to the local boards of review. Such a duty, however, is not found in any of the tax laws of the State, and while the question is not free from doubt it seems to me to be the fair construction that inasmuch as the examiners of records are not required by law to report this class of property to the local boards of review, the local boards of review are without authority to review the reports of the examiners of current or omitted property under the control of fiduciaries. This construction is sanctioned, I think, by virtue of the fact that the act creating the local boards of review was amended as above set out at the last session of the legislature, Acts of 1916, page 828, and no change was made in the duties of examiners of records to report directly this class of property to the commissioners of revenue. This construction is also sanctioned by the terms of the act creating the State Tax Board and local boards of review, approved March 17, 1916, which imposes the duty upon the examiners of records to assist the local boards of review in the examination and investigation of reports of purchases of merchants and of the returns of the tax-payers in regard to intangible personal property, money and income and fails to include in such duty the requirement that the examiners of records shall report the property under the control of fiduciaries.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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EXAMINERS OF RECORDS—*Compensation of—Chapter 490, Acts of 1916*—The law does not authorize the Auditor to pay out of the public treasury the examiners of records any sum other than the commissions and fees allowed by law, so that if the total fees and commissions allowed by law do not exceed \$4,000.00, the Auditor is not authorized to pay examiners of records any additional sum for the expenses of their office. If, however, the total fees and commissions allowed by law but for the provisions of chapter 490 of the Acts of 1916, would exceed \$4,000.00, then any sum in excess of \$4,000.00 which the examiners did earn by commissions and fees at the rates prescribed by law can be applied to the payment of sums actually paid out by him for necessary office expenses, and the amounts actually paid by him as premiums on official bonds on himself or clerks and as compensation to his deputies and assistants.

RICHMOND, VA., *March 13, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter to-day to the Attorney General with regard to the construction of chapter 490, Acts of Assembly 1916, pages 825 and 826 as affecting the compensation of examiners of records. The paragraph of said act in question is as follows:

No examiner of records shall receive as his total compensation, from fees and commissions allowed by law, an amount in excess of four thousand dol-

lars per annum, and the sums actually paid out by him for necessary office expenses and the amounts actually paid by him as premiums on the official bond of himself or clerks, and as compensation to his deputies and assistants. Provided, however, that nothing in this act shall affect the compensation of examiners for omitted taxes for the years prior to nineteen hundred and fifteen.

You desire to be advised as to whether under this law in order for the examiners to be paid out of the treasury the sums actually paid out for necessary office expenses, premiums on official bonds and compensation to deputies and assistants, their fees and commissions allowed by law shall be sufficient to cover these amounts, or, whether such amounts can be paid out of the public treasury in addition to the fees and commissions earned by them on property reported for taxation,

Illustrating the proposition upon which you desire to be advised you present the following case:

Suppose the compensation earned by an examiner is \$2,000.00. Is he entitle not only to that compensation out of the State treasury but also the expense of his office? Or must he pay the expenses of his office out of the \$2,000.00 compensation paid him out of the State treasury?

In my opinion there is no authority to pay examiners of records any sum other than the commissions and fees allowed by law, so that if the total fees and commissions allowed by law do not exceed \$4,000.00, there is no warrant in law for you to pay him any additional sum for the expenses of his office. If, however, the total fees and commissions allowed by law, but for the provisions of chapter 490, Acts 1916, above set out, would exceed \$4,000.00, then any sum in excess of \$4,000.00 which the examiner would earn by commissions and fees at the rates prescribed by law could be applied to the payment of

sums actually paid out by him for necessary office expenses and the amounts actually paid by him as premiums on official bonds on himself or clerks, and as compensation to his deputies and assistants.

In other words I think that the parenthetical clause "from fees and commissions allowed by law" governs not only the compensation of the examiners of records, but governs the expenses of his office, and that the expenses of his office must be paid out of commissions and fees earned by him.

It follows, therefore, that the only examiner of records who is benefited by the provisions for the payment of the expenses of his office is the examiner whose commissions and fees exceed the \$4,000.00.

Yours very truly,

LESLIE. C. GARNETT,

*Assistant Attorney General.*

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EXAMINERS OF RECORDS—Omitted taxes—Chapter 352, Acts of 1914—Section 508 of the Code of Virginia, 1904, as amended—Section 492 of the Code of Virginia, chapter 69, Acts of 1915.—Section 492 of the Code of Virginia, 1904, provides how property shall be listed and to whom taxed, and there is no authority for assessing omitted property of decedents in any other way than to the personal representative which makes the assessment such a fiduciary assessment as examiners of records were required to report even prior to the segregation act passed in 1915. This latter act imposed other duties upon examiners of records in addition to the duties imposed by law and provided a different rate of compensation.

*Same—Compensation of—Change of duties*—The change in the duties of an office during the term of the incumbent does not affect his compensation and although the legislature changed the rate of compensation for the duties imposed by the segregation act of 1915, it did not change the maximum compensation to be allowed an examiner under chapter 252 of the Acts of 1914, and therefore, the Auditor is not authorized to ignore the limitations imposed by the latter act commonly known as the West fee bill.

*Same*—An assessment embraced in the report of an examiner of records, dated May 26, 1916, for intangible property, against the personal representative of a person who died in the autumn of 1915, for intangible property omitted during the lifetime of the deceased, is, under section 492 of the Code of Virginia 1904, a fiduciary assessment.

*Same*—Whether or not the examiner of records was authorized to report this property prior to the segregation act of 1915, the West fee bill limited the compensation of the examiner of records, and the additional duties put upon such examiner by the segregation act did not affect the maximum compensation allowed under the West fee bill, which remained unpaid.

RICHMOND, VA., April 30, 1917.

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

DEAR SIR:

You have referred to this office for an opinion thereon a letter of Mr. James S. Easley, former examiner of records for the sixth judicial circuit.

Mr. Easley as examiner of records submitted his report of fiduciary funds to you on May 26, 1916. Embraced in this report was an assessment of intangible property against the personal representative of W. H. Gooch, who died in the fall of 1915; \$2,498,525 of the amount included in this report was for intangible property omitted during the lifetime of the said Gooch, and it is contended by Mr. Easley that in computing the maximum compensation allowed him under the provisions of the West fee bill of 1914, Acts of 1914, page 704, the intangible property reported by him as omitted by Gooch during his lifetime should not be taken into consideration.

In support of this contention it is submitted by Mr. Easley:

1. That the intangible property omitted by Gooch during his lifetime is not fiduciary property which examiners of records were authorized to assess under section 508 of the Code as amended by the Acts of 1914, and,
2. That the West fee bill of 1914 applied only to the compensation of examiners received by them for the discharge of their duties existing at the time of the passage of the act and did not apply to compensation received from new duties later placed upon them.

If we concede as correct the first contention made by Mr. Easley, to-wit: that section 508 as amended by the Acts of 1914 did not authorize the examiner of records to assess omitted intangible property, but imposed this duty solely upon the commissioners of the revenue, I cannot see that this contention will aid you in construing the law so as to permit the assessment of the intangible property omitted by Gooch in his lifetime and made against his estate after his death to be taken out of the class of fiduciary assessments.

Section 492 of the Code provides how property shall be listed and to whom taxed and there is no authority for assessing omitted property of decedents in any

other way than to the personal representative, which make the assessment such a fiduciary assessment as examiners of records were required to report even prior to the segregation act passed in 1915, Acts of 1915, page 93.

The segregation act of 1915 imposed other duties upon examiners of records in addition to the duties formerly imposed by law, and, as contended by Mr. Easley provided a different rate of compensation; but the doctrine is well settled that the change in the duties of an office during the term of the incumbent does not effect his compensation (29 Cyc. 1424), and although the legislature changed the rate of compensation for the duties imposed by the segregation act, it did not change the maximum compensation to be allowed to an examiner under the West fee bill of 1914, and you would not be warranted in ignoring the limitations imposed by the West fee bill. Indeed, I am persuaded that the legislature must be presumed to have known of the existence of this limitation and to have passed the segregation act with knowledge of existing law.

It follows that I am of opinion:

1. That the assessment reported by Mr. Easley against the personal representative of the Gooch estate for property omitted during his lifetime is under section 492 of the Code, a fiduciary assessment, and

2. That whether or not the examiner of records was authorized to report this property prior to the segregation act, the West fee bill limited the compensation of the examiners of records and the additional duties put upon such examiner by the segregation act did not affect the maximum compensation allowed under the West fee bill which remained unchanged.

I regret exceedingly there is not some way under the law by which the full fees earned by Mr. Easley could be paid him, and I have been reluctantly forced to the conclusions arrived at as above.

It is gratifying, however, to know that your ruling, based upon this opinion, is not conclusive of the case and that Mr. Easley has the privilege of applying to the courts for relief and in event of such application this office will do everything possible to speed a consideration of the cause.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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EXAMINERS OF RECORDS—*Compensation of—Chapter 352 of the Acts of 1914.—*

The payment of the expense accounts of examiners of records, is not conditioned upon the making of the report required by chapter 352 of the Acts of 1914, therefore the Auditor is authorized to pay an examiner of records commissions in excess of those earned by him not exceeding the actual expenses paid out by him, as provided by the West fee bill for the conduct of the affairs of his office before the report of the examiner of records is filed.

RICHMOND, VA., May 4, 1917.

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

DEAR SIR:

I acknowledge reference to this office of correspondence between you and Mr. James S. Easley, former examiner of records for the sixth judicial circuit.

Mr. Easley is contending for the right to be paid out of the commissions earned by him in excess of \$2,500, already paid him, the amount of the expenses of his office

not to exceed the amount paid out in the conduct of the affairs of said office during the year ending December 31, 1913, which amount Mr. Easley places at the sum of \$205.34, and you desire an opinion from this office as to whether or not, no report having been filed of the expense account of Mr. Easley for the year 1913, you can pay him additional commissions not to exceed the \$205.34 now demanded.

By section 3 of chapter 352 of the Acts of 1914, page 707, it is provided that each of the officers referred to either in the entire chapter or in the immediate section 3 shall on or before July 1, 1914, transmit to the Auditor of Public Accounts a statement verified by affidavit showing the amounts paid out for expenses, etc., during the year 1913, but it does not appear that the payment of these expense accounts is conditioned upon the making of such a report.

I am, therefore, of opinion that you are authorized to pay Mr. Easley commissions in excess of \$2,500, not exceeding the actual expenses paid out by him, as provided in said act, for the conduct of the affairs of his office for the year 1913, and that you will be warranted in taking Mr. Easley's statement, which seems to be a modest one, as correct.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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*FEES—Attorneys for the Commonwealth—Reduction of fees during term of office—Section 3528 of the Code of Virginia, 1904, as amended—Statutes, repeal of.*—Where a subsequent amendment to a statute legislates upon every subject legislated on by the original statute, or a previous amendment thereto, the former amendment is deemed to be repealed by the later enactment. Therefore, chapter 496 of the Acts of 1916, the last amendment to section 3528 of the Code of Virginia, 1904, repealed chapter 75 of the Acts of 1916, and in paying money out of the treasury to the attorneys for the Commonwealth, the Auditor of Public Accounts is governed by the amendment to section 3528 of the Code as found in chapter 496 of the Acts of 1916.

RICHMOND, VA., January 22, 1917.

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

DEAR SIR:

Acknowledgment is made of your communication, enclosing correspondence with Hon. Robert B. Albertson, Commonwealths attorney, city of Portsmouth, in reference to the last amendment of section 3528 of the Code of Virginia, 1904, by chapter 75 of the Acts of 1916, section 3528 of the Code of Virginia, 1904, was amended, and re-enacted. As so amended and re-enacted it was provided among other things that the attorney for the Commonwealth of the city of Portsmouth should not receive from the State treasury, for the prosecution of criminal cases, more in any one year than the sum of \$1,000. This act was approved February 29, 1916.

By chapter 496 of the Acts of 1916, approved March 22, 1916, section 3528 of the Code of Virginia, as heretofore mentioned, was amended and re-enacted and by this last act it was provided that the Commonwealths attorney for the city of Portsmouth should not receive from the State treasury for the prosecution of criminal cases more in any one year than the sum of \$500.00.

It is well to here note that chapter 496 of the Acts of 1916, the last amendment and re-enactment of section 3528 of the Code of Virginia, 1904, legislates upon and embraces every subject legislated upon and embraced in chapter 75 of the Acts of 1916, which is the earlier amendment of section 3528 of the Code of Virginia, 1904.

The question you have asked me to determine is whether or not the two amendments can be reconciled so as to permit you to pay Mr. Albertson out of the State treasury the sum of \$1,000, as provided for in the earlier amendment or whether you are limited in your settlement with him to the sum of \$500.00, as provided for in the last amendment and re-enactment of section 3528 of the Code.

The law seems perfectly clear. As I have said, chapter 496 of the Acts of 1916, the last amendment of section 3528 of the Code, legislates upon every subject legislated upon by chapter 75 of the Acts of 1916, the earlier amendment, and is a complete law on the subject in all particulars. In such a case, by a well established line of decisions in this Commonwealth the rule is that the former enactment is deemed to be repealed by the later enactment. The rule is thus stated in the opinion of the Court of Appeals in *Somers v. Commonwealth*, 97 Va. 759, where the court said, speaking through Riely, J.:

The repeal of a statute by implication is not favored by the courts. The presumption is always against the intention to repeal where express terms are not used, or the later statute does not amend the former. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. If by a fair and reasonable construction they can be reconciled, both must stand. If, however, they are inconsistent and irreconcilable, then an intention to repeal is presumed, but only to the extent of the repugnance. *Fulkerson v. Bristol*, 95 Va. 1; *Davies & Co. v. Creighton*, 33 Gratt. 696; and *Sutherland on Statutory Construction*, sec. 138.

But where the latter statute was plainly intended 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 it must be held to be a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed. *Fox v. Com.*, 16 Gratt. 1; *McCready v. Com.*, 27 Gratt. 982; *Davies & Co., v. Creighton*, 33 Gratt. 696; and *Sutherland on Statutory Construction*, secs. 155, 156.

Laws are presumed to be passed with deliberation, and with a knowledge of all existing laws on the same subject and their various provisions. The act of March 3, 1898, both in its title and in the enacting clause, refers directly to the act of March 5, 1888, and makes it in part the subject of the amendment. It amends it and section 2148 of the Code, "so as to read as follows," that is, in the words of the amendatory act. It is manifest that the act of March 3, 1898, was intended to be a repeal of all parts and provisions of the statutes amended, which were omitted from it. It is necessarily implied that what is left out is no longer in force. *Sutherland on Statutory Construction*, sec 137. It, therefore, follows the dredging on private oyster ground ceased, with the passage of the act of March 3, 1898, to be a criminal offense.

I must, therefore, conclude that chapter 496 of the Acts of 1916, the last amendment of section 3528 of the Code of Virginia, 1904, repealed chapter 75 of the Acts of 1916, and, therefore, in paying money out of the treasury to attorneys for the Commonwealth you must be governed by the amendment of section 3528 of the Code of Virginia, 1904, as found in chapter 496 of the Acts of 1916.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

*FEES—Attorneys for the Commonwealth—Chapter 44, Acts of 1916—Section 3528, Code of Virginia, 1904—Sections 3815-3833 inclusive, Code of Virginia, 1904.—Unlawful gaming.*—Prosecutions under chapter 44, Acts of 1916, are prosecutions for offenses under chapter 187 of the Code of Virginia, 1904, and the attorneys for the Commonwealth are not permitted to draw from the State treasury any fee for such prosecutions.

*Same—Statutes.*—The effect of chapter 44 of Acts of 1916, is to impliedly repeal section 3819 of the Code of Virginia, 1904, and to prevent any person from winning or losing any sum of money or anything of value by bet, wager or playing at any game.

RICHMOND, VA., May 25, 1917.

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

DEAR SIR:

I acknowledge reference to this office of the account of the Hon. David A. Harrison, Jr., Commonwealth's attorney of the city of Hopewell, in which there are two items against the Commonwealth for fees of \$5.00 each in the cases of *Commonwealth v. Henry Goss and E. H. Richardson*.

It is the contention of Mr. Harrison that chapter 44, Acts of 1916, page 50, making it a misdemeanor for any person to bet, wager or play at any game for money, taken in connection with section 3528 of the Code, authorized the payment of these fees. Section 3528 of the Code provides that for every case of misdemeanor actually tried in a circuit or corporation court, except violations of the revenue laws and for offenses under section 3815 and sections following to 3833, inclusive, the attorney for the Commonwealth is to get a fee of \$5.00.

In order to sustain the contention of Mr. Harrison, therefore, that he is entitled to a fee of \$5.00 in cases of unlawful gaming we would have to hold that chapter 44, Acts of 1916, took unlawful gaming out of the provisions of chapter 187 of the Code of Virginia. I do not think that this contention is sound, for the force and effect of chapter 44, Acts of 1916, is to impliedly repeal section 3819 of the Code and to prevent any person from winning or losing any sum of money or anything of value by bet, wager or playing at any game. Under section 3819 it was necessary before a man could be convicted of betting at any game or wager elsewhere than in a public place to prove that such person lost within 24 hours a greater sum or anything of greater value than \$20.00.

It is, therefore, my opinion that prosecutions under chapter 44, Acts of 1916, are prosecutions for offenses under chapter 187 of the Code of Virginia and that the Commonwealth's attorneys are not permitted to draw from the State treasury any fee for such prosecutions.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

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*FEES—In Criminal prosecutions—Byrd liquor law—Sections 725-4071—4074 and 4087 Code of Virginia, 1904.*—The fees of officers incurred in prosecutions for misdemeanors may be collected by *fieri facias* out of the estate of the person convicted even though he has already worked out his fine on the county roads.

*Same—Attorneys for the Commonwealth—Duty of.*—It is the duty of the attorney for the Commonwealth to superintend the issuing of executions on judgments in his court for fines going wholly or in part to the Commonwealth.

RICHMOND, VA., May 23, 1917.

HON. JOSEPH R. TAYLOR,  
*Commonwealth's Attorney,*  
*Martinsville, Va.*

DEAR SIR:

Acknowledgment is made of your letter of May 21, 1917, addressed to the Attorney General, in which you request him to advise you on the following state of facts:

Please inform me, that if, after a defendant is convicted under the Byrd liquor law, and he has real estate, but works out his fine and costs on the county road, there is any way the officers can collect their fees in the case. If they cannot, they have all worked for nothing. An early opinion will be appreciated.

By reference to section 27 of the Byrd law it will be seen that a violation of the provisions of that law is made a misdemeanor. Your question, therefore, is to be answered in the light of the general statutes of this State relating to this subject. This question is therefore governed by the provisions of section 4087 of the Code of Virginia, 1904, and sections 4071, 4074, and 4075 of the Code of Virginia, 1904.

Section 4075 is the general statute of limitations as to confinements in jail for failure to pay fines and costs. This statute provides, however, "Nothing herein or in the preceding section shall prevent the issue of a writ of *feri facias* after such release from jail." Therefore, I am of the opinion that there is nothing to prevent you from proceeding against the estate of such person for the collection of the fine and the costs in this case; indeed under section 725 of the Code it is the duty of the attorney for the Commonwealth to superintend the issuing of executions on judgments in his court for fines going wholly or in part to the Commonwealth.

I am also enclosing herewith a copy of an opinion rendered by Attorney General Anderson September 5, 1908, to the Auditor of Public Accounts of Virginia (Opinions of the Attorney General 1908, page 36) which will give you additional information as to the method of enforcing the collection of fines against real estate.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

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**FEES—Attorneys for the Commonwealth—Recovery of delinquent taxes—Section 56 Code of Virginia, 1904.**—The attorney for the Commonwealth cannot be paid out of the public treasury for the collection of delinquent taxes, but the court before whom the suit was brought has the right to decree counsel fees out of the corpus in its hands in a suit brought to enforce the lien for taxes.

RICHMOND, VA., December 1, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of the 23rd 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.

By section 456 of the Code, it is provided that the lien for delinquent taxes shall be enforceable by a suit in equity, and I am of opinion that upon the institution of such a suit by the attorney for the Commonwealth he could ask for proper counsel fees and that in the event of the sale of the property to satisfy the lien for taxes the court could allow him such a reasonable fee as his services justify. I know of no provision of the law providing for the compensation for attorneys for the Commonwealth out of the public treasury for the collection of delinquent taxes by suit, but unquestionably the court would have the right to decree counsel fees out of the corpus in its hands in a suit brought to enforce the lien for taxes.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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FEES—*Clerks of courts—Virginia prohibition law—Section 3505, Code of Virginia, 1904.*—Clerks of courts are not entitled to receive any fee for filling the prescriptions and affidavits required by the Virginia prohibition law.

RICHMOND, VA., December 23, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of December 16th, making inquiry as to whether or not under the prohibition law the clerks of the courts can charge a fee for each affidavit filed with them, as required under the prohibition act of transportation companies and druggists.

I beg to enclose you in this regard a copy of a letter written the Prohibition Commissioner by the Attorney General, in which he takes the position that while it may be reasonably held that the clerk of the court is entitled to 75 cents (under section 3505 of the Code) for issuing soft drink licenses under the order of the court, it is doubtful whether or not the clerks are entitled to fees for filing the affidavits above mentioned. The question did not come within the jurisdiction of the Prohibition Commissioner, and, therefore, the Attorney General declined to pass upon it.

In your letter you call attention to the fact that the clerks of the courts are required to pay into the treasury fees and allowances in excess of the amounts prescribed by law for the clerks to receive, and that, therefore, this matter becomes a question within your jurisdiction and one upon which you desire the advice of the Attorney General.

There is no provision in the prohibition law permitting the clerks to charge fees for filing these affidavits, and we will, therefore, have to look to the provisions of section 3505 of the Code as amended.

It is not clear from this section that the clerk is entitled to any fee for receiving and filing (filing makes these papers a matter of record, of course), and, therefore,

while I do not think that my opinion carries any conviction with it in the premises I shall have to hold that in the absence of a clear provision of the statute, the clerks are not entitled to receive any fee for filing these prescriptions and affidavits.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

FEES—*Clerks of courts—Hunting license—Chapter 152, Acts of 1916—Section 3505, Code of Virginia, 1904.*—Clerks of courts are not entitled to charge a fee in addition to the amount allowed by law for the issuance of a hunting license required by chapter 132 of the Acts of 1916.

RICHMOND, VA., *December 23, 1916.*

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

DEAR SIR:

I acknowledge your letter, enclosing a communication from Mr. Harry Burnett, clerk of Augusta county, in the following terms:

I have been informed that a number of the county clerks have been charging a fee of 25 cents for issuing hunting license. I can find no law for this charge. Will you kindly tell me if this charge is correct?

and asking the opinion of the Attorney General thereon.

Section 28 of the game law, chapter 152 of the Acts of 1916, page 257, 262, provides that the clerk shall retain 5% of the money received for each hunting license issued by him, and shall pay the balance to the State Treasurer on the first day of each month. Inasmuch as this section makes a specific allowance to the clerk, I am of the opinion that he can only claim the amount allowed by the game law, and cannot claim the provisions of section 3505 of the Code, which is the general statute covering his fees.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

FEES—*Clerks of court—Sections 3498-3537, inclusive, Code of Virginia, 1904, Sections 3505-3506 of the Code of Virginia, 1904, as amended—Sections 3507-3508-3515 and 3538 Code of Virginia, 1904.*—Clerks of court are entitled to require a deposit on account of fees before the institution of a suit and the fee commission should instruct the clerks of courts to require a deposit on account of fees on all suits instituted in their courts, as the Commonwealth is interested in having the fees of officers collected in full, so that the excess fees over and above the maximum compensation allowed the officers by law shall be paid into the public treasury.

RICHMOND, VA., *May 5, 1917.*

W. F. SMYTH, ESQ.,  
*Secretary State Fee Commission,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of the 3rd instant to the Attorney General, enclosing letter received by the commission from Mr. George T. Tyson,

county clerk of Northampton county, Va., and requesting on behalf of the State Fee Commission the opinion of the Attorney General on the following state of facts:

In reviewing the reports filed by State officers with the Auditor of Public Accounts and laid before the Commission by that official, it came to the attention of the Commission that several of the clerks of courts reported a considerable amount of fees uncollected. Thereupon, the Commission wrote to the clerks letters similar to the letter written Mr. Tyson, copy of which is enclosed.

As the Commonwealth is interested in having the fees of officers collected in full so that she may receive the excess, if any, as provided by law, kindly inform the Commission if there be any law under which the clerks of the courts can require the payment of all their fees in advance in the same manner as they are required to collect all State taxes in advance.

The fees of officers are treated in chapter 172 of the Code of 1904, being sections 3498 to 3537, inclusive. Sections 3505 and 3506, as amended by the acts of 1914, apply to the fees of county clerks, section 3507 to the fees for the clerks of the court of appeals, 3508 to the fees of sheriffs, sergeants, criers, coroners and constables.

By section 3515 it is provided that no person shall be compelled to pay any fees before mentioned for services already performed until a fee bill, signed by the officer, be produced to him and further provides:

\* \* \* nor shall such officer be compelled to perform any service unless his fees, if demanded, be paid or tendered or otherwise satisfactorily secured him, except in criminal cases and in the case of persons suing as provided by section 3538. (Section 3538 provides for persons suing *informa pauperis*.)

It would seem to me under the provisions of this section that the clerks of courts can require a deposit on account of fees before the institution of the suit. Indeed, as you suggest, the Commonwealth is interested in having the fees of officers collected in full so that the excess fees over and above the maximum compensation allowed the officers by law shall be paid into the public treasury and the clerks of courts in the State should be instructed to require a deposit on account of fees in all suits instituted in their courts.

While this may not be the universal practice in Virginia, it is certainly very largely the practice and is the uniform custom in the clerks' offices of the courts of the city of Richmond and throughout many of the judicial circuits in the State. Added to the plain terms of section 3515, as above set out, we have the weight of the almost universal practice in support of the proposition that the clerks can demand a deposit on account of fees in advance in suits instituted in their courts.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

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FEES—*Sheriffs—Virginia Prohibition Law—Sections 3531 and section 3508 Code of Virginia, 1904, as amended—Sections 3508-a, 3529 and 3530, Code of Virginia, 1904*—Section 3508 of the Code of Virginia, 1904, as amended, applies to fees of officers in civil cases only and does not operate as a repeal of sections 3529-3530 and 3531 of the Code of Virginia, 1904. Therefore, a sheriff is entitled to receive a fee of 30 cents for serving a summons in a misdemeanor case other than a summons for a witness; and where payment is to be made out of the State treasury he is entitled only to one-half of such fee.

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

RICHMOND, VA., *June 12, 1917.*

DEAR SIR:

I acknowledge reference to the Attorney General's office of the correspondence between you and Charles C. Curtis, Esq., sheriff of Elizabeth City county, who rendered charges against the Commonwealth of Virginia of 50 cents for serving copies of indictments upon defendants under the prohibition law.

You returned this account, holding that under section 3531 the sheriff is entitled to receive 30 cents for serving such a summons in a misdemeanor case, other than the summons for a witness, and that where payment is to be made out of the State treasury, he can get only one-half of the fees.

On the other hand, Mr. Curtis contends that section 3508 of the Code, as amended by chapter 285, Acts of 1916, page 503, provides for serving summons or other process, when body is not taken, and making return thereof, a fee of 50 cents, except the fee for summoning witnesses, &c.

I am clearly of the opinion that your construction of the law is correct, and that section 3508 applies to fees of officers in civil cases, only. This construction is given color by reason of the fact that section 3508-a provides that no sheriff shall be required to execute a summons or other process in a civil case, except a writ of *feri facias*, unless the fee accompany the same.

This matter has heretofore been passed by the Attorney General's office in an opinion rendered on February 23, 1914, "Opinions of the Attorney General, 1914," page 22, that a constable for serving a warrant, under chapter 140 of the Code, was entitled to 30 cents, and not 50 cents, as provided by section 3508. Section 3527 provides that only one-half of the fees of clerks, justices, sheriffs, sergeants, jailers, coroners, criers and constables in criminal cases shall be paid out of the public treasury. Section 3528 provides what the fees of attorneys of the Commonwealth in criminal cases shall be; sections 3529 for the fees of clerks in criminal cases; section 3530 for the fees of justices in criminal cases, and section 3531 specifically enumerates the fees in criminal cases to a sheriff, sergeant, coroner, crier or constable.

I am of the opinion that these sections of the Code, providing for fees in criminal cases, have not been repealed by any amendments to section 3508, for in section 3508 there is no expressed repeal of these sections, and implied repeals are not favored in the law.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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FEES—*Town sergeant*—Section 3533 of the Code of Virginia, 1904, as amended.—While a salaried officer is not entitled to fees for services performed by him, he is entitled to payment out of the public treasury for mileage or expenses incurred by him in the transportation of prisoners to jail.

MR. J. S. TURNER,  
*411 Moore street, Bristol, Va.*

RICHMOND, VA., *March 13, 1917.*

DEAR SIR:

Acknowledgment is made of your letter in reference to the disallowance of your claim for fees and expenses in the matter of carrying certain prisoners to jail, which occurred while you were sergeant of the town of Damascus, Va., on a salary basis.

This matter has been taken up with the Auditor and he does not now recall of what items the account consisted. If it was for fees the claim was disallowed under the provisions of section 3533 of the Code, Va., 1904, as amended by the Acts of 1914, page 572, which reads as follows:

1. Be it enacted by the General Assembly of Virginia, That section thirty-five hundred and thirty-three of the Code of Virginia as amended and re-enacted by an act approved March fifth, nineteen hundred and twelve, in relation to when certain officers not to be paid fees in criminal cases. Allowances in lieu of fees in serving process in criminal cases in cities, et cetera, be amended and re-enacted so as to read as follows:

Sec. 3533. No justice, constable, sergeant, captain or sergeant of police who receives a salary or allowance for general services out of the treasury of his county, city, or corporation shall receive any fees for services in a criminal case from the State, city, or county, but such fees to said officers shall be paid by the party against whom judgment is rendered; but the judge of any city or corporation court may make an allowance not exceeding two hundred dollars a year to each of two constables, sergeants, or policemen of such city or corporation, to be paid in lieu of all fees for serving criminal process of any kind, which allowance shall be paid out of the treasury; provided that when any incorporated communities have become cities of the second class under the act approved March ten, nineteen hundred and ten, entitled an act to provide for the organization and government of incorporated communities which shall become hereafter cities of the second class, as provided by law, then the allowance above provided for shall be made by the said circuit court of the said city; provided, that the provisions of this section shall not prevent the sheriff of a county or the sergeant of a city from being paid out of the treasury of the State the fee for receiving a person in jail when first committed authorized by section thirty-five hundred and thirty-two of the Code to be paid the jailer, the sheriff of a county and the sergeant of a city being by the provisions of section nineteen hundred and thirty-four of the Code the keeper of the jail (i. e., the jailer); and provided, further, should there at this time be accounts for commital fees due city sergeants which have not been paid by the Auditor of Public Accounts he is hereby authorized and directed to pay the same out of the appropriation made for the payment of criminal charges.

If any portion of this claim was for mileage or for expenses incurred by you and not for fees, the claim will be allowed, the Auditor informs me, as this section only forbids the payment of fees to salaried officers; therefore, unless your claim is for fees you should return the same and it will receive prompt attention.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

**FEES—Treasurers—Chapter 352, Acts of 1914.**—Commissions earned by a treasurer on State and local revenue in 1915, although not finally settled for with the State and locality until 1916, cannot be taken into consideration in computing the maximum allowed a treasurer under the law, and therefore cannot be considered in determining the excess, if any, he is required to pay into the State treasury.

RICHMOND, VA., March 23, 1917.

HON. C. LEE MOORE,

*Auditor of Public Accounts, Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of March 22 to the Attorney General as follows:

Referring to your letter of January 10, 1917, relative to commissions, fees, allowances, etc., which a treasurer should include in the report he is

required to make under the act of March 27, 1914, as the provisions of that act did not become operative until January 1, 1916, please advise me if the commissions earned by a treasurer upon State and local revenue (for which he settled finally with State and locality in 1916) collected during 1915 must be charged against him in determining the excess, if any, he is to pay into the State treasury.

I am of opinion that the commissions earned by a treasurer upon State and local revenue in 1915, although he does not finally settle with State and locality until 1916, cannot be taken into consideration in computing the maximum allowed him under the law, and, therefore, cannot be considered in determining the excess, if any, he is to pay into the State treasury.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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*FEES—Treasurer—Reports of—Chapter 332, Acts of 1914, as amended.*—A county or city treasurer should include commissions, fees and allowances which relate solely to the final settlements had with the Auditor of Public Accounts and the boards of supervisors in the report which he is required to make under chapter 332 of the Acts of 1914, as amended.

*Same*—The treasurer, while entitled to commissions upon all his collections, should not report commissions until his final settlement for the fiscal year in which the taxes were charged and for which he was required to make his settlement. The treasurer is not prevented from retaining commissions on his collections but simply postpones his report until the final settlement of his account when the auditing officers will know exactly what his commissions were.

RICHMOND, VA., *January 10, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter of January 10th, to the Attorney General, requesting an opinion on the following question:

Should a county or city treasurer, in the report which he is required to make under the act of March 27, 1914, as amended by the Acts of 1916, include commissions, fees and allowances which relate solely to the final settlements had with me and the boards of supervisors, or should they relate to the allowances, fees, commissions, etc., upon collections of revenue, both State and county, of two different fiscal years, which he does collect within the calendar year?

I am of opinion that a county or city treasurer should include commissions, fees and allowances which relate solely to the final settlements had with you and the boards of supervisors in the report which he is required to make under the act of March 27, 1914.

Of course, the treasurer is entitled to commissions upon all of his collections but those commissions should not be reported by the treasurer until his final settlement for the fiscal year in which the taxes were charged and for which he was required to make his settlement.

For instance, in the settlement of H. P. Britain, treasurer Tazewell county, I find that he has reported a statement of his fees, allowances and commissions of \$6,416.68 for the month of December, 1916. This amount should not be reported as collected by the treasurer until the end of the fiscal year 1916, to-wit: June 15, 1917, and will, therefore, go in the report required to be made by him in January, 1918.

Another instance is in the settlement of L. H. Kemp, treasurer of Henrico county, who credits himself with allowances, commissions, etc., for November and December, 1916, amounting to \$6,060.45. Of course, the treasurer is entitled to these credits, but they should not be reported until the end of the fiscal year, to-wit, June 15, 1917, and would get in his January report, 1918.

This construction does not prevent, of course, the treasurers from retaining commissions on his collections, but simply postpones his report until the final settlement of his account when the auditing officers will know exactly what his commissions were and will prevent a great deal of confusion in the auditing of the books of the county and city treasurers.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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**FEES—Reports of by officers—Chapter 352, Acts of 1914, as amended.**—While it is the duty of an officer mentioned in chapter 352 of the Acts of 1914, as amended, to report his uncollected fees he cannot be charged with uncollected fees as a portion of the maximum compensation to be retained by him. It is the duty of such officer, however, to report in the subsequent year any collections made by him on account of the fees reported uncollected and any collections so made will have to be taken into consideration in making up the maximum compensation of such officer for the next year.

RICHMOND, VA., *April 30, 1917.*

MR. W. F. SMITH,

*Secretary State Fee Commission,*

*Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of the 26th instant to the Attorney General, asking his opinion on the following state of facts:

Under chapter 352, Acts 1914, as amended, by the act approved March 22, 1916, chapter 490, Acts 1916, it is provided that each of the officers named in said act shall annually within fifteen days after the close of each anniversary of the beginning of his term file with the Auditor of Public Accounts a statement showing all his fees, allowances, salary, commission, etc., collected by him and a like statement of all such fees, allowances, salary, commissions, etc., chargeable under the law but not collected by him. It is further provided that each of the said officers shall retain as his compensation out of the said fees, etc., amount not in excess of the sum allowed him by law and he may also deduct certain expenses provided for in the act.

The State Fee Commission desires your opinion upon the following point:

In determining the amount to be paid into the State treasury by the officer, must he be charged with the fees, etc., reported uncollected or only with those reported collected?

A concrete case will illustrate the ruling desired. A, sheriff of .....county, reports \$7,500.00 as fees, etc., collected by him and \$500.00 as fees uncollected. He is allowed \$5,000.00 under the law and expenses, allowable under the law, \$2,000.00, total \$7,000.00. Is the excess to be returned by him \$2,500.00 or \$3,000.00?

By reference to section 3 of chapter 352, Acts of 1914, you will note that it is provided that "each of said officers shall *retain* as his compensation out of said fees, allowances, commissions and salaries and amount not in excess of the *same* hereinbefore named" (the word *same* in the foregoing quotation is evidently a clerical error for the word "sum.") In view of this provision of the law, it seems to me clear that the officers cannot *retain* an amount not yet collected, and that therefore while it is the duty of the officer to report his uncollected fees he cannot be charged with those uncollected fees as a portion of the maximum compensation to be retained by him.

Of course, it will be the duty of such officer to report next year any subsequent collections on account of the fees reported uncollected for the year and any collections made since his report this year will have to be taken into consideration in making up the maximum compensation of such officer next year.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

FLAG—*United States flag—Desecration of—Chapter 356, Acts of 1916.*—A calendar advertising a business, which in addition to the calendar itself consists of the picture of a woman draped in the United States Flag with advertising matter printed on the background adjoining the flag comes within the meaning of chapter 356 of the Acts of 1916 and violates the same.

RICHMOND, VA., *October 17, 1917.*

THE MIDDLETOWN STATE BANK,  
*Middletown, Va.*

GENTLEMEN:

Acknowledgment is made of your letter of September 26, in which you request the Attorney General to advise you if there has been any recent ruling of this office in reference to the use of the United States flag on any advertising matter. You also enclosed under separate cover a copy of the calendar which in addition to the calendar itself, consists of the picture of a woman draped in the United States flag, with advertising matter printed on the background adjoining the flag, and you request us to advise you if you can legally distribute the same.

This question is governed by the provisions of chapter 356 of the Acts of 1916. Subsection 1 thereof, so far as is applicable to the question here under consideration, provides:

Be it enacted by the General Assembly of Virginia, That any person who in any manner \* \* \* shall expose or cause to be exposed to public view any such flag, standard, color, or ensign upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or advertisement of any nature, \* \* \* shall be deemed guilty of a misdemeanor \* \* \*

Subsection 2 of the act provides that the words "flag, color, ensign, as used in this act, shall include any flag, standard, ensign or any picture or representation of either thereof, upon which shall be shown or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or ensign, of the United States of America, or a picture, or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, standard, or ensign, of the United States of America."

Under the provisions of section 1 of the act, I am of the opinion that the calendar in question violates the statute.

Yours very truly,

LEON M. BAZILE,

*Law Assistant.*

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FORESTRY—*Fires*—Chapter 305, Acts of 1916—Section 3702, Code of Virginia, 1904, as amended.—Section 22 of chapter 305 of the Acts of 1916 and section 3702 of the Code of Virginia, 1904, as amended, make it a criminal offense to set on fire property, if the same is set in the manner prohibited in these sections. Therefore, a warrant charging an unlawful setting on fire would cover prosecutions under both sections.

*Same*—As the offense provided for in section 23 of chapter 305 of the Acts of 1916 is not the setting on fire of property but the operation of certain engines without appliances provided for in that section, it is necessary to charge this offense in the warrant.

RICHMOND, VA., November 9, 1916.

HON. R. C. JONES,

*State Forester,*

*Charlottesville, Va.*

DEAR SIR:

Acknowledgment is made of your letter of October 19, 1916, written in response to my letter of October 17, 1916, to you, in reference to the State forestry laws.

Your first question is stated by you as follows:

With regard to the second of the questions contained in my letter, which you have answered on pages two and three of your letter; I note that it is your opinion that the three sections in question do not conflict. What I want to know is whether I should advise forest wardens to bring criminal action against parties guilty of starting fires under a certain one of these three sections, or whether I should advise them merely to charge a violation of law, and to wait until the evidence is in, and it is known just what facts are established, before asking for a specific penalty under a specified section of law. The question is frequently a pertinent one for the reasons stated in my previous letter.

Section 22 of chapter 305 of the Acts of 1916, and section 3702 of the Code of Virginia, 1904, as amended, make it a criminal offense to set on fire, if set in the manner prohibited by these sections; therefore, it would seem that a warrant charging the unlawful setting of fire would cover prosecutions under both sections.

As the offense provided for in section 23 of chapter 305 of the Acts of 1916, is not the setting on fire but the operation of certain engines without appliances provided for in that section. It would be necessary to charge this offense in the warrant.

Your second question is as follows:

The second point about which I want some further explanation is the point number three in my previous letter, and which you have answered at the bottom of page two of your letter. In saying "I express no opinion, however, as to the validity of this provision," you refer I presume to the law as applying to the first of the two parties in question, namely the land owner. I wish only to make absolutely certain that you do not imply a doubt as to the validity of the provision of law as applying to the second party in question, namely the party guilty of starting the fire.

The statement that I expressed no opinion as to the validity of section 19 of chapter 305, Acts of 1916, was intended to be limited to the liability therein imposed on the owner.

Your third question is as follows:

I wish also to inquire to what extent it is proper for me to quote your letter. It has occurred to me to send a letter sometime before the dangerous brush burning season next spring to each justice of the peace, forest warden, and Commonwealth's attorney, quoting your statement with regard to the criminal liability of the owner for brush burning on his place, on the lower half of page three of your letter, and also your statement with regard to the guilt of an operator of a saw mill, which statement occurs in the four lines in the exact middle of page four of your letter.

My letter of October 17th was written you as an official opinion, in response to the questions contained in your letter of August 1, 1916, and, of course, you have full authority to circulate the same as you deem necessary.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

FORESTRY—*Fires—Chapter 305, Acts of 1916.*—Neither the State forester nor the wardens have the authority to compel a sawmill operator to put out a fire in his sawdust pile in anticipation of his leaving same burning when he leaves his mill. The State forester should notify such sawmill operator if he leaves the sawdust pile burning, so that the fire escapes, he will be prosecuted under the laws of the State.

RICHMOND, VA., *November 28, 1916.*

HON. R. C. JONES,  
*State Forester,*  
*University, Va.*

DEAR SIR:

Acknowledgment is made of your letter of October 25, 1916, which is in the following terms:

A sawmill operator in Chesterfield county has recently, at Mr. Hatcher's request, cleaned up and burned off the debris around his mill in such a way that he has for the present obviated all danger of starting a fire in the woods through the operation of his mill. He has also, however, allowed the large sawdust pile nearby to catch fire. This sawdust pile is within the area which has been cleaned up, so that at the present time its being on fire does not constitute a menace to the surrounding county. The question which I wish to ask you is what authority under the law the forest warden has to compel the sawmill operator to guard against the spread of fire from this sawdust pile at a later season, when if things are left alone it undoubtedly will constitute a menace and jeopardize property, in violation of section 3702.

Under section 14 of chapter 305, Acts of 1916, it is provided that the State forester "shall take such action as is authorized by law to prevent and extinguish forest fires."

It is further provided by section 18, which prescribes the duties of forest wardens, that:

\* \* \* When any forest warden shall see or have reported to him a forest fire, it shall be his duty immediately to repair to the scene of the fire and employ such persons and means as in his judgment seem expedient and necessary to extinguish said fire. \* \* \*

Section 22 of chapter 305 of the Acts of 1916, reads as follows:

It shall be unlawful for any persons or corporations, as land owners, to set, or procure another to set, fire to any woods, brush, logs, leaves, grass or clearing upon their own land, unless they have previously taken all possible care and precaution against the spread of such fire to other lands not their own, by previously having cut and piled the same, or carefully cleared around the land which is to be burned, so as to prevent the spread of such fire. The setting of fire contrary to the provisions of this section *or allowing it to escape to the injury of adjoining lands*, shall be *prima facie* proof of wilfulness or neglect, and the land owners from whose land the fire originated shall be liable in a civil action for damages for the injury resulting from such fire, and also for the cost of fighting and extinguishing the same, and shall be fined not less than ten dollars nor more than one hundred dollars, or be confined in jail not less than ten days nor more than thirty days; provided that such fine or imprisonment may, in the discretion of the justice or jury be waived upon payment for the damages resulting from such fire and for the cost of fighting and extinguishing the same.

These seem to be the only sections of the act which bear on this question, and as I find no express authority authorizing you to compel this sawmill operator to put out the fire in his sawdust pile, as the matter stands at present, I am of the opinion that all you can do is to notify him that if he leaves the sawdust pile burning so that the fire from the same escapes to the forest, that he will be prosecuted under the forest laws of the State.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

FORESTRY—*Posters of State forestry department—Defacing and mutilation of—Section 3729, Code of Virginia, 1904, as amended—Chapter 305, Acts of 1916.*—While the right to prosecute persons tearing down notices posted by forest wardens pursuant of section 315 of chapter 305 of the Acts of 1916 is not specifically mentioned such offenders should be proceeded against under section 3729 of the Code of Virginia, 1904, as amended.

*Same.*—Suggested amendment to forestry laws.

RICHMOND, VA., December 4, 1916.

HON. R. C. JONES, *State Forester,*  
*University of Virginia,*  
*Charlottesville, Va.*

DEAR SIR:

Acknowledgment is made of your letter of October 25, 1916, in which you request me to advise you on the following state of facts:

The second question with regard to which I wish your advice relates to the tearing down or mutilation of posters quoting the forest fire laws, etc.,

which are furnished by me to forest wardens and posted by them. I am required by section 15, chapter 305, laws of 1916, to furnish such notices to forest wardens, which they are required to post in conspicuous places, there is no penalty provided in this same chapter for tearing down or mutilating such notices, and I wish to inquire what the penalty is under other statutes for an offense of this sort.

The only law that we have which bears on the subject is section 3729 of the Code of Virginia, 1904, as amended by Acts of 1914, page 498, Vol. 4 Code, page 523. This section reads as follows:

If any person, unlawfully, but not feloniously, take and carry away, or destroy, deface or injure any property, real or personal, not his own, or break down, destroy, deface, injure or remove any monument erected for the purpose of marking the site of any engagement fought during the war between the States, or for the purpose of designating the boundaries of any city, town, tract of land, or any tree marked for the purpose, he shall be fined not less than five nor more than five hundred dollars.

While your right to prosecute persons for tearing down notices posted by forest wardens, in pursuance of section 15 of chapter 305, Acts of 1916, is not specifically mentioned, I would advise that if annoyed you proceed against such offenders under this section. However, as this section is not entirely clear, I would advise you to have an amendment covering this phase of the law added to the forestry laws at the next session of the legislature.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

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GAME AND FISH—*Trout fishing*—Section 2108, Code of Virginia, 1904.—Under the provisions of section 2108 of the Code of Virginia, 1904, it is unlawful to kill or capture mountain brook, California or rainbow trout for any purpose whatever in any of the waters of this State at any time unless the board of supervisors of a county permit angling with hook and line under such conditions and at such times and places as may be designated by said board.

GAME AND FISH—*Same*—Chapter 341, Acts 1912, as amended—Code of Virginia, Vol. 4, page 893.—Under the provisions of chapter 341 of Acts of 1912, as amended, by Acts of 1914, page 119, Virginia Code, Vol. 4, page 893, the legislature has permitted the catching of the class of trout enumerated in said act, in streams west of the Blue Ridge mountains under the restrictions and conditions imposed by the act.

*Statutes, construction of.*—While the terms of a general statute prevail over any prior special legislation in case of conflict the same rule of construction is inapplicable to statutes passed subsequent to the enactment of the general statute where the legislative intention to make an exception is clear.

*Same.*—While repeals by implication are not favored, and where two acts are passed by the legislature at the same session they must be reconciled so far as the same can be done, nevertheless, where there is a conflict between the two laws the last enactment will be constructed as repealing those portions of the earlier enactment in conflict therewith. Chapter 341 of Acts of 1912, as amended, being in conflict with section 2108 of the Code of Virginia, 1904, as amended, and having been passed subsequent to the last amendment of section 2108 of the Code, the provisions of chapter 341 of the Acts of 1912, as amended, prevail over the provisions of section 2108 of the Code of Virginia, 1904, as amended, so far as the same are in conflict.

RICHMOND, VA., June 7, 1917.

HON. JOHN S. PARSONS,  
*Commissioner of Fisheries,  
Norfolk, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of May 22nd to the Attorney General, in which you enclosed what purports to have been an opinion from the Attorney General in reference to the catching of mountain trout west of the Blue Ridge mountains. You call attention to the fact that the opinion is given with reference to section 2108 of the Code, as amended, which section makes it unlawful to catch trout except as permitted by the boards of supervisors of the various counties. You then say:

In order to get this matter fully settled, I enclose page 32 detached from the game and fish laws of the State, which contains an act passed on the 14th day of March, 1912 (one day after the section above referred to was amended), and this section, or statute provided that it shall be unlawful to take trout and certain other fish between the 1st day of September and the 1st day of April and the latter part of the statute provides "That the supervisors may shorten the open season act."

Now it seems as though this latter act is the one which governs fishing in the waters west of the Blue Ridge mountains, and that supercedes section 2108 in so far as the two are at variance and inconsistent, and that under the provisions of the last statute, it is only a violation to take trout from the streams west of the Blue Ridge mountains during the open season (from April 1st to September 1st), provided the supervisors have shortened or closed the season as is provided in this statute that they may do.

The files relating to opinions given by this office in reference to the game laws of this State are very voluminous, and, in view of the fact that the printed slip enclosed by you refers neither to the date of the opinion, the person to whom it was written, nor the subject thereof, except to quote from a portion of section 2108 of the Virginia Code, as amended, renders it almost impossible to locate the opinion referred to by Mr. Osborne, as this section has been quoted a number of times in opinions given by this office in reference to questions other than the one here under consideration.

As is stated by Mr. Osborne in the paper enclosed with your letter, it is provided by section 2108 that it shall be unlawful to kill or capture mountain, brook, California or rainbow trout by any process, whatever, in any of the waters of this State, at any time, except that the board of supervisors of any county may permit angling with hook and line under such conditions and at such times and places as they may designate. This section was amended by the Acts of 1912, page 473, in an opinion given by Attorney General Anderson (report of Attorney General, 1902, page 71), the opinion was expressed that this section prevails over any prior special legislation in case of conflict. The same rule of construction, however, is inapplicable to statutes passed subsequent to the enactment of section 2108 of the Code, where the legislative intention to make an exception is clear.

By chapter 341 of the Acts of 1912, as amended by the Acts of 1914, page 119, (Virginia Code, Vol. 4, page 893), the legislature enacted a law to regulate the taking of fish from streams west of the Blue Ridge mountains, with certain exceptions. This section reads as follows:

Then it shall be unlawful for any person to catch or destroy, in the waters, in any counties west of the Blue Ridge mountains, or to have in his possession any black bass, large or small mouth, between the first day of January and the first day of July following, or any brook or mountain trout or rainbow trout between the first day of September and the first day of April following, or to catch or destroy any of them at any time in any way except by angling

with hook and line, and any black bass, large or small mouth, or brook or mountain trout or rainbow trout caught at any time in any way except by angling with hook and line, shall be returned to the water immediately with as little injury as possible; provided, that it shall be lawful for any person to use a net commonly known as a landing net to land any black bass or brook or mountain trout or rainbow trout hooked by lawful angling with hook and line.

It shall be unlawful for any person to retain any black bass, large or small, of less than nine inches in length, or any brook or mountain trout or rainbow trout of less than five inches in length, and all black bass, large or small mouth, or brook or mountain trout or rainbow trout of less than the lengths specified herein, shall be returned to the water immediately with as little injury as possible, and the measurements of fish shall be from the end of nose to center form of tail.

It shall be unlawful for any person to take in any one day more than twenty-five black bass, or forty brook or mountain trout and rainbow trout, or to have in his possession at one time more than fifty black bass or eighty brook or mountain trout and rainbow trout.

It shall be unlawful for any non-resident of the State to fish in any of the waters of the counties west of the Blue Ridge mountains without first procuring a license in the same manner as provided for non-resident hunting license, except that fee for fishing license shall be five dollars.

The supervisors of any counties west of the Blue Ridge mountains may shorten the open seasons as herein prescribed and make other regulations regarding the taking of black bass or brook or mountain trout or rainbow trout or other fish from the waters of their respective counties not inconsistent with this act.

Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than ten dollars nor more than fifty dollars, or imprisoned in jail for not more than thirty days, or both fined and imprisoned, at the discretion of the justice or jury trying the case: provided, the provisions of this act shall not apply to the counties of Floyd, Washington, Botetourt, Bland, Giles, Highland, Augusta, Smyth, Craig and Rockbridge.

2. All acts or parts of acts inconsistent with this act are hereby repealed.

An examination of this statute clearly shows that it was the intent of the legislature to permit the catching of the enumerated classes of trout in streams west of the Blue Ridge mountains under the restrictions and conditions imposed by the act. While the general rule of construction is that repeals by implication are not favored, and that where two acts are passed by the legislature at the same session, they must be reconciled, so far as the same can be done; nevertheless, where there is a conflict between the two laws, the last enactment will be construed as repealing those portions of the earlier enactment in conflict therewith.

Chapter 341 of the Acts of 1912, as amended by the Acts of 1914, page 119, being in conflict with section 2108 of the Code of Virginia, 1904, as amended, which was last amended and re-enacted at the last session of the General Assembly for 1912, I am of the opinion that the provisions of chapter 341 of the Acts of 1912, as amended, must prevail over the provisions of section 2108 of the Code, as amended, so far as the same are in conflict.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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GAME AND FISH—*Prosecutions for violation of fish laws under section 2108, Code of Virginia, 1904, as amended.*—While section 2108 of the Code of Virginia, 1904, as amended, does not prescribe any penalty for the violation of the acts therein de-

clared to be unlawful, section 2109 of the Code of Virginia, 1904, provides the penalty for the violation of the preceding section, which violation is punishable by a fine of twenty dollars and imprisonment in jail in the event such fine is not paid, until the fine is paid, for a period not exceeding thirty days, therefore a person accused of violation of section 2108 of the Code of Virginia, 1904, as amended, can be proceeded against by criminal proceedings and committed to jail in the event of conviction and a refusal to pay the fine that may be assessed against him.

*Same—Crimes, what is a crime—Statutory offenses.*—It is not necessary for the legislature to employ the word misdemeanor in order to make the violation of a statute such an offense. The test by which it may be determined whether or not the violation of a statute is a misdemeanor is to be gathered from the words employed by the legislature and the punishment prescribed. All offenses other than treason under section 3879 of the Code of Virginia, 1904, being either felonies or misdemeanors, offenses punishable with death or confinement in the penitentiary being declared to be felonies, and all other offenses misdemeanors, where the legislature prescribes a punishment by fine for violation of a statute and provision for imprisonment in the event that such fine is not paid, the violation of such statute is a misdemeanor.

RICHMOND, VA., August 31, 1917.

HON. JOSEPH A. BILLINGSLEY,  
*Commonwealth's Attorney,*  
*King George C. H., Virginia.*

MY DEAR SIR:

Acknowledgment is made of your communication of August 23, 1917, addressed to the Attorney General, in which you say:

It is maintained here that a man cannot be tried criminally for a violation of section 2108 of the Code of Virginia, 1904, as amended, and cannot be fined or sent to jail because of the fact that the statute does not say that he shall be guilty of a misdemeanor, but merely says that he shall be fined or imprisoned. In other words, the word, "misdemeanor," is not used, and it is argued that the only way the State can recover is by civil action for the forfeiture, and if the man is not worth it, the State loses the fine. Kindly advise me if this is correct, or whether or not a criminal action will lie, as it is evident the legislature intended it should.

It will be observed that section 2108 of the Code, as amended, makes the doing of several acts therein specified unlawful. This section does not prescribe any penalty for the violation of its provision. It is provided by section 2109 of the Code of Virginia, 1904, however, 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 subdivisions 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.

It will be seen that a violation of any of the provisions of section 2108, except a violation of sub-section first, is punished by a fine of twenty dollars. In the event that such fine is not paid, the statute directs the imprisonment in jail of the offender un-

til the fine is paid, for a period not exceeding thirty days. As the statute expressly says that in the event of the non-payment of the fine therein prescribed, that the accused shall be imprisoned in jail until the fine is paid, or thirty days have expired, I am clearly of the opinion that a person accused of violating section 2108 of the Code of Virginia, 1904, as amended, can be proceeded against by a criminal proceeding and committed to jail in the event of conviction and a refusal to pay the fine that may be assessed against him. I do not think it at all necessary for the legislature to employ the word, "misdemeanor," nor to make a violation of a statute such an offense in express words, but the test by which it may be determined whether or not the violation of a statute is a misdemeanor, is to be gathered from the words employed by the legislature and the punishment prescribed. It is provided by section 3879 of the Code of Virginia, 1904, that "offenses are either felonies or misdemeanors," and that "such offenses as are punishable with death or confinement in the penitentiary are felonies; all other offenses are misdemeanors." The legislature having prescribed a punishment by fine for a violation of this statute and having provided for imprisonment in the event that such fine is not paid, I am of the opinion that the violation of section 2108 of the Code of Virginia, 1904, is a misdemeanor, and as I have before said, a person violating this statute may be proceeded against in the same manner that other misdemeanor cases are prosecuted.

The case of *Commonwealth v. Wells*, 107 Va. 834 (1907), cannot be regarded as authority on this question. In that case, the statute (section 3799) merely provided that for a violation of the provisions thereof the offender "shall forfeit two dollars for each offense." In this case, the statute prescribes a *fine* and provides for *imprisonment* in the event that the fine is not paid.

Yours very truly,

LEON M. BAZILE,  
Law Assistant.

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GAME AND FISH—*Sale of fish out of season—Statutes—Construction of—Section 2108, Code of Virginia, 1904, as amended—Chapter 92, Acts of 1916.*—Chapter 92 of the Acts of 1916 merely prescribes the time in which river bass commonly called black bass or black perch, or pond bass commonly called southern chub, may be killed or captured. This section in no way expressly authorizes the sale of fish so killed or captured, therefore, although sub-section 2 thereof provides that all acts or parts of acts inconsistent with the same, are repealed, nevertheless, it is only in those instances in which the terms of chapter 92 of the Acts of 1916 are inconsistent with section 2108 of the Code of Virginia, 1904, as amended, that the latter statute can be construed as repealed by the former. Chapter 92 of the Acts of 1916 is a special law applicable only to the county of Princess Anne, and was not intended to repeal the provisions of the general law except in that county, and so far as the express provisions of the special law conflicts with the provisions of the general laws then in existence.

*Same.*—The only effect of chapter 92 of the Acts of 1916 is to permit persons to kill or capture river bass in the county of Princess Anne alone, and does not permit either the sale or the purchase of such fish when caught out of the season prescribed by the general law without a violation of sub-sections 2 and 3 of section 2070-a of the Code of Virginia, 1904, as amended.

RICHMOND, VA., *May 31, 1917.*

C. M. McCLAIN, ESQ.,  
*Justice of the Peace,*  
*Greenfield, Va.*

Dear Sir:

Acknowledgment is made of your letter to the Attorney General, which is in the following terms:

The game warden of this county obtained a warrant from me against one of the citizens of this county charged with the offense of selling fish (commonly called black bass or black perch). The party asked for time to investigate the matter before I could try the warrant. He wrote to the dealer in Northfold, Virginia, from whom he had purchased the fish. The dealer in reply to the letter, which was shown me, stated that the fish were caught in Back Bay in Princess Anne county, Virginia, and the time for catching them there was extended to the first day of April. I would like to get your opinion about the law in regard to this matter, whether or not it would be a violation of sub-section 2 of section 2108 of the Code of 1887, to buy and sell fish caught in Back Bay, Princess Anne county, Virginia, in Nelson county, Virginia, during the month of March, 1917, as this matter is now pending before me, and I will wait to hear from you before I try the case. Your opinion at an early date will be kindly received and appreciated.

It is provided by section 2108 of the Code of Va., 1904, as amended, by so much thereof as is applicable to this question as follows:

First. It shall be unlawful—

Second. When to catch river or pond bass. To kill or capture a river bass (commonly called black bass or black perch), or pond bass (commonly called southern chub), between the 15th day of March and the 15th day of June of each year, or to shoot, spear, trap or net the same at any time: or,

\* \* \* Third. When to buy, sell, or use same. To buy, sell or make use of \* \* \* black bass or pond bass within the said prohibited periods, respectively.

It is provided by chapter 92 of the Acts of 1916, as follows:

1. Be it enacted by the General Assembly of Virginia, That the time to kill or capture river bass (commonly called black bass), or black perch, or pond bass (commonly called southern chub), in the county of Princess Anne, shall be extended to the first day of April, to accord with the catching of other fish in the waters of Back Bay in Princess Anne county, Virginia.
2. All acts and parts of acts inconsistent with this act are hereby repealed.
3. An emergency existing this act shall be in force from its passage.

It will be seen that chapter 92, of the Acts of 1916 merely prescribes the time in which river bass (commonly called black bass) or black perch, or pond bass (commonly called southern chub) may be killed or captured. This section in no way expressly authorizes the sale of fish so killed or captured. Therefore, although sub-section 2 of this act does provide that all acts or parts of acts inconsistent with this act are repealed, nevertheless, it is only in those instances in which the terms of chapter 92 of the Acts of 1916 are inconsistent with section 2108 of the Code of Virginia, 1904, as amended, that it can be construed as repealed, chapter 92 of the Acts of 1916 is a special law applicable only to the county of Princess Anne, and was not intended to repeal the provisions of the general law except in that county, and so far as the express provisions of the special law conflicted with the provisions of the general laws then in existence.

This question is, therefore, to be governed by the principle laid down in the opinion given the Commissioner of Game and Inland Fisheries, October 9, 1916, by this office in reference to hares killed on the property of an owner under the provisions of sub-section 2 of section 2070-a of the Code of Virginia, 1904, as amended, and the opinion of the Attorney General given the Commissioner of Game and Inland Fisheries January 12, 1917, in reference to the purchase and sale of deer killed in the counties having special laws extending the season for killing deer beyond the season prescribed by the general law relating to that subject.

In the first opinion it was held that although the owner of land could kill hares upon his own land out of season, as permitted by section 2070-a as amended, that he had no right to offer the same for sale on the market, and further, that under the provisions of this section:

It shall be unlawful for any person \* \* \* to \* \* \* buy, offer for sale, or have in possession and \* \* \* hares ( or rabbits ) \* \* \* between February 1st and November 1st.

The purchase of such rabbits would violate the provisions of this section, and incur in so doing the penalty prescribed for violation of the same.

In the second opinion it appeared that in Chesterfield and Mecklenburg counties, the open season for hunting and killing deer extended beyond the season prescribed by the general law, the general law, sub-section 2 of section 2070-a, Code of Virginia, 1904, as amended, providing that the closed season should be between December 1st and September 1st, while by chapter 191, Acts of 1916, a special law relating to the county of Chesterfield, it was provided:

It shall be unlawful for any person to hunt, kill or trap any deer in the county of Chesterfield from the first day of January to the first day of October in each year.

By chapter 52 of the Acts of 1916, a special law relating to the county of Mecklenburg, it was provided:

The open season for hunting and killing deer in Mecklenburg county is between the first day of October and the first day of January in each year. \* \* \*

In both of these special acts it was provided that all acts or parts thereof in conflict are inconsistent with these acts "*are hereby repealed.*" In this opinion it was held by the Attorney General that while under the special laws relating to Chesterfield and Mecklenburg counties, one could lawfully kill deer in those counties beyond the season prescribed by the general law; that nevertheless such deer could not be sold, even in such counties, by the person killing the same, and moreover that the purchaser of such deer would violate the provisions of sub-section 2 of section 2070-a as amended, and incur in so doing the penalties prescribed for the violation of the same.

I am of the opinion, as has been said, that the conclusion reached in the foregoing opinions governs the question here, and that the only effect of chapter 92 of the Acts of 1916 is to permit persons to kill or capture river bass, or black perch in the county of Princess Anne alone, and does not permit either the sale or purchase of such fish without a violation of sub-sections 2 and 3 of section 2070-a of the Code of Va., 1904, as amended.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

GAME AND FISH—*Catching of black bass—Statutes, repeals by implication—Section 2108, Code of Virginia, 1904, as amended; Section 2086, Code of Virginia, 1904, as amended.*—Sub-section (6) of section 2086 of the Code of Virginia, 1904, as amended, does not repeal by implication the provisions of section 2108 of the Code of Virginia, 1904, as amended, which prescribes the period of the year during which black bass can be caught, and does not totally prohibit the taking of the same during the other seasons of the year; and the effect of sub-section (6) of section 2086 of the Code of Virginia, 1904, as amended, being to place additional restrictions upon the taking of black bass during the open season instead of conferring additional rights on fishermen. Section 2086 of the Code of Virginia, 1904, refers only to the taking of black bass during the open seasons prescribed by section 2108 of the Code of Virginia, 1904, as amended.

RICHMOND, VA., August 31, 1917.

HON. JOSEPH A. BILLINGSLEY,  
*Commonwealth's Attorney,*  
*King George C. H., Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of August 23, 1917, addressed to the Attorney General, in which you request the official opinion of this office on the following matter:

I recently tried a man under a criminal warrant charging him with a misdemeanor for having caught black bass in the Rappahannock river in trap nets. The warrant was issued under section 2108, sub-section 2, of the Code. It is urged by the counsel for defense that this section of the Code is repealed, and rendered null and void by the new fishing law passed in 1916, amending sub-section 6 of section 2086 of the Code, which seems to imply that black bass may be caught in nets provided any under eight inches in length are returned to the water.

For the purpose of enabling me to intelligently instruct fishermen as to their rights in regard to bass, I will thank you to give me your opinion as to whether or not it is lawful to catch them, and if so, when, where and how. This is a much mooted question here, which I am anxious to settle for good.

It is provided by sub-section 2 of section 2108 of the Code of Virginia, as amended, as follows:

It shall be unlawful:—

When to catch river or pond bass. To kill or capture a river bass (commonly called black bass or black perch), or pond bass (commonly called southern chub), between the fifteenth day of March and the fifteenth day of June of each year, or to shoot, spear, trap or net the same at any time.

And by sub-section 3 of the same statute, it is provided:

When to buy, sell or use same. To buy, sell or make use of mountain trout or black bass or pond bass within said prohibited periods, respectively.

It is provided by sub-section 6 of section 2086 of the Code of Virginia, 1904, as amended, that "it shall be unlawful to take, catch or have in possession \* \* any black bass less than eight inches in length \* \* \* "

The question that you wish this office to determine is whether or not the above quoted provision of sub-section 6 of section 2086 of the Code of Virginia, 1904, repeals by implication sub-section 2 of section 2108 of the Code of Virginia, 1904, as amended, it being argued that the implied authority to catch black bass over eight inches in length abrogates the prohibition contained in section 2108 of the Code of Virginia, 1904, as amended.

I cannot agree with the contention that sub-section 6 of section 2086 of the Code of Virginia, 1904, as amended, repeals by implication or affects the provisions of section 2108 of the Code, as amended. Sub-section 2 of section 2108 of the Code of Virginia, 1904, as amended, prescribes the period of the year during which black bass can be caught, and does not totally prohibit the taking of the same during the other seasons of the year, the only effect of sub-section 6 of section 2086 of the Code of Virginia, 1904, as amended, instead of conferring additional rights upon fishermen, is to place an additional restriction upon the taking of black bass during the open season, viz., that black bass so taken shall not be less than eight inches in length. This latter section, I am of the opinion and so hold, refers only to the taking of black bass during the open season prescribed by section 2108 of the Code of Virginia, as amended, and in no wise repeals the provisions of the former section. That this conclusion is correct is confirmed by sub-section 1 of section 2086 of the Code, which prescribes "that nothing in this act shall be construed to permit fishing in rivers or other waters prohibited by law, and in any seasons prohibited by law."

Yours very truly,

LEON M. BAZILE,  
*Law Assistant.*

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GAME AND FISH—*Streams, pollution of*—Section 2108, Code of Virginia, 1904, as amended.—As to whether or not the placing of saw dust in a stream above tidewater is a violation of section 2108 of the Code of Virginia, 1904, as amended, depends on whether saw dust is a noxious substance or matter by which fish may be destroyed, which question is a question of fact and not of law.

*Same—Duty of Commissioner of Game and Inland Fisheries.*—Where the Commissioner of Game and Inland Fisheries ascertains that a substance placed in a stream kills the fish in the stream in which it is discharged, he should notify the person placing such substance in the stream, not to discharge the same in such waters, and if such course is persisted in the Commissioner of Game and Inland Fisheries should institute a prosecution against such persons as provided for by law.

RICHMOND, VA., December 12, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of December 8, 1916, in which you request an opinion on the following state of facts:

The department would like to have your opinion as to whether the language in section 2108, sub-section 4, "or knowingly or wilfully to cast any noxious substance or matter into any water-course of this State above tidewater, by which fish therein may be destroyed," etc., is broad enough to justify this department in instructing the game wardens to prohibit all mill-owners from dumping sawdust into the rivers and streams of the State.

It is provided by sub-section 4 of section 2108 of the Code of Va., 1904, that it shall be unlawful:

To use fish berries, lime, or giant powder, dynamite, or any other explosive for the destruction of fish, or knowingly or wilfully to cast any noxious substance or matter into any water course of this State above tidewater by

which fish therein may be destroyed or to place or allow to pass into the waters of the James or Appomattox rivers, or any of their tributaries, any lime, gas tar or refuse of gas works injurious to fish.

As to whether or not the placing of sawdust in the stream above tidewater is a violation of this provision of section 2108 of the Code, as amended, depends on whether the sawdust is a "noxious substance or matter \* \* \* by which fish may be destroyed."

Most of the cases that I have been able to find involving the question of pollution of streams by sawdust have been proceedings by individuals to enjoin the same.

In *Western Paper Co. v. Pope et al.*, 155 Ind. 354; 356 L. R. A. 899; and *Indianapolis Water Co. v. American Strawboard Co.*, 57 Fed. 1000, it was there held that the refuse material from a strawboard factory could be enjoined at the instance of riparian owners situated on the stream below the point of pollution.

Some authorities have held that the discharge of sawdust and waste into a stream in the ordinary course of using a mill is not such pollution as can be enjoined, provided the same is done in a reasonable manner.

The case of *State v. Mitchell*, 47 W. Va., 789, 35 S. E. 845, is authority to the contrary, however.

In the instant case, as I have said, the only question to be determined is whether or not sawdust is a noxious substance or matter which destroys fish in the stream in which it is discharged. This, of course, is a question of fact and not a question of law. If you ascertain that sawdust does kill the fish in those streams in which it is discharged, I would advise that you notify the proprietors of such saw mills not to discharge sawdust into such waters, and if they persisted in so doing that you institute a prosecution against such persons as provided for by law.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

GAME AND FISH—*Crab fishing—Section 2086, Va. Code, 1904, Chapter 501, Acts 1916.*—Residents of Virginia who fish with trot lines for crabs for their own domestic use and not for sale are not required to take out a license as provided in the crab law.

*Licenses—Construction of license laws.*—All license laws must be construed strictly in favor of the citizen and against the State.

RICHMOND, VA., June 9, 1917.

HON. JOHN S. PARSONS, *Commissioner,*  
*Dept. of Game and Inland Fisheries,*  
*Norfolk, Va.*

DEAR SIR:

Acknowledgment is made of your communication, addressed to the Attorney General, in which you request him to answer the following question:

Is it necessary for a resident of this State to take out and pay for a license to permit him to fish a trot line for crabs for his own private use, provided he does not sell or ship any crabs so taken?

After a consideration of the various statutes set out in your letter and especially sub-sections 1 and 13 of section 2086 of the Code and section 17 of chapter 501, Acts of 1916, I beg to advise that I am of opinion that residents of this State who fish with trot lines for crabs for their own domestic use and not for sale, are not required to take out a license as provided in the crab law.

While it is not entirely clear that the legislature excepted from the crab act those persons who catch crabs with trot lines for their own use and not for sale, yet when you consider the law creating the Board of Fisheries and its most recent amendment in chapter 501, Acts of 1916, together with the well-known history of this legislation, and when you further consider that all license laws must be construed strictly in favor of the citizen and against the State, I must conclude that it was not the intention of the legislature to require a man to pay a license to catch crabs with a trot line for his own domestic use and not to be sold.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

GAME AND FISH—*Fish ladders*—Section 2105, Code of Virginia, 1904—Chapter 501, Acts of 1916—*Words and phrases*—*Tidewater Virginia*.—While certain counties are designated by section 18 of chapter 501 of the Acts of 1916, as being embraced within Tidewater Virginia, this section provides that these counties are in Tidewater Virginia, for the purposes of chapter 501 of the Acts of 1916, therefore, the term "Tidewater Virginia," as defined in this statute, is not used in reference to section 2105 of the Code of 1904, or with the intent to affect the operation of the same. "Tidewater," as used in section 2105 of the Code, was used in ordinary acceptation, which means "water" whether salt or fresh wherever the ebb and flow of the tide from the sea is felt.

RICHMOND, VA., March 27, 1917.

HON. JNO. S. PARSONS,

*Commissioner of Game and Inland Fisheries,  
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication of February 24, 1917, in which you request the opinion of the Attorney General on the following question:

This department would like to have your opinion as to what rivers should be exempted from the provisions of section 2105 as "above Tidewater."

You will note in chapter 501 as amended March 23rd. Section 18, "Tidewater Virginia" is defined to embrace certain enumerated counties and nowhere else do we find any definition of the word tidewater. "Above Tidewater" might mean in any river where the tide did not rise and fall twice in every twenty-four hours.

Section 2105 of the Code of Virginia, 1904, so far as applicable to this question, provides as follows:

Any person or corporation owning or having control of any dam or other obstruction in any of the rivers of this State above tidewater, which may interfere with the free passage of fish, shall provide such dam or other obstruction with a suitable fish ladder.

While it is true, as you have noted in your letter, certain counties are designated by section 18 of chapter 501, Acts of 1916, as being embraced within Tidewater Virginia, it should be observed that this section provides that these counties are in Tidewater Virginia for the purpose of chapter 501 of the Acts of 1916.

The section provides:

Tidewater Virginia, as used in this act, is hereby defined to embrace the following counties and any towns and cities situated in any of the said counties \* \* \*

Therefore, I am of the opinion that the term "*Tidewater Virginia*" as defined in chapter 501, Acts of 1916, is not used in reference to section 2105 of the Code of Virginia, 1904, or with the intent to affect the operation of the same, but that "*Tidewater*," as used in section 2105 of the Code, was used in its ordinary acceptation, which means "water whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt." 38 Cyc. 303. See also *Commonwealth v. Vincent*, 108 Mass. 441, 442, also *Attorney General v. Woods*, 108 Mass. 436, 439, 11 A. Rep. 308, where this word is thus judicially defined.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

GAME AND FISH—*Fish ladders*—*Section 2105 of the Code of Virginia, 1904—Chapter 135, Acts of 1881-2.*—As section 2105 of the Code of 1904 expressly provides that the same shall not be construed so as to require fish ladders to be placed on any dam exempted by law at the time of the enactment of this statute, the same does not operate as a repeal of chapter 135 of the Acts of 1881-2 exempting dams in the counties of Floyd, Grayson and Carroll, from the operation of the law relating to fish ladders.

RICHMOND, VA., *February 17, 1917.*

HON. JOHN S. PARSONS,

*Commissioner of Game and Inland Fisheries,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication of February 14, 1917, and the enclosures, in which you request the Attorney General to advise you whether or not chapter 135 of the Acts of 1881-82 were repealed by section 2105 of the Code of Virginia, 1904, which was re-enacted at the session of 1899-1900.

Chapter 135 of the Acts of 1881-82 reads as follows:

1. Be it enacted by the General Assembly, that section one of an act approved April twenty-ninth, eighteen hundred and seventy-four, Session Acts eighteen hundred and seventy-four, for the protection of fish in the waters of the Commonwealth above tidewater, as amended by an act approved March twenty-one, eighteen hundred and seventy-seven, be and is hereby repealed so far as it relates to the rivers, creeks and branches that are embraced within the boundaries and jurisdiction of Floyd, Carroll, and Grayson counties.

2. And so much of the third section of chapter sixty-two, Code eighteen hundred and seventy-three, as refers to mill-dams across rivers, creeks, or branches lying within the limits of Floyd, Grayson and Carroll counties be and is hereby repealed.

3. This act shall be in force from its passage.

It is provided as follows by paragraph 2 of section 2105 of the Code of Va., 1904.

This act shall not be construed as requiring fish-ladders to be placed on any dam now exempt by law.

You will, therefore, see that it is expressly provided by section 2105, that its provisions shall not be construed so as to require fish ladders to be placed on any dam exempt by law at the time of the passage of this act.

It appearing from the provisions of chapter 135 of the Acts of 1881-82 that the dams in the counties of Floyd, Grayson and Carroll were exempt by law at the time of the enactment in its present form of section 2105, I am, therefore, of the opinion that this section is not applicable to these counties.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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GAME AND FISH—*Fish ladders*—Section 2105, Code of Virginia, 1904—Section 2105 of the Code of Virginia, 1904, is confined in its application to rivers in this state above tidewater, and applies to rivers only and not to creeks.

*Same—Words and phrases.*—The word "rivers" as used in section 2105 of the Code of Virginia, 1904, does not include within its meaning, creeks.

RICHMOND, VA., February 7, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of February 2, 1917, which is in the following terms:

This department would be glad to have your construction of section 2105, as to whether it will be necessary to require fish-ladders to be erected upon dams across the creeks which are obstructing the free passage of fish up and down said creeks.

You will note the language of the law requires fishways or ladders to be erected upon the rivers, and is silent as to creeks.

Section 2105 of the Code of Virginia reads as follows:

Any person or corporation owning or having control of any dam or other obstruction in any of the rivers of this State above tidewater, which may interfere with the free passage of fish, shall provide every such dam or other obstruction with a suitable fish-ladder so that fish may have free passage up and down said rivers during the months of March, April, May and June of each year, and keep the same in good repair, and restore it in case of destruction; provided, however, that this section shall not apply to the Meherrin river, within the county of Brunswick.

This act shall not be construed as requiring fish-ladders to be placed on any dam now exempt by law.

You will see from the words of the statute that the application thereof is confined to rivers in this State above tidewater.

I am, therefore, of the opinion that this section applies to rivers only, and not to creeks.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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GAME AND FISH—Section 2108 of the Code of Virginia, 1904, as amended.—Section 2108 of the Code of Virginia, 1904, as amended, prohibiting the killing and capture of certain enumerated fish at certain seasons of the year, is applicable to all public waters in this State.

*Same—Lakes belonging to a municipality—City lakes of Norfolk—Public property.*—Property belonging to a city which is a well known political division of a State is public property. The provisions of section 2108 of the Code of Virginia, 1904, as amended, are therefore applicable to such property.

RICHMOND, VA., March 21, 1917.

HON. JOHN S. PARSONS,  
Commissioner of Fisheries,  
Norfolk, Va.

DEAR SIR:

Acknowledgment is made of your letter of March 1, 1917, referring to the Attorney General for an opinion thereon the letter of the board of control of the city of Norfolk to you dated March 10th, which letter is in the following terms:

The existing law regulating the catching of fish in the State of Virginia provides that it shall be unlawful to kill or capture river bass, commonly called black bass, or pond bass, commonly called southern chub, between the 15th day of March and the 15th day of June in any year.

The city lakes have been pretty well stocked with black bass or chub and heretofore it has been the custom to permit fishing in the said lakes under proper restrictions at any time of the year except between April 1st and May 30th.

Will you kindly advise whether or not in your judgment the fishing law quoted above would apply to waters such as the city lakes which are the property of the city and in no sense public waters.

It is provided by section 2108 of the Code of Va., 1904, as amended, sub-section 2, that it is unlawful to "kill, or capture river bass (commonly called black bass or black perch), or pond bass (commonly called southern chub), between the 15th day of March and the 15th day of June of each year, or to shoot, spear, trap or net the same at any time." It is further provided by sub-section 3 of the above section that it shall be unlawful "to buy, sell, or make use of \* \* \* black bass or pond bass within the said prohibited periods respectively."

Aside from any question that might be raised as to the application of this statute to ponds or waters which are private property it is clear that the above section is applicable to all public waters in this State. Therefore, the first question to be determined here is whether or not the city lakes belonging to the city of Norfolk are public or private property, and if the conclusion is reached that they are public property it inevitably follows that section 2108 of the Code of Va., 1904, as amended applies.

In discussing the meaning of the term public property it is said in 32 Cyc. 651:

The term "public property" is commonly used as a designation of those things which are *publici juris* and therefore considered as being owned by "the public" the entire State or community, and not restricted to the domain of private person, or that which belongs to a State or political division thereof, and property owned by private persons or corporations and from which a private or corporate income is derived is not public property, although used for a purpose which is in its nature public, such as a school, public market, or armory for State troops. In one sense the same property may be said to be both public and private.

The cases seem to be in accord with the text and sustain the statement of the law as there made. For example it was held in *Owensboro v. Commonwealth*, 105 Ky. 344, S. W. 320, 20 Ky. L. Rep. 1281, 44 L. R. A. 202, that a public park maintained by a city at the public expense for the public good, and to which all the public without

distinction have access is public property, and in *Walden v. Whigham*, 120 Ga. 646, 48 S. E. 159, that a dispensary consisting of a building and stock of liquors, owned and operated by a municipal corporation, is public property within the application of a statutory exemption from taxation of "all public property."

In *Mundy v. Van Hoose*, 104 Ga. 299, 30 S. E. 783, quoted from in the opinion of Cobb, J. In *Board of Trustees v. Atlanta*, 113 Ga. 883, it was said "public property in the sense as used in the provision for rendering property exempt means property belonging to the State or political division thereof, such as counties, cities, towns and the like.

In *Coyle v. McIntyre*, 7 Houston (Del.) 44, 40 Am. St. Rep. 109, 120-1, it was held that the right of property of a municipal corporation is in a private right of property in the sense in which property is said to be private when held by an individual citizen; and that the property of a municipality is private only in the sense that it is exempt from being taken and applied to any other public use by the State or by authority of the State without compensation being made, and from being taken and given away to other corporations or persons.

In discussing this question Saulsbury, C. said (page 94):

The inhabitants of the city of Wilmington were constituted a corporation, under the name and style of the mayor and council of the city of Wilmington, and were given a seal by the legislature that they might acquire, hold, and dispose of property, sue and be sued. But for what purpose or purposes? For public and not private purposes. The corporation is a public corporation. The uses for which the corporation may acquit and hold property must necessarily, we think, be public uses. Uses, beneficial it may be in some respects to the public at large, but certainly beneficial to the citizens generally of the municipality, who may be called a particular local public, although a part of the general public of the State. Such property cannot in any sense be said to be private in the sense in which property may be said to be private which is held by an individual citizen.

No citizen of Wilmington possesses any interest in the property of the municipality, which is said to be private, which he can sell or in any manner dispose of. No portion of property held by the city passes to the local representatives of any inhabitant of the city, or descends to his heirs upon his death; partition cannot be made of the real estate among the inhabitants in any manner known to law. Such property has not the incidents or qualities of private property attaching to property recognized as private among individual owners of property.

It, therefore, seems clear that property belonging to a city which is a well known political division of a State is public property, and, therefore, I am of the opinion that in the instant case that lakes belonging to the city of Norfolk are public property, and as such applicable to the above quoted provisions of section 2108 of the Code of Virginia as amended.

Yours very truly,

LESLIE C. GARNETT,  
Assistant Attorney General.

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GAME AND FISH—*Private waters*—Section 2108, Code of Virginia, 1904, as amended—*Ownership of fish*.—The owner of private unnavigable streams does not have the exclusive ownership of the fish in such streams for all purposes, and his rights of fishery in the waters of his private property are subject to reasonable control by the legislature.

*Same*—Section 2108 of the Code of Virginia, 1904, as amended, which makes it unlawful to kill or capture certain enumerated fish between the 15th day of March and the 15th day of June of each year, or to buy, sell or make use of certain enumerated fish within the said prohibited periods, being general in its terms, was intended by the legislature to apply to all persons; to owners of private ponds as well as to the public generally. The limitation in this particular having been placed upon fishing only between the 15th day of March and the 15th day of June in each year, is reasonable and therefore a valid restriction.

RICHMOND, VA., April 16, 1917.

HON. JNO. S. PARSONS,

*Commissioner of Game and Inland Fisheries,  
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication of March 29, 1917, which is in the following terms:

This department would like to be advised whether an owner of a private pond, privately stocked, would be amenable to the provisions of section 2108, sub-sections 2 and 3.

Section 2108 of the Code of Va. as amended reads as follows, so far as is applicable to this case:

1. It shall be unlawful—First, to kill or capture mountain or brook or California or rainbow trout by any process whatever in any of the waters of this State at any time, except that the board of supervisors of any county may permit angling with hook and line under such conditions and at such time and at such places as they may designate.

2. To kill or capture a river bass (commonly called black bass or black perch), or pond bass (commonly called southern chub) between the fifteenth day of March, and the fifteenth day of June of each year, or to shoot, spear, trap or net the same at any time.

3. To buy, sell or make use of mountain trout or black bass, or pond bass within said prohibited periods respectively.

This office held in the opinion rendered you on March 21st, relative to the Norfolk city lakes, that this section applied to all public waters in the State of Virginia. The question here involved, however, is on first impression, somewhat different from the question involved in that opinion, since the authorities are agreed that owners of private ponds and unnavigable fresh water streams passing through their property have certain exclusive fishing rights which do not belong to the public in general. In a note to the case of *Sterling v. Jackson*, 13 Am. St. Rep. 406, 420, the rule is thus stated by the editor:

As to the right to fish in the unnavigable fresh water streams of this country, this belongs exclusively to the owner of the soil under such waters, to the exclusion of the public. Anyone entering thereon for the purpose of fishing becomes a trespasser, and may be punished accordingly. Such is the rule, independent of any regulating legislation, and it applies with equal force to the small lakes and ponds throughout the country.

This rule, however, does not create in the owner of the land under the pond or under the navigable stream exclusive ownership in the fish in such waters for all purposes, as will be seen from the following quotation found in 19 Cyc. p. 988, paragraph B.

Fish and game being wild animals, their ownership so far as they are capable of ownership, is in the State for the benefit of all its people in common, and a private person cannot acquire an exclusive property therein except

by taking and reducing them to actual possession, or by a grant from the government. Property in fish as well swimming as shell-fish, is in the public, until they are taken and reduced to actual possession, in which case absolute property is acquired by the individual so taking them and continues as long as he retains such possession, but subject to be divested if the fish escape, or are returned to other waters.

The rule appears to be that the rights of fishery of the owner in waters on his private property are subject to the control of the legislature, and it has been held that statutes made in the exercise of such control are constitutional, provided such legislative enactments are reasonable in their limitations. Accordingly it was held by the Supreme Court of Massachusetts in *Commonwealth v. Gilbert*, 22 L. R. A. 439, that the legislature had the authority to forbid the sale, offering for sale, or possession during the closed season of trout, which are not alive, under a provision similar to paragraph third of the Virginia statute, even though they were artificially propagated on one's own premises, if such close season is not unreasonable. In so holding the court said:

\* \* \* The importance of preserving from extinction or undue depletion the trout and other useful fish in the waters of the Commonwealth, has been recognized and illustrated in many familiar statutes and decisions from an early time. Such protection has always been deemed to be for "the good and welfare of this Commonwealth," and the legislature may pass reasonable laws to promote it. Such laws are not to be held unreasonable because owners of property may thereby, to some extent, be restricted in its use. It has often been declared that all property is acquired and held under the tacit condition that it shall not be so used, so as to destroy or greatly impair the public rights or interests of the community. \* \* \* The limitation is that the restrictions must not be unreasonable. \* \* \* The legislature may forbid the catching or selling of useful fishes during reasonable closed seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their own lands. The statute under consideration falls within this power.

I am of the opinion that *Commonwealth v. Gilbert*, *supra*, lays down the correct rule to be applied to interpreting section 2108 of the Code of Va. as amended. It will be observed from the reading of this section that it is made unlawful to kill or capture certain enumerated fish between the 15th day of March and the 15th day of June of each year, or to buy, sell or make use of certain enumerated fish within the said prohibited periods. The restriction imposed by this statute is general in its terms, and I am of the opinion was intended by the legislature, especially in view of the provision of sub-section 3 of section 1 of the act, to apply to all persons—to owners of private ponds, as well as to the public in general. I am further of the opinion that the limitation in this particular having been placed upon fishing only between the 15th day of March and the 15th day of June in each year, that the same is a reasonable, and, therefore, valid restriction.

It will be observed that by sub-section 1 of section 1 of the act, it is made unlawful to kill or capture trout at any time unless permitted by the board of supervisors of a county as therein provided. It will be seen from the above cited authorities that the validity of such legislation is made dependent on its reasonableness when applied to private waters, and, therefore, the validity of this total prohibition is doubtful when applied to private ponds, or other private waters stocked by owners.

*State v. Mallory* (Ark.) 67 L. R. A. 773.

Yours very truly,

LESLIE C. GARNETT,  
Assistant Attorney General.

*GAME AND FISH—Oyster laws—Residence—Words and phrases—“Actually resided.”*—The words actually resided as contained in section 37 of the Virginia oyster laws were intended by the legislature to apply to those persons who have not only maintained a legal residence in this State for one year, but have also been physically present within the State continuously for four months; or, in other words to declare as non-residents of this State, so far as concerns the privilege of taking oysters, all persons who have not been physically present in the State for the four consecutive months prior to making the application, without any regard to how long they have had their legal residence in the State and without any regard to the cause of absence during the four months or any part thereof.

*Same—Statutes, construction of.*—In construing statutes meaning must be given to all parts of the statute.

*Same—Statutes, Constitutionality of—Oysters—Section 175 Virginia Constitution 1902.*—Under the provisions of section 175 of the Constitution of Virginia, 1902, the General Assembly has power to prescribe all reasonable rules and regulations relating to oysters which do not defeat the constitutional rights of the people of this State to the natural oyster beds, rocks, and shoals; but any unreasonable rule or regulation relating thereto is unconstitutional and void. There being no reason why the right to take oysters should be confined to those people of this State who keep themselves physically present therein for four months next before making application to take oysters, a statute having such provision is invalid.

*Same.*—A restriction which prevents a resident of this State, who is otherwise qualified, from securing a license to take oysters from the natural oyster beds of this Commonwealth, upon the sole ground that he has not been physically present in the State for the entire period of four months prior to the making of his application, is such an unreasonable restriction upon the rights of the people of this State as to impair the constitutional right accorded them by section 175 of the Constitution, and is therefore void.

RICHMOND, VA., September 26, 1917.

HON. JOHN S. PARSONS,

*Commissioner of Game and Inland Fisheries,  
City.*

DEAR SIR:

Your letter of September 22 has been received, in which you make the following statement:

I have been asked to request your opinion as to the following provisions of the Virginia oyster law.

Section 24 of the Virginia oyster law (chap. 343) provides as follows: (As amended March 22, 1916.) Any resident of this State, who shall be qualified under this act, and desires to take or catch oysters from the natural oyster beds, rocks, or shoals of the waters of the Commonwealth by hand or with ordinary or patent tongs, or any instrument allowed by law, other than a scrape or dredge, shall first apply in writing to the inspector of the district in which he resides for a license.

Section 37 of the same law provides as follows:

*Who deemed non-resident; proviso.*—No person shall be deemed a resident of the State within the meaning of this act, who is not a tax payer in the State, and shall not have maintained his residence therein for one year and actually resided therein for the four months next preceding the time when he makes application for any privileges or licenses granted to residents under this act; or unless he be a bona fide purchaser of land in this State and has actually lived within this State for the four months next preceding the time when he makes application for any privileges or licenses.

A contention has been raised by some attorneys that as this last provision of the law prohibits residents of the State who have not resided in same for four months from the time when they make application for licenses from obtaining same, it is unconstitutional, because of unauthorized restrictions of the rights of the citizens.

I have not had time to look into this question at all myself, but am informed that some reputable attorneys are taking the position that this provision of the law is unconstitutional, and I will be very glad to have your opinion as soon as possible as the oyster season is now on.

In order to determine the constitutionality of section 37, quoted in your letter, it will be necessary first to ascertain its meaning. This section undertakes to define who is a resident of this State, so far as concerns the taking of oysters by providing that, in order to be deemed a resident, one must have "*actually resided*" therein for the four months next preceding the time of application. The question, therefore, arises as to what is meant by the words "*actually resided*."

As is said in *Long v. Ryan*, 71 Va. 718, 720.

It is extremely difficult to say what is meant by the word "*residence*" as used in particular statutes, or to lay down any particular rules on the subject. All the authorities agree that each case must be decided on its own particular circumstances and the general definitions are calculated to perplex and mislead.

But there can hardly be any question of the meaning of the words, "*actually resided*" contained in the section under review. It is evident, from its language, that the draftsman of section 37 intended to draw a distinction between the kind of residence to be maintained in this State for one year and the kind contemplated by the requirement that the applicant must have "*actually resided*" in the State for four months. If no such distinction was intended to be drawn, it is impossible to account for the fact that the section requires one kind of residence for one year and another kind of residence for four months. If the kind of residence referred to in both cases are the same, it would be useless to have made any provision for the period of four months, inasmuch as four months is a part of one year, and if it were contended that the purpose was, in both cases, to require a legal residence, then the provision in regard to four months would be entirely superfluous.

According to a well-established rule of construction, we must, if possible, give meaning to all parts of the statute. It must be concluded, therefore, that the statute intended to restrict the right in question to those persons who have not only maintained a *legal residence* in this State for one year, but have also been *physically present within the State continuously for four months*; or, in other words, to declare as non-residents of this State (so far as concerns the privilege to take oysters) all persons who have not been physically present in the State for the four consecutive months prior to making application, without any regard to how long they have had their legal residence in the State, and without any regard to the cause of the absence during the four months, or any part thereof.

Section 175 of the Constitution provides that:

The natural oyster beds, rocks, and shoals, \* \* \* shall be held in trust for the benefit of the people of this State subject to such regulations and restrictions as the General Assembly may prescribe.

This, of course, means that the General Assembly may prescribe all *reasonable* rules and regulations which do not defeat the constitutional rights of the "people of this State" to the natural oyster beds, rocks and shoals. I can conceive of no

reason why the right to take oysters should be confined to those "people of this State" who keep themselves physically present therein for four months next before making their application. It surely cannot be contended that because one of the "people of this State" leaves it temporarily for a week or a month, or even for four months, he thereby forfeits—or should forfeit—any of his rights under the Constitution, and I cannot believe it to be within the power of the legislature to confine the rights of the "people of this State" to any such class.

The restriction, therefore, which prevents a resident of this State, who is otherwise qualified, from securing a license to take oysters from the natural oyster beds of this Commonwealth upon the sole ground that he has not been physically present in the State for the entire period of four months prior to the time of making his application, is such an unreasonable restriction upon the rights of the "people of this State" as to impair the constitutional right accorded them by section 175 of the Constitution and is therefore void. Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

GAME AND FISH—*Hunting—Landlords—Corporate property—Chapter 152—Acts of 1916.*—Title to property belonging to a corporation is in the corporation and not in the stockholders, therefore, the agent for the stockholders is not the landlord of the property of a corporation within the meaning of chapter 152 of the Acts of 1916.

*Same—Words and phrases—Landlords.*—The word "landlord" as used in chapter 152 of the Acts of 1916 is intended to be synonymous with the owner of the land.

RICHMOND, VA., November 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 27, 1916, in which you enclose a letter written by G. B. Williams, Esq., requesting an opinion on the following state of facts:

The Three States Realty Company, a corporation, owns land in the State of Virginia. The secretary and treasurer of that corporation, who is a resident of the State of New York, desires to hunt on the land of the corporation located in this State without procuring a hunting license, as provided for by chapter 152 of the Acts of 1916. He says "I am an officer of this corporation; we are the owners of this property; we act as agent for the stockholders; therefore, the agent is looked upon as the landlord; and I also wish to state that I am a stockholder in the company and thereby part owner. In view of this it would seem to me that I should be entitled to shoot over our own grounds."

I am of the opinion that the agent for the stockholders is not the landlord of the property of a corporation. Where a corporation owns property the title to the same is in the corporation and it is not the stockholders' property but the property of the corporation, and the word "landlord" as used in chapter 152 of the Acts of 1916, is intended to be synonymous with the owner of the land.

Sections 29 and 32 of chapter 152 of the Acts of 1916, are as follows:

29. 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.

32. 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.

Under the provisions of these sections the hunter in question is required to procure a license before hunting upon the land of the corporation.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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GAME AND FISH—*Hunting—Who are required to obtain licenses.*—Chapter 152 of the Acts of 1916 applies to any person who hunts, therefore, a woman is required to obtain a license to hunt unless she comes within the exceptions contained in section 29 of the statute.

RICHMOND, VA., *January 11, 1917.*

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

DEAR SIR:

Acknowledgment is made of your communication of January 5, 1916, in which you say:

Please let me know if a woman, a resident of Gloucester county, Va., is required to have a license to fox hunt.

Section 32 of chapter 152 of the Acts of 1916, reads 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 landowner, 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 landowner or bona fide tenant or lessee.

As you will see, the statute applies to any person. I am, therefore, of the opinion that in order for a woman to hunt it is necessary for her to first obtain a license to do so, unless she comes within the usual exceptions.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

GAME AND FISH—*Fox hunting—Licenses.*—Under the provisions of chapter 152 of the Acts of 1916 any person who hunts outside the limits of his own or adjoining property except as provided by section 29 of this act is required to obtain a license in order to hunt any kind of game in this State which includes foxes.

*Same—Who are hunters?*—Any person who joins in a hunt, whether he owns the dogs or not, provided he participates in the hunt, is a hunter and is required to obtain a license.

RICHMOND VA., *January 11, 1917.*

MRS. W. E. GRANT,  
*Plain View, Va*

DEAR MRS. GRANT:

Acknowledgment is made of your letter of January 4, 1917, addressed to the Attorney General, in which you request him to advise you if it is necessary to get a license to fox hunt, and, if so, who must be licensed, the one who owns the dogs or all who go.

By an examination of section 32 of chapter 152 of the Acts of 1916 you will see that any person who hunts outside of the limits of his own or adjoining property, except as provided by section 29 of the same act, is required to obtain a license in order to hunt any kind of game in this State.

I am further of the opinion that any person who joins in the hunt, whether he owns the dogs or not, provided he participates in the hunt, is required to obtain a license.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

GAME AND FISH—*Hunting—Tenants.*—A tenant who pays a crop rent rather than a money rent for land is a tenant or renter within the meaning of chapter 152 of the Acts of 1916, and may hunt on such land or adjoining lands when the necessary consent is obtained without license.

*Same.*—A tenant or renter has no authority to invite his friends to hunt upon rented land, the right to hunt on such land being limited to the tenant or renter residing thereon and then only with the consent of the land owner.

RICHMOND, VA., *November 9, 1916.*

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

DEAR SIR:

Acknowledgment is made of your letter of November 1, 1916, enclosing a letter of H. P. Gresham, which is in the following terms:

I wish to know what hunting privileges belong to a tenant who rents for one year and gives a share of his crop but does not pay any money rent and

occupies the house free, furnishing his labor and team. I wish to know if he has the legal right to hunt and has he the right to invite others to join him who do not live on this farm. Remember he does not lease this farm or pay money rent.

The occupant of the land under the above circumstances is a tenant or renter and the question is not affected by reason of the fact that his rental is paid in crops rather than in money. His hunting rights are defined in 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.

This section, however, gives no authority to the tenant or renter to invite his friends to hunt upon the rented land, the right being limited to "tenants and renters residing thereon" and then only "with the consent of the land owners."

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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GAME AND FISH—*Hunting license—Non-residents.*—Non-residents who are not landowners must procure a non-resident license in order to hunt in Virginia. A non-resident leaseholder of land in Virginia is not the same as a non-resident land owner.

RICHMOND, VA., December 6, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of December 4th, enclosing a letter from H. W. Stewart, making inquiry if a non-resident leaseholder of a tract of land in Fairfax county, Va., can hunt on this and adjoining lands without a license.

I beg to advise that Mr. Stewart is not a resident of Virginia and is not a non resident landowner, and that, therefore in order to hunt in Virginia he would have to take out a non-resident's license.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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GAME AND FISH—*Hunting without a license—Tenants and renters—Chapter 152, Acts 1916.*—While tenants and renters residing on rented land are permitted to hunt thereon and on adjoining lands without license, in order to do so it must be with the consent of the landowners of the respective tracts of land on which they hunt.

RICHMOND, VA., December 21, 1916.

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

DEAR SIR:

Acknowledgment is made of your communication of December 20th, in which you request me to advise you whether a man who rents land and pays the rent thereof

either with cash or crops can hunt on the rented land and the land of his neighbors without a license, and whether permission from the owner to hunt on the same is required.

This question is governed by the provision 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.

As you will see, this section gives the right to tenants and renters residing on the rented land to hunt without license, but expressly says that in order to do so it must be "with the consent of the landowners."

Therefore, I am of the opinion that in order for a tenant to hunt on the land that he has rented or on adjoining lands, that he must first obtain the consent of the owners of the respective tracts of land.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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GAME AND FISH—*Hunting—Licenses—Chapter 152, Acts 1916, chapter 145, Acts 1916.*—Section 32 of chapter 152 of the Acts of 1916 does not in any way affect or control the interpretation of chapter 145 of the Acts of 1916.

*Same—Statutes, construction of.*—While the general rule is that in the construction of a particular statute, or the interpretation of any of its provisions or acts relating to the same subject or having the same general purpose must be read in connection with it, this rule is to be applied only in the case of doubtful statutes and cannot be invoked where the language of a statute is clear and unambiguous. As chapter 145 of the Acts of 1916, is not a doubtful statute and its provisions are not ambiguous, it should be read alone and not in connection with section 32 of chapter 152 of Acts of 1916, therefore where a person is a *bona fide* renter or lessee of land he has a right to shoot squirrels thereon at any time in the counties referred to in chapter 145 of the Acts of 1916, although he and others leasing the land have formed themselves into an unincorporated gun club, hunting or fishing club or association.

RICHMOND, VA., September 5, 1917.

HON. M. D. HART, *Chief Clerk,*  
*Department of Game and Inland Fisheries,*  
*City.*

DEAR SIR:

I beg to reply to your inquiry as to whether chapter 145 of the Acts of Assembly, 1916, as far as concerns the words "*bona fide* renter or lessee" is controlled or affected by the provision contained in section 32 of chapter 152 of the same acts as to who is a *bona fide* tenant or lessee.

Chapter 145, after providing that it shall be unlawful to hunt or shoot squirrels in certain counties between the first day of February and the first day of November and fixing a penalty, provides (Acts of Assembly, 1916, p. 215) that:

Nothing in this act shall be construed to prevent the board of supervisors of such counties from shortening the open season for hunting or shooting squirrels in such counties, as in the case of other game; nor to prohibit any person from hunting, shooting or trapping squirrels on his own land at any time, or on land of which he is the *bona fide* renter or lessee.

Section 32 of chapter 152 of the Acts of Assembly, 1916, page 263, in prescribing what persons must secure a license as a pre-requisite to hunt, provides that:

It shall be unlawful \* \* \* 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.

You inquire whether or not the words "*bona fide* renter or lessee" as contained in chapter 145 is to be construed not to include memberships in a gun club, hunting or fishing club, association or preserve, because of the provision in section 32 of chapter 152 providing that their membership in such club or association shall not entitle them to hunting or fishing privileges as a resident landowner or *bona fide* tenant or lessee. I do not think that section 32 of chapter 152 in any way affects or controls the interpretation of chapter 145, for two reasons.

In the first place, it will be noted that section 32 of chapter 152, in providing that club memberships cannot be construed to entitle the holders thereof to hunting and fishing privileges as a *bona fide* tenant or lessee, follows the clause providing that it shall be unlawful to hunt upon the lands of a gunning, hunting or fishing club as a member thereof or as a resident landowner without having procured a license, and the provision as to *bona fide* tenants and lessees evidently has to do entirely with the question of licenses.

In the second place there is nothing in section 32 of chapter 152 which shows any intention on the part of the legislature that the restricted construction placed on the words "*bona fide* tenant or lessee" shall apply to any statute save that in which section 32 is contained. There is no ambiguity in chapter 145 of the acts, nor is there any conflict between this chapter and chapter 152 and no rule of construction will permit chapter 145 to be read in connection with section 32 of chapter 152 in order to produce an ambiguity.

We thoroughly recognize that there is a rule of construction that in the construction of a particular statute or the interpretation of any of its provisions, all acts relating to the same subject or having the same general purpose should be read in connection with it, but as is said in 36 Cyc., p. 1150:

It must not be overlooked, however, that the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it cannot be invoked where the language of a statute is clear and unambiguous.

As chapter 145 is not a doubtful statute and its provisions are not ambiguous, it should be read alone and not in connection with section 32 of chapter 152, and I am, therefore of the opinion that where a person is a "*bona fide* renter or lessee" of land, he has the right to shoot squirrels thereon at any time even in the counties referred to in chapter 145, and although he and others leasing the land have formed themselves into an unincorporated gun club, hunting or fishing club or association. In other words, provided the person desiring to hunt squirrels is one of the lessees of the land upon which he desires to hunt, the fact that he and the other lessees have formed a club or association does not prevent him from being a *bona fide* tenant or lessee.

Yours very truly,

J. D. HANK, JR.,  
Assistant Attorney General.

GAME AND FISH—*Hunting—Who may hunt without license—Ambassadors—Chapter 152 of the Acts of 1916.*—An official member of the British Embassy to the United States, as such, is immune from the laws of the United States and of the various States of the Union and, therefore, can hunt in this State without first procuring a license to do so. Ambassadors of foreign countries to the United States are immune from the laws of the United States and of the various States of the American Union and members of the official family of a foreign ambassador are entitled to the same privileges and immunities which apply to the ambassador.

RICHMOND, VA., November 9, 1916.

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

DEAR SIR:

Acknowledgment is made of the letter of your secretary, dated November 6, 1916, which is in the following terms:

The Governor directs me to hand you the enclosed letter from Commander J. E. Bray of His British Majesty's Navy, and to ask you if he has authority to take the action requested. Your letter to Hon. Johns S. Parsons, Game Commissioner, under date of September 26, 1916, has been examined in this connection, but there seems a possibility that the status in this case is somewhat different from the one we were then dealing with, since Commander Bray is not a consul. The Governor will be glad to hear from you on the subject.

The letter from Commander J. E. Bray follows:

The Commander J. E. Bray, H. B. M. Navy, presents his compliments to His Excellency The Governor of Virginia, and has the honor to enquire whether His Excellency would be kind enough to instruct the competent authorities to issue to Commander Bray a non-resident shooting license for the State of Virginia.

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

Hunting without license prohibited. 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 land of any gun club, hunting or fishing club, association or preserve, of whatsoever description, public or private, as a member thereof or resident landowner, 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.

Therefore, unless Commander Bray is a member of the British Embassy, and, as such, is immune from the laws of the United States and of the various States of the Union, before hunting in this State, it will be necessary for him to procure a license as provided for in chapter 152 of the Acts of 1916.

If, however, he is an official member of the British Embassy, it would appear that, as such, the same immunities that protect the British Ambassador would apply to him.

Speaking of attaches, Halleck in his work on International Law and the Laws of War, page 205, section 9, says:

The attaches, and the wife and family of a minister, participate in the inviolability attached to his public character. "The persons in an ambassador's retinue," says Vattel, "partake of his inviolability; his independency extends to all his household; these persons are so connected with him, that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country, into which they would not have come, but with this reserve. The ambassador is to protect them, and whenever they are insulted, it is an insult to himself. \* \* \* The ambassador's consort is intimately united to him, and more particularly belongs to him than any other person of his household. Accordingly, she shares his independency, and inviolability; even distinguished honors are paid her, which in some measure could not be denied her without affronting the ambassador. For these, most courts have a fixed ceremonial. The regard due to the ambassador communicates itself likewise to his children, who also partake of his immunities."

To the same effect is Wheaton on International Law, 8th edition, edited by R. H. Dana, page 305, note, where it is said:

It is agreed that the ambassador himself, and his family and suite, are entitled to immunity. The question is, who are comprehended within the terms "family and suite." The test must be, again, its effect upon the convenience of nations. It is reasonable that the immunity should be extended to the wife and children of the minister, and to such other persons, as in good faith, are permanent members of his family; and that it should not extend to mere visitors. It is impossible to make, in advance, a classification applicable to all cases. If a case arises respecting persons in a doubtful position between mere visitors and permanent members of the family, it must be settled on its own circumstances.

As to the suite, all writers and all practice agrees that the official suite are protected; and by "official suite" is meant persons employed directly in diplomatic duties, appointed or recognized by the ambassador's government as diplomatic functionaries. But doubts, it has been seen, are thrown out whether the immunity extends further. But surely the convenient discharge of his duties, according to the customs of society, requires that the ambassador shall have the necessary services, about his hotel and his person, of people usually employed in those capacities. If he is an invalid or temporarily ill, a nurse or body-servant is a necessity; and a right to free transportation, according to the customs and necessities of society, in his private carriage, and to the performance of offices in his household by proper persons, is reasonable. Although it may be that high officials, in their own country, have no such general immunity for their servants and residences, still, in the case of a sole representative of his nation, under foreign and not necessarily friendly jurisdiction, the dignity and convenience of nations is best secured by a rule which shall give large protection, leaving the concessions and accommodations to comity and good faith in cases as they may arise. Here, again, a classification, in advance, of what shall in all cases be the personal suite of an ambassador entitled to exemption, is not practicable. The doubtful cases must rest on their circumstances. A mode sometimes adopted is for the minister to transmit to the foreign office a list of his official and personal suite; and, if the foreign office thinks it an unreasonable one, objection can be made and the matter settled at the time.

It would, therefore, seem that if Commander Bray is a member of the official family of the British Ambassador to the United States, that as such he is entitled to

the same privileges and immunities which apply to the British Ambassador, and, therefore, would not be amenable to the laws of this State, and as such is exempted from the application thereof.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

GAME AND FISH—*Hunting license—Residence—Students in colleges and universities—Chapter 152 Acts 1916.*—It was not the purpose of chapter 152 of Acts of 1916 to limit the right of hunting to those who can qualify themselves to vote, therefore section 24 of the Virginia Constitution has no application in determining who are residents of Virginia within the meaning of the game laws. A person who is a student at a university, college or school in this State and has been in this State for a period of six months next preceding the date of the application as provided for in section 23 of chapter 152 of Acts of 1916, may obtain a resident's license to hunt in this State.

RICHMOND, VA., *December 16, 1916.*

HON. JOHN S. PARSONS, *Commissioner,*

*Department of Game and Inland Fisheries*

*Richmond, Va.*

DEAR SIR:

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

Our game warden at Charlottesville wishes to know if students who have been residing at the University of Virginia six months prior to applying would be entitled to obtain county and State licenses, the said students having their homes in other States and at present attending the University of Virginia.

Residence within the meaning of the election laws is in the case of students governed by section 24 of the Constitution, where it is provided that a student in any institution of learning shall not be regarded as having either gained or lost a residence as to right of suffrage by reason of his location or sojourn in such institution, but residence within the meaning of the election laws has quite a different significance from the same term used in the game laws. A study of the game act will show that it was not the purpose to limit the right of hunting to those who can qualify themselves to vote; for instance, a woman or a minor may be lawfully granted a license to hunt in Virginia, section 23 of the game act, providing that a license may be granted to "any person," etc.

I am, therefore, of the opinion that if a person is a student at the University of Virginia or any other college or school in this State, and has been in this State for the period of six months next preceding the date of the application, as provided for in section 23 of chapter 152 of the Acts of 1916, he may obtain a resident's license to hunt in this State.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

GAME AND FISH—*Hunting on posted lands.*—Lands posted under the provisions of chapter 152 of Acts of 1916 must be posted in conspicuous places. If the provisions of this law are relied on, the question as to whether notices have been posted in conspicuous places depends in each case upon the facts and circumstances surrounding that particular case and the same is a question of fact to be decided by the jury, or, where there is no jury, by the court or justice to whom such matter is presented for decision.

RICHMOND, VA., *September 25, 1917.*

M. D. HART ESQ., *Chief Clerk,*  
*Department of Game and Inland Fisheries,*  
*City.*

DEAR SIR:

Acknowledgment is made of your request for my opinion as to the proper answers to the following questions:

(1) Is a tract of land posted in the sense of the game law, said tract fronting more than one mile on main road, when there is no sign signifying said land is posted on said main road.

(2) Would you consider a tract of land posted that was over one mile wide and more than one mile in depth with only one small ill-written sign on or near a railroad, nearly one mile from main road and another sign on a field side of said tract more than one mile from the natural approach to huntsmen from the city.

Section 33 of the game law provides:

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 the 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 this section provides that the notices shall be posted "in conspicuous places." From the bare statement of fact as set out in the question above it would appear that in neither case have the notices been posted "in conspicuous places" and if not they are not posted in accordance with the game law

The question as to whether the notices have been posted in "conspicuous places" depends in each case upon the facts and circumstances surrounding that particular case, and no hard and fast rule can be laid down as to what are "conspicuous places," but the same is a question of fact to be decided by the jury, or where there is no jury, by the court or justice to whom such matter is presented for decision. In this connection, it is proper to call your attention to the fact that this letter does not deal with the right of one to hunt on the land of another, but only with what constitutes posting "in conspicuous places" within the meaning of the statute quoted. The former question is dealt with in letters written to the Hon. John S. Parsons, Commissioner of Game and Inland Fisheries, by this office on July 1, 1916, and September 15, 1916, respectively.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

GAME AND FISH—*Hunting on land of another—Chapter 152, Acts of 1916—Section 2071 of the Code of Virginia, 1904.*—If the land on which a person desires to hunt is posted in accordance with the provisions of section 33 of chapter 152 of the Acts of 1916, written permission to hunt thereon whether they are enclosed or unenclosed, is necessary. If such lands are not posted, the right to hunt thereon without violation of the criminal laws of the State, is governed by the provisions of section 2071 of the Code of Virginia, 1904, which requires the consent of the owner or tenant as a prerequisite to hunt on such land.

RICHMOND, VA., *September 21, 1917.*

S C. AGEE ESQ.,  
*Baldwin Station, Va*

DEAR SIR:

Acknowledgment is made of your letter of September 19, 1917, addressed to the Attorney General, in which you request him to advise you on the following state of facts.

Some construe the game law to mean that if you have a license that you can hunt on unenclosed land without the written consent of the owner and that permission from the owner of the land only applies to enclosed land, while others contend that in all cases you have to have the consent of the landowner.

It is provided by section 33 of chapter 152 of the Acts of 1916, that if the owner of any premises shall post notices thereon in conspicuous places stating that hunting thereon without the permission of the owner is prohibited, that any person who hunts on such land during the current year without first having obtained from the owner or agent thereof permission in writing to do so, shall be fined not less than \$5.00 nor more than \$25.00. This provision of the game law was construed in an opinion of the Attorney General given Hon. John S. Parsons, Commissioner of Game and Inland Fisheries, September 15, 1915, report of the Attorney General, 1916, p. 110, in which opinion it was held that if the owner of any premises posts notices thereon in conspicuous places stating that hunting thereon without the written permission of the owner or agent 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; and it was further held in this opinion that section 29 of the acts does not qualify section 33, but merely permits one to hunt upon his own land or the adjoining lands with the consent of the landowners without license.

Under the laws of this State, if the land on which a person desires to hunt is posted in accordance with the provisions of section 33 of chapter 152 of the Acts of 1916, written permission to hunt thereon, whether they are enclosed or unenclosed, is necessary. If such lands are not posted, the right to hunt thereon without violation of the criminal laws of the State is governed by the provisions of section 2071 of the Code of Virginia, 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, 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.

Yours very truly,

LEON M. BAZILE,

*Law Assistant.*

GAME AND FISH—*Licenses to hunt—Exhibition of same—Chapter 152, Acts 1916.*—While section 30 of chapter 152 of Acts of 1916 provides that every hunter shall carry his license with him at all times when hunting and shall exhibit it to any officer or landowner requesting him so to do, there is no provision for punishment because of the failure of the hunter to exhibit it when requested to do so. The only effect of the failure of a hunter to exhibit such license upon request is to create the *prima facie* presumption that he is hunting without a license.

*Same—Arrests—Refusal to exhibit license.*—The law having provided no penalty or punishment for failure on the part of a hunter to exhibit his license when requested by the warden or land owner, he cannot be arrested on a charge of refusing to exhibit his license. Such failure, however, justifies a warden in arresting the hunter upon the charge of hunting without a license.

*Same—Fees of wardens.*—As a game warden has no right to arrest a hunter upon a charge of failure to exhibit his license, he is not entitled to any fee if he does so.

RICHMOND, VA., August 20, 1917.

MR. G. M. INMAN, *Acting Assistant Commissioner,*  
*Department of Game and Inland Fisheries,*  
*Richmond, Virginia.*

DEAR SIR:

In the absence of the Attorney General, I beg to reply to your letter of August 18th, requesting the opinion of the Attorney General as to whether or not a game warden would be entitled to a fee taxed as costs for an arrest, prosecution and conviction for the violation of section 30 of the game law.

While section 30 of chapter 152 of the Acts of 1916 provides that every hunter shall carry his license with him at all times when hunting and shall exhibit it to any officer or any landowner requesting him so to do, there is no provision for punishment because of the failure of the hunter to exhibit it when requested as aforesaid. The only effect of the failure to exhibit such license upon request would seem to be contained in section 15 of the game law, which provides that the failure of any person hunting to exhibit his license shall be deemed *prima facie* evidence that he is hunting without license. The law providing no penalty or punishment for failure on the part of a hunter to exhibit his license when requested by the warden or landowner, I am of the opinion that it would not be proper for a warden to arrest a hunter on such charge, but such failure would undoubtedly justify a warden in arresting such person upon the charge of hunting without a license. As a warden has no right to arrest a hunter upon the charge of his failure to exhibit his license, he would not be entitled to any fee if he did so.

Yours very truly,

J. D. HANK, JR.,

*Assistant Attorney General.*

**GAME AND FISH—Deer.**—Under section 2070-a of the Code of Virginia, 1904, as amended, it is unlawful for anyone to kill, chase, capture, buy or offer for sale or have in their possession any wild deer between December 1 and September 1, except in the counties of Prince George and Surry, those counties having special laws in conflict with the provisions of this statute.

*Same—Deer killed in the counties of Chesterfield and Mecklenburg.*—While under the special laws relating to the counties of Chesterfield and Mecklenburg, one may lawfully kill deer in those counties beyond the season prescribed by the general law, under section 2070-a of the Code of Virginia, 1904, as amended, such deer cannot be sold even in such counties by the person killing the same and if such deer so killed are purchased, the purchaser violates the provisions of sub-section 2 of section 2070-a of the Code of Virginia, 1904, and in so doing incurs the penalty prescribed for violation of the same.

*Same—Deer killed in the counties of Surry and Prince George.*—Owing to the peculiar phraseology of sub-section 2 of section 2070-a of the Code of Virginia, 1904, as amended, permitting persons to hunt, chase, capture or buy or offer for sale or have in their possession any wild deer between October 1 and January 1, deer killed in the counties of Surry and Prince George between October 1 and January 1 can be bought and sold in those counties between those dates but in those counties only.

RICHMOND, VA., January 12, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of December 5, 1916, which is in the following terms:

The department would like to have your opinion whether deer killed in Chesterfield, Mecklenburg, Prince George, Surry (Jan. 1st,) can be bought and sold and publicly served in the cities of the State; and in the counties of the State where the open season for deer has expired (Dec. 1st.)

It is provided by sub-section 2 of section 2070-a of the Code of Va., 1904, as amended by the Acts of 1908, as follows:

That it shall be unlawful for any person to kill, chase or capture or buy or offer for sale or have in possession any wild deer between December 1st, and September 1st, or to track or hunt them in the snow. \* \* \*

In the case of Chesterfield, it is provided by chapter 191, Acts of 1916:

It shall be unlawful for any person to hunt, kill or trap any deer in the county of Chesterfield from the first day of January to the first day of October in each year.

It is provided by chapter 52 of the Acts of 1916:

The open season for hunting and killing deer in Mecklenburg county, Va., shall be between the first day of October and the first day of January in each year. \* \* \*

In the case of the counties of Surry and Prince George, a rather remarkable state of affairs exists. By chapter 129 of the Acts of 1914, a special act relating to these two counties alone, sub-section 2 of section 2070-a of the Code of Va. was amended as to Surry and Prince George counties, in which amendment it was provided as follows:

That it shall be unlawful for any person to hunt, chase, capture or buy or offer for sale or have in possession any wild deer between January 1st and October 1st or to track or hunt them in the snow, provided this shall not interfere as to laws now governing the boards of supervisors in the several counties of this State, but nothing in this act shall alter, affect or apply to any counties in this Commonwealth, save those of Surry and Prince George.

It will, therefore, be seen that under the general law, as found in sub-section 2 of section 2070-a of the Code of Virginia, as amended by Acts of 1908, it is unlawful for anyone to kill, chase or capture or buy or offer for sale or have in possession any wild deer between December 1st and September 1st.

In other counties, owing to the peculiar phraseology of the amendment to this statute relating to the counties of Surry and Prince George, the general law, except in so far as it is in conflict with the season as prescribed in the special law relating to Chesterfield and Mecklenburg counties, is still in force; therefore placing these acts as to sub-section 2 of section 2070-a of the Code as amended with that provision of sub-section 2 of section 2070-a of the Code of Va. as amended, which provides that this act shall not restrict the killing of hares by residents of this State upon their own land at any time, a subject which was dealt with in an opinion rendered you by this office on October 9, 1916, in which it was held that the only effect of the proviso relating to hares was to permit the killing of hares by residents in this State upon their own land at any time, and extended no further, as a result of which the conclusion was reached that one who kills hares on his own land out of season as permitted in section 2070-a, 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 would incur in so doing the penalties prescribed for violation of the same.

I am of the opinion that the decision in this case governs the present question so far as it relates to deer killed in the counties of Chesterfield and Mecklenburg out of the season, prescribed by the general law, sub-section 2, section 2070-a, of the Code, as amended.

Therefore, while under the special laws relating to those counties one may lawfully kill deer in those counties beyond the season prescribed in the general law, I am of the opinion that such deer cannot be sold even in such counties by the person killing the same, and, moreover, that the purchaser of such deer would violate the provisions of sub-section 2 of section 2070-a as amended, and incur in so doing the penalties prescribed for violation of the same.

As to the counties of Surry and Prince George, owing to the peculiar phraseology of the amendment to sub-section 2 of section 2070-a permitting persons to hunt, chase, capture or buy or offer for sale or have in possession any wild deer between October 1st and January 1st, I am of the opinion that deer killed in those counties between October 1st and January 1st can be bought and sold in those counties between October 1st and January 1st, but in those counties only.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

GAME AND FISH—*Prosecution for violation of game laws—Costs—Chapter 376, Acts 1916; chapter 152, Acts 1916.*—Under the provisions of chapter 152 of Acts of 1916 when the defendant is arrested or prosecuted for violation of the game and fish laws by the commissioner or by any warden or other officer, and the defendant is convicted, a fee of two dollars and fifty cents must be taxed as costs in favor of the person making the arrest or instigating the prosecution. Therefore in a prosecution under chapter 376 of Acts of 1916, which is one of the general game laws of this State, the fee of two dollars and fifty cents as provided for in section 38 of chapter 152 of Acts of 1916 should be taxed as costs as therein provided.

RICHMOND, VA., *December 12, 1916.*

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

DEAR SIR:

Acknowledgment is made of your communication of December 1, 1916, in which you request me to advise you on the following state of facts furnished by one of your game wardens:

I had a case and conviction today under chapter 376, page 18, game laws of Va., relative to trapping, and the defendant's lawyer claimed and it was so ruled by the three justices sitting in the case, that under this special trapping law, there should not be assessed against the defendant the \$2.50 as provided for on page 12, paragraph 38, in favor of the person making the arrest, etc.

It is provided by section 38 of chapter 152 of the Acts of 1916, as follows:

When an arrest or a prosecution for a violation of the game and fish laws by the commissioner, or by any warden or other officer is had or instigated, and the defendant is convicted, there shall be taxed as costs in favor of the person making the arrest or instigating the prosecution, a fee of two dollars and fifty cents. No such fee shall be allowed in cases of acquittal. And in addition any special warden or other officer or other person shall receive one-half or fifty per centum of the actual cash fines collected from the defendant, upon a conviction, to be paid by the officer making the collection at the time of payment, in each prosecution instigated by said warden, officer or other person, and in addition thereto such warden or other officer shall be paid the same fees as other officers are paid for serving warrants, making arrests, and serving subpoenas and summons, said fees to be included in the costs taxed against the defendants and shall be paid out of the game fund in the event of failure to convict or if they cannot be collected from the defendant.

It will, therefore, be seen that section 38 of chapter 152 of the Acts of 1916 provides that when the defendant is arrested or prosecuted "for a violation of the game and fish laws by the commissioner or by any warden or other officer" and the defendant is convicted, a fee of \$2.50 must be taxed as costs in favor of the person making the arrest or instigating the prosecution. Therefore, chapter 376, Acts of 1916, which makes it unlawful to set or place traps, snares, etc., upon the lands or in the waters adjoining the lands of any person in the State of Virginia, for the purpose of killing any fur-bearing or hair-bearing animals, etc., is one of the general game laws of the State, and being such I am of the opinion that in a prosecution under this chapter of the Acts of 1916, the fee of \$2.50 as provided for in section 38 of chapter 152 of the Acts of 1916 should be taxed as costs, as therein provided.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

GAME AND FISH—*Prosecutions for violation of game and fish laws—Costs.*—The fee of \$2.50 provided for by section 38 of chapter 152 of the Acts of 1916 can be taxed only in prosecutions for a violation of the game and fish laws and does not apply to dog and forestry laws.

RICHMOND, VA., *January 12, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter of January 9, 1917, in which you ask the following question:

The department would like to have your opinion as to whether a game warden would be entitled to a fee of \$2.50 to be taxed as cost in cases arising from the arrest for violation of the dog and forestry laws by a game warden.

This question is governed by section 38, chapter 152, Acts of 1916, which provides so far as is material to this question, as follows:

\* \* \* When an arrest or a prosecution for a violation of the game and fish laws by the commissioner or by any warden or other officer is had or instigated and the defendant is convicted there shall be taxed as costs in favor of the person making the arrest or instigating the prosecution a fee of \$2.50. No such fee shall be allowed in case of acquittal.

As you will see, this fee can be taxed only in prosecutions for a violation of the game and fish laws.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

GAME AND FISH—*Prosecution for violation of game laws—Costs—How and to whom paid—Chapter 152 of Acts of 1916.*—In every prosecution instigated under chapter 152 of the Acts of 1916, only the officer or officers who serve the warrant, make the arrest and serve the subpoenas and summons are to be paid out of the game fund in the event of failure to convict or if the same cannot be collected from the defendant. In such cases, officers are to be paid only for (1) serving warrants; (2) making arrests; (3) serving subpoenas and summons. With this exception all other costs incidental to such prosecution are to be paid as costs in other prosecutions for misdemeanors

RICHMOND, VA., *March 27, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter of March 23, 1917.

Section 38 of chapter 152 of the Acts of 1916 which governs the answer to your question reads as follows:

When an arrest or a prosecution for a violation of the game and fish laws by the commissioner, or by any warden or other officer is had or instigated, and the defendant is convicted, there shall be taxed as costs in favor of the

person making the arrest or instigating the prosecution, a fee of two dollars and fifty cents. No such fee shall be allowed in cases of acquittal. And in addition any special warden or other officer or other person shall receive one-half or fifty per centum of the actual cash fines collected from the defendant, upon a conviction, to be paid by the officer making the collection at the time of payment, in each prosecution instigated by said warden, officer or other person, and in addition thereto such warden or other officer shall be paid the same fees as other officers are paid for serving warrants, making arrests, and serving subpoenas and summons, said fees to be included in the costs taxed against the defendants and shall be paid out of the game fund in the event of failure to convict or if they cannot be collected from the defendant.

I am of the opinion that in each prosecution instigated only the officer or officers who serve the warrant, make the arrest, and serve the subpoenas and summons are to be paid out of the game fund in the event of failure to convict, or if they cannot be collected from the defendant, I am further of the opinion that such officers are in such case to be paid only for (1) serving warrants, (2) making arrests and (3) serving subpoenas and summons. With this exception I am of the opinion that other costs incident to such a prosecution are to be paid as costs in other prosecutions for misdemeanors.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

**GAME AND FISH—Game protection fund, Charges against—Chapter 152, Acts 1916.**—Where the duty is placed on an officer of the State to perform legal service for a department of the State government, the employment of a private attorney is unauthorized and therefore, a fee charged by such private attorney cannot be paid out of the State treasury.

**Same—Attorney General, duties of.**—Where property is bought by the Department of Game and Inland Fisheries it is the duty of the Attorney General to give his opinion in writing as to the sufficiency of the bill of sale on its face if presented to him for his opinion by the Governor or the Commissioner of Game and Inland Fisheries. It is not the duty of the Attorney General, however, to have examined the records of courts in order to ascertain whether there are any liens against the property to be conveyed.

**Same—Property bought by a department of the State government—Preparation of bill of sale.**—The cost of preparing a bill of sale for property sold to a department of the State government must be borne by the seller, it being his duty to deliver to the purchaser the customary papers conveying title

**Same—Attorneys for the Commonwealth, duties of.**—In such cases no duties are placed on the attorneys for the Commonwealth.

**Same—Payments out of the State treasury.**—In cases where property is purchased by the Department of Game and Inland Fisheries it is not proper to pay out of the game protection fund any fee to an attorney for preparing a bill of sale for the same, but it is proper to pay an attorney out of said fund a fee for examining the records to ascertain whether there are any liens against said property as no duty is placed upon the Attorney General or the attorneys for the Commonwealth in such latter case.

RICHMOND, VA., November 6, 1917.

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

DEAR SIR:

Acknowledgment is made of your request for my opinion as to whether it is proper to pay out of the game protection fund a claim of a local attorney in the city of Norfolk for preparing for the Game Department a bill of sale for a launch and house-boat purchased by said department and for examining the records for liens against said property.

The game protection fund is created by the same act establishing the Department of Game and Inland Fisheries, which appears as chapter 152 of Acts of 1916 (Vol. 4 of Code, p. 1135). Section 7 of said act provides that payments out of the said fund shall be made by warrant of the Auditor upon the approval of the Governor.

I assume that the Governor has, or does approve the purchase of said launch and house-boat as being reasonably necessary in the performance of the duties placed by law upon the Commissioner of this department. If the purchase of this property was proper, it was likewise proper to obtain legal advice as to the title to the property and the sufficiency of the bill of sale conveying same. The question is whether the duty of performing such legal services devolves on any officer of the State. If so, the employment of a private attorney would be unauthorized. I therefore examined the statutes in order to ascertain whether it was the duty either of the Attorney General or the Commonwealth's attorney of Norfolk city, as legal representatives of the State to have performed the legal service upon which this claim is founded. The general duties of the Attorney General, other than appearance in the courts, are set out in section 3203 of the Code, which reads as follows:

Sec. 3203. The Attorney General shall give his opinion and advice, in writing, when required to do so by the Governor, or by the State Corporation Commission, or by any of the public boards and officers at the seat of government.

From this language I think it is apparent that if the Governor or the Commissioner of Game and Inland Fisheries had presented to the Attorney General a bill of sale for said property it would have been the duty of the Attorney General to have given his opinion, in writing, as to the sufficiency of said bill of sale on its face. The cost of preparing the bill of sale, however, should be borne by the seller, it being his duty to deliver to the purchaser the customary papers conveying title. I do not think, however, that it could be considered the duty of the Attorney General to have examined the records in order to ascertain whether there were any liens against the property to be conveyed.

The duties of the attorneys for the Commonwealth are contained in many statutes too numerous here to cite. None of these statutes, however, place upon this officer any duty in cases like this now under consideration.

My conclusion, therefore, is that it is not proper to pay out of the game protection fund a fee to an attorney for preparing a bill of sale for the launch and house-boat purchased by the game department; but that it is proper to pay said attorney out of said fund a fee for examining the records to ascertain whether there were any liens against the said property.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

GAME AND FISH—*Prosecutions for violation of game and inland fish laws—Reports of—Chapter 152 of Acts of 1916.*—Under section 37 of chapter 152 of the Acts of 1916, a duty is placed upon (a) every court (b) the clerk of any court before whom any prosecution under this law is commenced or shall be taken on appeal within twenty days after the trial or dismissal of such prosecution to report in writing the result thereof and the amount of the fine collected, if any, to the Commissioner of Game and Inland Fisheries.

*Same—Words and phrases—Court.*—The word "court" as used in section 37 of chapter 152 of the Acts of 1916 includes a justice of the peace or police courts before whom a person is tried for violation of the game law.

*Same—Justices of the peace—Clerks of court—Duties of in game prosecutions.*—Every justice of the peace or police justice before whom a prosecution under chapter 152 of the Acts of 1916 is tried, is required to report the result thereof to the Commissioner of Game and Inland Fisheries. If an appeal is taken in such case or if the prosecution of such case originates in a court of record or a court having a clerk, the duty is imposed upon the clerk thereof to report to the Commissioner of Game and Inland Fisheries such cases as originate in his court or which reach the same by means of appeal.

*Same—Justice of the peace.*—The report which justices of the peace are required to make under chapter 152 of the Acts of 1916 is in addition to and in no way takes the place of that provision of the law which requires justices of the peace to make reports on cases tried before them as provided by law.

RICHMOND, VA., January 27, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of December 18, 1916, which is in the following terms:

The department would like to have your construction of section 37, chapter 152, Acts 1916, as to whom this department should make demand upon for the report of cases tried by justices of the peace for violation of the game laws.

Some of the justices are claiming that they are fulfilling their whole duty when they report these cases to the clerks of the circuit courts of their said counties, and some of the county clerks are claiming that they have nothing to do with reporting these cases, unless they are tried in their respective courts.

The answer to your question is governed by the provisions of section 37 of chapter 152 of the Acts of 1916, which reads as follows:

Every court or clerk of any court before whom any prosecution under this chapter is commenced or shall go on appeal, and within twenty days after trial or dismissal thereof, shall report in writing the result thereof, and the amount of fine collected, if any, to the commissioner, for the failure of any court or clerk to comply with any provisions of this section, he shall forfeit to the Commonwealth the sum of five dollars for each failure, such sum to go to the credit of the game fund.

You will, therefore, see that this section places the duty upon (a) every court, or (b) the clerk of any court before whom any prosecution under chapter 152 of the

Acts of 1916 is commenced or shall go on appeal, within 20 days after the trial or dismissal of such prosecution to report in writing the result thereof and the amount of fine collected, if any, to the Commissioner of Game and Inland Fisheries. This provision, employing the word "court" in the sense it has means justice of the peace or police court before whom a person is tried for a violation of the game laws. It, therefore, follows that every justice of the peace, or police justice before whom such case is tried, is required by this section to report the result thereof to the Commissioner of Game and Inland Fisheries. If an appeal is taken in such case, or if the prosecution of such a case originated in a court of record, or a court having a clerk, the duty is imposed upon the clerk thereof to report to the Commissioner of Game and Inland Fisheries such cases as have originated in his court or which reach the same by means of an appeal.

I may further say that this section, requiring this information to be reported to the Commissioner of Game and Inland Fisheries, is in addition to and in no way takes the place of that provision of the law which requires justices of the peace to make reports on cases tried before them as heretofore provided by law.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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GAME AND FISH—*Clerks of court—Duties of.*—Clerks of court are under no duty to file with the Department of Game and Inland Fisheries claims for costs due other officials in cases which have been dismissed at the trial before a justice of the peace.

RICHMOND, VA., February 7, 1917.

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

DEAR SIR:

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

The department would like to have your opinion as to whether it could require the clerks of the circuit courts to make claim for costs in prosecutions dismissed in justice of the peace trials, section 28, chapter 152, Acts of 1916.

Claims for costs are reaching us from game wardens who instigated prosecutions which were dismissed and if possible we would like to have all of such cases reported to us by the county clerk with whom we could settle and not be bothered by having to issue a number of small warrants

I know of no law by which you could compel the clerks of courts to file with your department claims for costs due other officials in cases which have been dismissed at the trial before a justice of the peace.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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GAME AND FISH—*Hunting in violation of law—Powers of game wardens.*—While the statutes of this State confer no power on a game warden to seize or to confiscate the gun used by a hunter who is found hunting in violation of the game laws,

a game warden who makes an arrest has the right to seize and hold until disposition of the case the gun used by a person violating the game laws of this State as evidence to be used against such hunter and also for the further reason that such officer has the right to protect himself by the seizure of such weapon, as to leave it in the possession of the hunter would give him the means to commit an act of violence against the officer or enable him to effect his escape.

*Same—Disposition of guns seized.*—After the trial of the hunter his gun must be returned to him, whether he is acquitted or convicted at such trial, of a violation of the game laws of the State.

RICHMOND, VA., November 9, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of November 1, 1916, in which you request my opinion as to the following state of facts furnished you by one of your game wardens:

Please tell me whether or not a game warden or an ex-officio game warden has the right to take a gun from a fellow that he catches hunting unlawfully. I did that thing only a few days ago and now have the gun in my possession and would like to know what disposal to make of it. I did not put a fine on the fellow at the time but am going to have him brought before me in a few days.

The department would like to have your opinion as to whether this ex-officio acted within his right in seizing the gun of the hunter he found violating the game laws.

Section 15 of chapter 152 of the Acts of 1916, which prescribes the duties and powers of game wardens, gives to the game warden no authority to seize or to confiscate the gun used by a hunter who is found hunting in violation of the game laws.

Under sub-section 6 of section 2070-b of the Code of Virginia, as amended, the game warden is authorized to seize "all guns, gunning or hunting appliances found in such search." Sub-section 6 of section 2070-b of the Code of Virginia, 1904, as amended, which bears on this question, is as follows:

All game animals, wild water fowl, and birds protected by law, or parts thereof, found under such warrant, shall be seized by the warden or other officer making the search, and shall be disposed of as the court, judge or justice having jurisdiction may direct. All guns, gunning, or hunting appliances found in such search shall be seized by said warden or other officer, and held subject to the payment of the fine prescribed by law for the offense charged, and the cost of prosecution. If any of the articles so found be such as are not authorized by law, they shall upon the order of the court, judge, or justice having jurisdiction, be destroyed, and all other of such articles shall be sold at public auction, after the lapse of twenty days from the time of seizure, and after such notice as the court, judge, or justice having jurisdiction may prescribe, unless the reputed owner appears and acquits himself of the charge or pay the fine that may be imposed by the court, judge, or justice.

Inasmuch, however, as the provisions of this section now in force refer to proceedings under a search warrant issued pursuant to the provisions of sub-section 5 of section 2070-b of the Code of Va., 1904, as amended, and as chapter 152 of the Acts of 1916 is silent as to the right of game wardens to seize the gun used by a

hunter, it becomes necessary to examine the question from the standpoint of the common law in order to answer the question propounded in your letter.

The rule in such cases is thus set out in 3 Cyc. 896, where it is said:

After making an arrest an officer has the right to search the prisoner and take from his person, and hold for the disposition of the trial court, any property connected with the offense charged or that may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape.

Therefore, I am of the opinion that a game warden who makes an arrest has the right to seize and hold, until disposition of the case, the gun used by a person in violating the game laws of this State, as evidence to be used against him, and also for the further reason that such officer has the right to protect himself by the seizure of such a weapon, as to leave it in the possession of the hunter would give him the means to commit an act of violence against the officer or enable him to effect his escape.

While there seems to be some conflict among the authorities as to this question, inasmuch as chapter 152 of the Acts of 1916 does not provide for the confiscation of the hunter's gun, I am of the opinion that after his trial the same must be returned to him, whether he is acquitted or convicted at such trial of a violation of the game laws of the State.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General*

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GAME AND FISH—*Violation of game laws—Powers and duties of game wardens—Chapter 152 of the Acts of 1916—Section 3957, Code of Virginia, 1904, as amended.*—Under section 3957 of the Code of Virginia, 1904, as amended, if a person accused of crime is out of the county at the time a warrant is issued, or if he leaves it subsequent thereto, a constable has the right to pursue him and arrest him in whatever jurisdiction within the State he may be found, the Commissioner of Game and Inland Fisheries being given by chapter 152 of the Acts of 1916, the same powers as to the service of process as is conferred upon constables and sheriffs, has a right to serve criminal process in jurisdictions other than that in which the crime occurred, provided at the time of the issuance of the warrant, the accused is out of the jurisdiction or subsequent thereto leaves the same.

RICHMOND, VA., November 28, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of November 23rd, in which you request my opinion on the following state of facts:

Will you please advise us whether a county game warden would have the right to go in a city of this State to arrest on warrant for offense committed in his territory, warrant being issued by justice of peace in his territory.

This question is governed by the provisions of sections 13 and 15 of chapter 152 of the Acts of 1916. Section 13 reads as follows:

The commissioner and warden may serve original and mesne process as sheriffs and constables, in all matters arising from violations of the game, fish, forestry and dog laws of this State.

So much of section 15 as relates to this subject reads 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. \* \* \*

If the legislature had not expressly prescribed the powers of the commissioner and wardens to serve processes as set forth in section 13 of chapter 152 of the Acts of 1916, it would seem clear from the sweeping provisions of section 15 of chapter 152 of the Acts of 1916 that there could be no question as to the right of a county game warden to go in a city to arrest on warrant for an offense committed in his territory. However, inasmuch as the powers of the commissioner and game wardens as to the service of process are expressly provided for in section 13 of the act, some doubt is cast on this view. Nevertheless, the question would not seem to be a practical one, inasmuch as such right is conferred on constables by section 3957 of the Code of Va., 1904, as amended. This section reads as follows:

If a person charged with an offense shall, after or at the time the warrant is issued for his arrest, escape from or be out of the county or corporation in which the offense is alleged to have been committed, the officer to whom the warrant is directed may pursue and arrest him anywhere in the State; or a justice of a county or corporation other than that in which it was issued on being satisfied of the genuineness thereof, may endorse thereon his name and official character, and such endorsement shall operate as a direction of the warrant to an officer of such justice's county or corporation.

It will, therefore, be seen that under this section of the Code, if the accused is out of the county at the time the warrant is issued or if he leaves it subsequent thereto, a constable has the right to pursue him and arrest him in whatever jurisdiction within the State he may be found. The commissioner and the game wardens being given by section 13 of chapter 152 of the Acts of 1916 the same powers as to the service of process as conferred upon constables and sheriffs would, therefore, have a right to serve criminal processes in jurisdictions other than that in which the crime occurred provided that at the time of the issuance of the warrant the accused is out of the jurisdiction or subsequent thereto leaves the same.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

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GAME AND FISH—*Game wardens—Powers and duties—Enforcement of federal laws.*—It is improper for a game warden to arrest persons violating the federal migratory bird laws unless the act also constitutes the violation of a State law.

RICHMOND, VA., January 12, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of December 27, 1916, which is in the following terms:

The department would like to have your opinion as to whether Virginia State game wardens would have the authority to arrest and prosecute violators of the federal migratory bird laws.

While it is proper for the game wardens to report any violations of the federal migratory bird laws, I am of the opinion that it would be improper for said game wardens to arrest persons violating the federal law unless the act also constituted a violation of a State law.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

GAME AND FISH—*Game wardens, bonds of.*—The Commonwealth is interested in the bonds of game wardens only to the extent of the warden's accounting for and lawfully applying all money which may come into his hands in his official capacity and for his faithful performance of the duties enjoined upon him by law and if default in any of these particulars is made, the warden and his sureties can be proceeded against upon his bond.

*Same—Liability of warden for malicious acts.*—The liability of a warden to persons for malicious acts or unlawful seizure, arrests or imprisonment, is a matter solely between the individual game warden and the person injured to which the Commonwealth is in no sense a party.

RICHMOND, VA., December 21, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of December 8, 1916, which is in the following terms:

In reference to bonds required by section 17, chapter 152, Acts of 1916, this department would respectfully request an opinion as to the liability of the warden and his sureties thereon, especially desiring to know if the bond would be liable for action for damages on account of negligence of the warden as well as for malicious acts, other than malicious prosecutions or unlawful seizure, arrest or imprisonment.

Section 17 of chapter 152 of the Acts of 1916, reads as follows:

Before entering upon the discharge of his official duties, each game warden shall give bond before the clerk of the circuit court of his county or of the corporation court of his city, in the penalty of one thousand dollars, payable to the State of Virginia, with sufficient surety, to be approved by the said clerk, conditioned that he will well and truly account for and legally

apply all money which may come into his hands in his official capacity, and to pay all judgments rendered against said game wardens for malicious prosecution or for unlawful search, arrest or imprisonment, and that he will faithfully perform all the duties enjoined upon him by law.

As you will see, this section provides that the bond given by a game warden shall be payable to the State of Virginia, on condition that the game warden will well and truly account for and legally supply all money which may come into his hands in his official capacity and to pay all judgments rendered against said game warden for malicious prosecution or for unlawful arrest and imprisonment and that he will faithfully perform all the duties enjoined upon him by law.

The Commonwealth is interested only to the extent of the warden accounting for and legally applying all money which may come into his hands in his official capacity and for his faithful performance of the duties enjoined upon him by law. If the warden makes default in either of these particulars, he and his sureties can be proceeded against upon his bond.

His liability to persons for malicious acts or unlawful seizure, arrest or imprisonment of persons is a matter solely between the individual game warden and the person injured, to which the Commonwealth is in no sense a party; therefore your request that this office advise you as to the rights and liabilities of game wardens in such cases is a matter which does not come under your jurisdiction or mine, and, therefore, I must decline to express an opinion on this question.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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GAME AND FISH—*Officers—Game wardens, qualification of—Chapter 152, Acts 1916, sections 168, 169, 170, Code of Virginia, 1904.*—In addition to giving the bond provided for by section 17 of chapter 152 of Acts of 1916, it is necessary for a game warden to take and subscribe the oath provided for in section 168 of the Code of 1904, and oath provided for in section 169 of the Code of Virginia, 1904, or in lieu of the latter, the oath provided for in section 170 of the Code of Virginia, 1904.

*Same—Game wardens, duties of.*—Persons who violate valid regulations passed by the board of supervisors of a county in pursuance of authority given them by section 2070-a of the Code of Virginia, 1904, as amended, violate a provision of the game laws of this State, and it is the duty of game wardens to arrest any person found in the act of violating the same.

RICHMOND, VA., December 26, 1916.

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

DEAR SIR:

Acknowledgment is made of your communication in which you request me to advise you whether a game warden has to do more to qualify than to give bond.

It is provided by section 17, chapter 152, of the Acts of 1916, as follows:

Before entering upon the discharge of his official duties, each game warden shall give bond before the clerk of the circuit court of his county or of the corporation court of his city, in the penalty of one thousand dollars, payable to the State of Virginia, with sufficient surety, to be approved by the said clerk, conditioned that he will well and truly account for and legally apply all money which may come into his hands in his official capacity, and to pay all

judgments rendered against said game wardens for malicious prosecution or for unlawful search, arrest or imprisonment, and that he will faithfully perform all the duties enjoined upon him by law.

It is provided as follows by section 168 of the Code of Virginia, 1904:

Every person before entering upon the discharge of any function as an officer of this State shall take and subscribe the following oath: "I....., do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of Virginia ordained by the convention which assembled in the city of Richmond on the twelfth day of June, nineteen hundred and one, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as..... according to the best of my ability. So help me God."

And it is further provided by section 169 of the Code that he shall at the same time, unless his disabilities have been removed by the General Assembly, take and subscribe the anti-dueling oath, the form of which is set out in section 169 of the Code of Virginia, 1904.

It is provided by section 170 of the Code of Virginia, 1904, that if such person cannot take and subscribe the oath required in section 169 that he may take and subscribe in lieu thereof the oath set out in section 170.

I am of the opinion that in addition to giving the bond provided for in section 17 of chapter 152 of the Acts of 1916, it is necessary for a game warden to take and subscribe the oath provided for in section 168 of the Code of Virginia, 1904, and the oath provided for in section 169 of the Code of Virginia, 1904, or in lieu of the latter, the oath provided for in section 170 of the Code of Virginia, 1904.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

GAME AND FISH—*Supervisors, board of—Regulations relating to game—Section 2070-a of the Code of Virginia, 1904—Chapter 152 of the Acts of 1916.*—Persons who violate valid regulations passed by the board of supervisors of a county in pursuance of authority given by sub-section 5 of section 2070-a of the Code of Virginia, 1904, as amended, violate a provision of the game laws of this State and therefore it is the duty of game wardens to arrest persons found in the act of violating the same.

RICHMOND, VA., December 28, 1916.

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

DEAR SIR:

Acknowledgment is made of your letter of December 27, 1916, which is in the following terms:

This department would like to have your opinion as to whether regular or special game wardens, appointed by this department, would be acting within their authority in enforcing rules and regulations passed by boards of supervisors for the further protection of game in their said counties. It is claimed that such regulations are county laws, and, as such, enforceable by county authorities; see sec. 2070-a, sub-section 5, as amended by act approved March 14, 1912.

By sub-section 5 of section 2070-a of the Code of Virginia, 1904, as amended, it is provided that the board of supervisors of any county shall have the power to shorten the open season of their said county and by regulations not inconsistent with the provisions of section 2070-a, may further protect the game within their county and may include in such protection other game not specifically mentioned in section 2070-a.

It is provided by section 15 of chapter 152 of the Acts of 1916 that in addition to the power and authority in the enforcement of chapter 152 of the Acts of 1916, as provided for the State Game Commissioner that game wardens shall have jurisdiction throughout the entire State in all matters relative to the enforcement of chapter 152 of the Acts of 1916, and are also "invested with the power and authority \* \* \* 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. \* \* \*"

I am of the opinion that persons who violate valid regulations passed by the board of supervisors of the county in pursuance of authority given them by sub-section 5 of section 2070-a of the Code of Virginia, 1904, as amended, violate a provision of the game laws of this State, and, therefore, it is the duty of game wardens to arrest any person found in the act of violating the same.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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GAME AND FISH—*Game wardens, death of—Chapter 152, Acts of 1916.*—When a regularly qualified game warden dies, a vacancy is created in such office, and his successor should be selected in the manner provided for in section 14 of chapter 152 of the Acts of 1916.

· RICHMOND, VA., May 2, 1917.

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

DEAR SIR:

Acknowledgment is made of the reference to this office of letter of B. E. Nelson, of Mt. Jackson, Va., in which he requests an opinion on the following state of facts:

Will you advise me the procedure of appointment under the law of the successor to a deceased county game warden. Does the same procedure take place as in the recommendation of a list of 10 by the board of supervisors or does the commissioner fill the vacancy by direct appointment?

The only law relating to the appointment of county and city game wardens is found in section 14 of chapter 152 of the Acts of 1916, which section reads as follows:

The commissioner shall appoint from a list of ten suitable persons 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 to enforce the laws, which appointment shall be based upon a practical knowledge of the animal, bird and fish life and game laws of this State, and such person so appointed shall be known as game wardens, and shall hold office during

## REPORT OF THE ATTORNEY GENERAL

the pleasure of the commissioner appointing them, and until their successors are duly appointed; provided, however, that there shall be not less than one regular warden in each county.

Of course, when a regularly qualified game warden dies a vacancy is created in this office, and I am of the opinion that his successor should be selected in the manner provided for in section 14 of the act.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

GAME AND FISH—*Officers, public—Game wardens—Incompatibility of office—Section 163, Code of Virginia, 1904.*—Under section 163 of the Code of Virginia, 1904, the acceptance of any office, post, trust, or emolument whatsoever under the federal government *ipso facto* vacates any office, post, trust or emolument under the government of this State or any county, city or town thereof; and, therefore, if the appointment of a game warden to enforce the federal migratory bird law is an office, post, or trust, Virginia game wardens are forbidden to accept the same and cannot without forfeiting their office in Virginia accept any emolument whatever for any service rendered by them to the federal government.

RICHMOND, VA., July 17, 1917.

HON. E. W. NELSON, Chief, Biological Survey,  
United States Department of Agriculture,  
Washington, D. C.

DEAR SIR:

Acknowledgment is made of your letter of the 13th instant to the Attorney General of Virginia, asking that he advise you whether there is any provision of law or of the Constitution of the State of Virginia which would prohibit the State or county fish and game wardens from co-operating with the federal government in the enforcement of federal laws for the protection of migratory birds, and prohibiting such State or county fish and game wardens from accepting remuneration from the federal government for such services.

I beg to advise that under section 163 of the Code of Virginia, the acceptance of any office, post, trust, or emolument whatever under the federal government shall, *ipso facto*, vacate any office, post, trust or emolument under the government of this State or any county, city, or town thereof, and I am of the opinion that if the appointment to enforce the federal migratory bird law is an office, post, or a trust, that the Virginia game wardens are forbidden to accept the same, and of course, such game wardens cannot, without forfeiting their office in Virginia, accept any emolument whatever for any service rendered by them to the federal government.

For your information I quote below section 163 of the Code above referred to:

No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who received from it in any way any emolument whatsoever; and the acceptance of any such office, post, trust or emolument, or the acceptance of any emolument whatever under such government, shall, *ipso facto*, vacate any office, or post of profit, trust, or emolument under the government of this Commonwealth, or under any county, city, or town thereof.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

HEALTH, PUBLIC—*Catawba Sanatorium—Who may be treated—Section 1713-d (4), Code of Virginia, 1904, as amended.*—Although the statutes of this State do not prescribe what patients may be treated at Catawba Sanatorium it should be assumed that it was not the intention of the General Assembly to provide for the maintenance in the sanatorium for the treatment of patients from other States and it is the duty of the board having charge of the institution to admit only those patients who are *bona fide* residents of the State of Virginia.

*Same—Residents, who are?*—One who moved on September 20, 1917, from Bristol, Tenn., to Bristol, Va., intending to make Virginia his permanent home, and who later is advised for the first time that he has tuberculosis may be properly admitted to Catawba Sanatorium although he has never voted or registered in Virginia, it not being necessary for one to be a voter in Virginia to be entitled to the benefits of the sanatorium, which was established for the benefit of all *bona fide* residents of the State, no matter how short their residence may have been.

*Same—Duty of the officers of Catawba Sanatorium.*—It is the duty of the officers in charge of Catawba Sanatorium to see that the State is not imposed upon by people moving into the State simply for the purpose of availing themselves of the advantages offered by the institution.

RICHMOND, VA., December 6, 1917.

B. L. TALIAFERRO, M. D.,

*Resident Physician,*

*Catawba Sanatorium, Va.*

DEAR DOCTOR:

Since writing you on yesterday I have ascertained that the Catawba Sanatorium was established in pursuance of an act passed in 1908 amending the statute providing for the appointment of a State Board of Health, etc. Inasmuch as the statute did not mention Catawba Sanatorium it is not surprising that I found difficulty in tracing the origin of that institution. The information I obtained could only be gotten from one acquainted with the history of the institution as found outside of the statutes. It seems that the State Board of Health established Catawba Sanatorium in 1908 in pursuance of authority given the board under section 1713-d (4) which, so far as applicable, reads as follows:

They shall forthwith make inquiry into the altitude, moisture and other climatic conditions in various parts of the State, with a view of determining the most suitable location therein, for the treatment of tuberculosis, and the establishment of tuberculosis sanatoriums, and shall investigate the best methods of treatment, with a view to preventing and curing such diseases.

It shall be the duty of the State Board of Health as soon as practicable to begin the erection and maintenance of temporary or permanent buildings or camps for the treatment of tuberculosis in such localities as are proper, and at such sanatoriums they shall provide for the treatment by the most advanced methods of the tuberculosis patients in the State at a minimum expense to the patient. Acts 1908, p. 636, Vol. 3 of Code, p. 252.

Then follows in the statute a provision making an appropriation of \$40,000.00 for the establishment of sanatoriums and for other purposes.

Since that time appropriations have been made from time to time for the maintenance of the sanatorium and at the session of the General Assembly in 1916 there was appropriated for the support of the institution \$50,000.00 in the following language: "Catawba Sanatorium, support \$50,000.00."—Acts 1916, p. 206.

It will be observed that the statutes above quoted do not prescribe what patients may be treated at the sanatorium and there are no other statutes touching this subject. It is safe to assume, however, that it was not the intention of the General Assembly to provide for the maintenance of a sanatorium for the treatment of patients from other States, and I think it is the plain duty of the board having charge of the institution to admit only those patients who are *bona fide* residents of the State of Virginia.

I understand from you that the following are the facts concerning the young man the legality of whose admission is questioned:

On the 20th of September last he moved from Bristol, Tennessee, to Bristol, Virginia, intending to make Virginia his permanent home. Shortly after moving into the State he was advised for the first time that he had tuberculosis. He has never registered or voted in Virginia.

Under these circumstances I think he may be properly admitted to the institution. It is not necessary for one to be a voter in Virginia to be entitled to the benefits of the sanatorium which, it may be fairly assumed, was established for the benefit of all *bona fide* residents of the State no matter how short their residence may have been. Of course the board having charge of your institution will be careful to see that the State is not imposed upon by people moving into the State simply for the purpose of availing themselves of the advantages offered by our State institutions.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

HEALTH, PUBLIC—*Catawba Sanatorium—Who may be treated—Section 1713-d (4), Code of Virginia, 1904, as amended.*—The authorities of the Catawba Sanatorium may properly admit into the sanatorium any white person living in this State, regardless of age or sex and whether married or single. Colored persons must be excluded from the sanatorium just as white persons are excluded from the colored sanatorium.

*Same*—Only *bona fide* residents of the State of Virginia should be admitted for treatment to the Catawba Sanatorium. It is not necessary for one to be a citizen of Virginia, however, to be admitted to such institution for treatment if he be a *bona fide* resident of the State.

*Same*.—Persons moving into Virginia simply for the purpose of availing themselves of the advantages of Catawba Sanatorium, are not entitled to treatment at such institution.

*Same*—Where the form of application prepared for admission to the tubercular sanatorium at Catawba is not prescribed by law, the same may be changed at any time by the authorities of the institution provided such change does not conflict with the existing law.

RICHMOND, VA., December 19, 1917.

B. L. TALIAFERRO, M. D.,

*Resident Physician,*

*Catawba Sanatorium, Va.*

DEAR DOCTOR:

Yours of December 11th received.

You inform me that the form of application for admission to your institution begins with the following words: "....., being a white citizen of Virginia."

This form is not prescribed by law and may be changed at any time by the authorities of your institution, who may properly admit into the sanatorium any white person living in the State regardless of age or sex and whether married or single. Colored persons must be excluded from this sanatorium just as white persons are excluded from the colored sanatorium.

You need not concern yourself with the definition of the term "citizen." That term is used in many different senses which need not be discussed for the reason that the law does not use the term "citizen."

The statute under which your sanatorium was established provides:

for the treatment by the most advanced methods, of the tuberculosis patients in the State at a minimum expense to the patients. Acts 1908, p. 636, Vol. 3 of Code, p. 252.

As stated in my letter of December 6th, it is safe to assume that it was not the intention of the General Assembly to provide for the maintenance of a sanatorium for the treatment of patients from other States, and I think it is the plain duty of the board having charge of the institution to admit only those who are *bona fide* residents of the State of Virginia. In that letter I also stated: "Of course the board having charge of your institution will be careful to see that the State is not imposed upon by people moving into the State simply for the purpose of availing themselves of the advantages offered by our State institutions."

From the above you will see that your board does not have to concern itself with the question of citizenship, but it may admit any *bona fide* residents of the State, excluding no persons living in Virginia except those who may have moved in simply for the purpose of availing themselves of the advantages of our institutions.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

HEALTH, PUBLIC—*General appropriation bill 1916-17, 1917-18—Trachoma hospital—Statutes—Construction of.*—Where it appears that a hospital cannot do its proper work by remaining in one place but that in order to perform its work to the best advantage it must move from place to place and that the treatment of the disease for which it is provided does not necessitate the patient remaining at the hospital nor confinement in bed, it is to be presumed that the legislature was familiar with these facts and in providing for an appropriation for such hospital its object was to make an appropriation for the purpose of treating the disease and not for the purpose of establishing the hospital at any one given point, and, therefore, that the words "At Coeburn" used in the statute were merely descriptive and used because of the fact that the hospital was at that time located at Coeburn and not for the purpose of limiting the usefulness of the appropriation or confining the hospital to Coeburn.

RICHMOND, VA., September 5, 1917.

DR. ENNION G. WILLIAMS,  
*State Health Commissioner,*  
*City.*

DEAR SIR:

Acknowledgment is made of your letter of August 23, 1917, in which you say:

At the last session of the General Assembly an appropriation was made "for trachoma hospital in Wise county, twelve hundred dollars," page

906, for the fiscal year 1916-1917; and for the fiscal year 1917-1918, "For Trachoma Hospital at Coeburn twelve hundred dollars," page 933. This hospital was established by the U. S. Public Health Service on condition that the town furnish the building and the State furnish one hundred dollars per month. The government would supply all the rest that it needed. Dr. McMullen, in charge of the hospital, writes that he would recommend that the hospital be transferred to Norton, Wise county, for the reason that they had administered the treatment practically to all needing treatment in Coeburn and vicinity.

The point is raised by certain parties in the Coeburn community that it cannot be moved, as the appropriation for this year is made "for Trachoma Hospital at Coeburn." I would appreciate an opinion from you as to whether in case the hospital should be moved to Norton the Auditor would be authorized to pay the hundred dollars a month for the support of the hospital at Norton.

You have informed me that this appropriation was made by the General Assembly at your request and you are of the opinion that the changing of the appropriation for the year 1917-1918 "from *Wise county to Coeburn*" was inadvertently made, and you also advise me that the hospital was at that time located at Coeburn and that it is not such a hospital as can do its proper work by remaining in one place, but that, in order to perform its work to the best advantage, it must be moved from place to place; that the treatment of these diseases does not necessitate the remaining of the patient at the hospital nor confinement in bed. Your letter states that the treatment has been administered to practically all persons needing it in Coeburn and vicinity, and that on this account it is the belief of Dr. McMullen who is in charge, that it would best subserve the purpose for which it was established by transferring it to Norton.

It is to be presumed that the legislature was familiar with these facts and, in providing for an appropriation for a trachoma hospital, its object was to make an appropriation for the purpose of treating the disease and not for the purpose of establishing the hospital at any one given point, and that the words "at Coeburn" were merely descriptive and used because of the fact that the hospital was at that time located at Coeburn, and not for the purpose of limiting the usefulness of the appropriation by confining the hospital to Coeburn. If the hospital, therefore, was transferred to Norton, the Auditor of Public Accounts would be advised by this office to continue the payment of the \$100.00 per month.

Nevertheless, I desire to call your attention to the fact that in case the hospital were removed, the right to make the monthly payment could be tested by any citizen in the State and it is possible that the opinion herein expressed would not be concurred in by the court before whom the matter was brought.

Yours very truly,

J. D. HANK, JR.,  
*Assistant Attorney General.*

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HEALTH, PUBLIC—*Rules and regulations of State Board of Health—Force and effect of—Chapter 179 of Acts of 1910.*—Under the provisions of chapter 179 of the Acts of 1910 the rules and regulations adopted and promulgated by the State Board of Health are given the force and effect of law if reasonable and any violation thereof constitutes a misdemeanor.

*Same.*—The fact that there is a local board of health in a community in no wise exempts violators of the law from prosecution therefor.

RICHMOND, VA., August 14, 1917.

DR. ENNION G. WILLIAMS,  
*Commissioner of Health,  
Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of your communication of August 14, 1917, in which you request an opinion on the following facts:

In the unincorporated town of Elliston, Montgomery county, Virginia, certain persons have failed to provide sanitary privies or such as are required by sections 4, 5 and 6 of the rules and regulations for the protection of the public health adopted by the State Board of Health of Virginia, May 5, 1916, pursuant to authority conferred upon the board by chapter 179 of the Acts of 1910. It is the contention of persons failing to comply with the rules and regulations of the Board of Health that said board has no right to proceed against persons having on their premises an unsanitary privy in a county where there is a local board of health.

By chapter 179 of the Acts of 1910, it is provided:

That the State Board of Health shall have the power to make, adopt, promulgate and enforce reasonable rules and regulations from time to time requiring and providing for the thorough sanitation and disinfection of all passenger cars, sleeping cars, steamboats, and other vehicles of transportation in this State, and also of all convict camps, penitentiaries, jails, hotels, schools and other places used by or open to the public; to provide for the care, segregation and isolation of persons having, or suspected of having, any communicable, contagious or infectious disease; to regulate the method of disposition of garbage or sewage and any other refuse matter in or near any incorporated town, city, or unincorporated town or village of this State; to provide for the thorough investigation and study of the causes of all diseases, epidemics and otherwise, in this State, and the means for the prevention of contagious disease, and the publication and distribution of such information as may contribute to the preservation of the public health, and the prevention of disease; to make separate orders and rules to meet any emergency, not provided for by general rules and regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other dangers to the public life and health: \* \* \* provided, however, that nothing herein contained shall be construed as in anywise limiting any duty, power or powers now possessed by or heretofore granted to the said State Board of Health by the statutes of this State, or as affecting, modifying or repealing any rule or regulation heretofore adopted by said board.

By section 2 of this act, it is provided that any person who shall violate, disobey, refuse, omit or neglect to comply with any rule of the State Board of Health made by it, in pursuance of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished in the manner provided by law.

Pursuant to the authority conferred upon the State Board of Health by this statute, the State Board of Health adopted, among other rules and regulations, on the 5th day of May, 1916, the following rules and regulations:

4. Every house or other place used as a human habitation in the State, every place of business and every pleasure, recreation or construction camp shall be provided with a decent closet or privy where human excrement is so disposed of that the excrement cannot endanger a source of drinking water and cannot be accessible to flies or animals.

5. No person, firm or corporation shall maintain or permit on premises owned by him any arrangement for the disposal of human excrement which may possibly endanger a source of drinking water or be accessible to flies or animals.

6. No person shall deposit any human excrement upon the surface of the ground or in any place where it may be exposed to flies or animals.

Under the provisions of chapter 179 of the Acts of 1910, the rules and regulations adopted and promulgated by the State Board of Health are given the force and effect of law, if reasonable, and any violation thereof constitutes a misdemeanor punishable in the manner provided by law, and should be punished as such.

I am further of the opinion that the fact that there is a local board of health in a community, in nowise exempts violators of the law from prosecution therefor.

Very truly yours,

LEON M. BAZILE,  
*Law Assistant.*

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HEALTH, PUBLIC—*Rules and regulations of State Board of Health—Force and effect of—Chapter 179, Acts of 1910.*—Under the provisions of chapter 179 of the Acts of 1910 the rules and regulations adopted and promulgated by the State Board of Health are given the force and effect of law if reasonable and any violation thereof constitutes a misdemeanor.

*Same.*—Under the powers conferred on it by chapter 179 of the Acts of 1910 and in view of the well-established fact that unsanitary privies are one of the greatest causes for the spread of disease the State Board of Health has the power to require citizens of this State to place their privies in a sanitary condition.

*Same.*—The fact that the community had a county or municipal board of health does not relieve one of the penalty incurred by the violation of a reasonable rule or regulation made by the State Board of Health, pursuant to the power conferred upon it.

*Same.*—As to whether a privy is sanitary or not is a question of fact to be determined by the justice or jury trying the case in the light of the evidence produced before it.

*Same.*—Every man is presumed to know the law, therefore, it is unnecessary to give notice to persons violating the law before instituting proceedings thereof.

LEGAL ETHICS—*Duties of the Attorney General.*—It is no part of the duty of the Attorney General to pass upon questions of legal ethics.

RICHMOND, VA., *September 29, 1917.*

HOMER STILES, ESQ.,

*Attorney at Law,  
Elliston, Va.*

DEAR SIR:

Acknowledgment is made of your letter of September 18, 1917, in which you request me to answer several questions asked in your letter. Your first question is:

Does the State Board of Health have the power to require any citizen of the State to make his privy sanitary?

This question is governed by the provisions of chapter 179 of the Acts of 1910, which provides:

That the State Board of Health shall have the power to make, adopt, promulgate and enforce reasonable rules and regulations from time to time requiring and providing for the thorough sanitation and disinfection of all passenger cars, sleeping cars, steamboats and other vehicles of transportation in this State, and also of all convict camps, penitentiaries, jails, hotels, schools and other places used by or open to the public; to provide, for the care, segregation and isolation of persons having, or suspected of having, any communi-

cable, contagious or infectious disease; to regulate the method of disposition of garbage or sewerage and any other refuse matter in or near any incorporated town, city, or unincorporated town or village of this State; to provide for the thorough investigation and study of the causes of all diseases, epidemics and otherwise, in this State, and the means for the prevention of contagious disease, and the publication and distribution of such information as may contribute to the preservation of the public health, and the prevention of disease; to make separate orders and rules to meet any emergency, not provided for by general rules and regulations, for the purpose of suppressing nuisances dangerous to the public health and communicable, contagious and infectious diseases and other dangers to the public life and health; \* \* \* provided, however, that nothing herein contained shall be construed as in any wise limiting any duty, power or powers now possessed by or heretofore granted to the said State Board of Health by the statutes of this State, or as affecting, modifying or repealing any rule or regulation heretofore adopted by said board.

Section 2 of this act provides that any person who violates, disobeys, omits or neglects to comply with any rule of the State Board of Health made by it in pursuance of this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished in the manner provided by law. Under authority of this statute, the State Board of Health adopted, among other rules and regulations, on the 5th day of May, 1917, the following rules and regulations:

4. Every house or other place used as a human habitation in the State, every place of business and every pleasure, recreation or construction camp, shall be provided with a decent closet or privy where human excrement is so disposed of that the excrement cannot endanger a source of drinking water and cannot be accessible to flies or animals.

5. No person, firm or corporation shall maintain or permit on premises owned by him any arrangement for the disposal of human excrement which may possibly endanger a source of drinking water or be accessible to flies or animals.

6. No person shall deposit any human excrement upon the surface of the ground or in any place where it may be exposed to flies or animals.

Under the provisions of chapter 179 of the Acts of 1910, the rules and regulations adopted and promulgated by the State Board of Health are given the force and effect of law, if reasonable, and any violation thereof constitutes a misdemeanor punishable in the manner provided by law.

Chapter 179 of the Acts of 1910, having conferred upon the State Board of Health the power to make, adopt, promulgate and enforce reasonable rules to regulate the disposition of garbage or sewerage or any other refuse matter "in or near any incorporated town, city, or unincorporated town or village of this State," and also the power to provide for the suppressing of nuisances dangerous to the public health and communicable, contagious and infectious diseases and *other dangers to the public life and health*, I am of the opinion that in view of the well established fact that unsanitary privies are one of the greatest causes of the spread of diseases such as typhoid fever, etc., that the State Board of Health has the power, under the provisions of chapter 179 of the Acts of 1910, to require citizens of this State to place their privies in a sanitary condition.

Your second question is:

Is there anything in the argument that this power lies with the State Board only where there are no local boards of health, i. e., no county or municipal boards of health?

I am of the opinion that there is not. As I have before said, chapter 179 of the Acts of 1910 authorizes the State Board of Health to make reasonable rules and regulations relating to this question and provides that any person who shall violate, disobey, refuse or omit to comply with any rule of the State Board of Health made by it in pursuance of this act, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished in the manner provided by law. The fact that the community has a county or municipal board of health does not relieve one of the penalty incurred by a violation of a reasonable rule or regulation made by the State Board of Health pursuant to the power conferred upon it.

Your third question is:

Who would be the proper judge as to whether a privy was sanitary or not?

I am of the opinion that this is a question of fact to be determined by the justice or jury trying the case in the light of the evidence produced before the justice or the jury.

Your fourth question is:

What would be legal notice to any individual that legal action was to be brought against him for violation of the law requiring sanitary privies? Does it have to be printed in a local newspaper once a week so many times a week, etc.?

The answer to this question is that every man is presumed to know the law and that ignorance thereof excuses no man. I am, therefore, of the opinion that it is unnecessary to give notice to persons violating the law before instituting proceedings for violation thereof, except the usual notice required in misdemeanor cases.

You fifth question is:

Would it be good ethics for an attorney to take a case against the State Board of Health in such a case, and argue that the State Board did not have the power here because there was a local county board and that there was not legal notice, when he knew his stand was groundless and that he was trying to aid in a miscarriage of justice?

This is a question of legal ethics, which I feel it would be improper for me to pass upon.

Of course, you are aware of the fact that the Attorney General is the legal advisor of the executive officers and departments located at the seat of government, and, therefore, what is said here is unofficial and written merely as a matter of courtesy.

Yours very truly,

LEON M. BAZILE,  
*Law Assistant.*

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HEALTH, PUBLIC—*Towels, public*—Chapter 278, Acts of 1916—Chapter 160, Acts of 1916—*Statutes, construction of*.—Statutes 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 statute may be accomplished. Therefore, chapters 278 and 160 of the Acts of 1916 are not to be construed so as to limit the operation thereof to buildings of like nature with those specifically enumerated, the evident object of the law being to prevent the spread of disease and the protection of the public health.

*Same—Constitutional law—Virginia Constitution—Section 52.*—Even when an act of the legislature contains two subjects if they have natural connection with and are germane to one object the provision of section 52 of the Constitution is not violated and the act is valid.

*Same—Words and phrases—Public lavatory or washroom.*—A lavatory or washroom to which all of the tenants of any one floor of a public building have access is a public lavatory or washroom even though such access is limited to the tenants on that floor.

RICHMOND, VA., *January 25, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter to the Attorney General enclosing a letter from Mr. Jas. G. Martin, attorney at law, Norfolk, Va., written to the manager of the Royster building in that city, contending that chapter 278 of the Acts of 1916 concerning the use of the common towel in the public lavatory or washroom is unconstitutional, for the reason that the words "office building" inserted in the body of the act is not referred to in its title.

We still adhere to the opinion expressed in the Attorney General's letter to you of June 16, 1916, 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 foregoing act together with chapter 160 of the Acts of 1916, I think plainly indicate that it was not intended to limit the operation of the statute to buildings of like nature with those specifically enumerated. The evident object of these statutes is to prevent the spread of disease and the protection of the public health.

Indeed the two statutes referred to contain but that one object, and I am of the opinion that Mr. Martin's position that the insertion of the words "office building" in the body of chapter 278, while not mentioned in the title thereto, renders the act unconstitutional, is not well taken. The general doctrine is even where an act contains two subjects which have natural connection with and are germane to one object the provision of section 52 of the Constitution is not violated, and the act is valid.

*Whitlock v. Hawkins*, 105 Va. 242.  
*Iverson Brown's Case*, 91 Va. 762.  
*Ingles v. Straus*, 91 Va. 209.

As before written you I think the two acts relating to the use of the "common towel" must be read together, and at least the insertion of the words "office building" in chapter 278 is clear evidence of what the legislature meant by prohibiting the use of such towel in public lavatory or washroom. Further than this, it seems to be clear that a lavatory or washroom to which all of the tenants on any one floor of a public office building have access is necessarily a public lavatory or washroom, even though such access is limited to the tenants on that floor.

It follows, therefore, that this office considers the pamphlets issued by you, with regard to the common towel law, correctly interpretates that law.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

INDIANS—*Taxation.*—So long as the tribes of Pamunkey and Mattaponi Indians follow up their pursuits upon their reservations, they are governed by their own tribal laws and are not subject to taxation by the laws of the State of Virginia.

*Same.*—*Status of Pamunkey and Mattaponi Indians.*—The Pamunkey and Mattaponi Indians of Virginia are wards of the State just as the Indians under the guardianship of the United States are wards of the Nation.

*Same.*—Statutes of Virginia relating to Indians referred to.

RICHMOND, VA., June 26, 1917.

MR. C. LEE MOORE,  
*Auditor of Public Accounts,*  
*City.*

DEAR SIR:

I acknowledge reference to this office of copy of your letter of June 23, 1917, to Mr. H. W. Neale, commissioner of revenue of King William county, in which you express opinion that the tribes of Pamunkey and Mattaponi Indians were exempt from all taxes, State, local, and otherwise, and requesting me to advise you as to the correctness of your opinion.

I am of the opinion that you have correctly construed the law as to these tribes of Indians, for so long as they follow up their pursuits upon the reservation, they are governed by their own tribal laws and are not subject to taxes by the laws of the State of Virginia.

As far back as 1658 these Indians' lands were confirmed to them by the Governor, the Council, and the Grand Assemblée of Virginia. (See Indians Colonial and State laws, being E-93, U-58 in the State Library.)

Upon examination, I find that the legislature of Virginia has frequently appointed trustees to lease the surplus lands of these tribes and empowered the trustees to prosecute actions against persons trespassing thereon.

By an act approved March 8, 1894, Acts of 1893-4, page 973, trustees were appointed by the General Assembly for the Mattaponi Indian tribe, formerly known as the Pamunkey Indian tribe. This act provided that the tribe should be governed by the laws now in force in regard to Indians and their reservation in the State, provided upon vote of a majority of chiefs and members twenty-one years of age, the trustees could expel from their reservation any person who has no right thereon and any person guilty of any unlawful offense. This act was amended by the Acts of 1896, page 922. By the Acts of 1895-6, page 847, the legislature made an appropriation for payment out of the treasury of losses sustained by the Indians due to the epidemic of smallpox. This act recognized the dependent condition of these Indians.

I think it is fair to assume from all of these various acts that the Pamunkey and Mattaponi Indians of Virginia, are wards of the State, just as the Indians under the guardianship of the United States are wards of the nation. It has been the policy of both State and nation not to subject their wards to taxation.

I am of the opinion, therefore, that your letter is clearly right.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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INDIANS—*Mattaponi tribe, reservation of—Trespass upon—7 Henning's statutes, page 298—8 Henning's statutes, page 433—12 Henning's statutes, page 406—Act of January 19, 1799, Acts of Assembly 1798, page 17, chapter 845, Acts of Assembly*

1893-94.—Persons who go upon the reservation of the Mattaponi tribe of Indians without the consent of the tribe are trespassers and a right of action exists in the trustees of the tribe for the benefit of the tribe against such persons.

*Same.*—Members of the Mattaponi tribe of Indians above the age of 21 are authorized to appoint trustees as provided for in the act of January 19, 1799.

RICHMOND, VA., July 21, 1917.

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

MY DEAR SIR:

Acknowledgment is made of your communication of June 7, 1917, enclosing correspondence in reference to the trespass committed upon the reservation of the Mattaponi tribe of Indians in King William county.

It appears from a statement furnished this office by Chiefs Arthur Allmond and George F. Custalow that the Chesapeake Pulp and Paper Company, Inc., with headquarters at West Point, and various agents of this corporation have been guilty of coming upon the reservation over the protest of the chief of the tribe, and using the wharf belonging to the reservation and property adjacent thereto for the purpose of piling cord wood, which is later removed on boats on the Mattaponi river and transported to the plant of this company. I am informed by these chiefs that they have repeatedly protested against these acts of trespass, and have forbidden the agents of the company to come upon the reservation, or to deposit any wood thereon, which protests have been repeatedly disregarded, and that almost daily acts of trespass are being committed upon the reservation.

I am informed by Chief Custalow that the Mattaponi tribe of Indians are a branch of the Pamunkey tribe of Indians, and occupy a reservation separate from the tract of land known as the Pamunkey reservation on the Pamunkey river.

From an examination of the laws relating to Indians, I find in Henning's Statutes at Large, 1756-1763, Vol. 7, page 298, the following act relating to the Pamunkey Indians, and vesting their lands, other than the reservation on the Pamunkey river, in trustees:

I. Whereas, the Indians on Pamunkey river, in the county of King William, are seized of a very valuable tract of land whereon they live, much more than they can tend in corn and other things; and are also seized of a small quantity of land, separate from the said tract, which is of no other use to them than to furnish them with timber to build their houses, and is greatly wasted and cut down by the adjacent inhabitants; and the said Indians have petitioned this General Assembly that the said separate lands may be vested in trustees, to be leased out at reasonable rents, to be applied to their use: *Be it therefore enacted, by the Lieutenant-Governor, Council and Burgesses, of this present General Assembly, and it is hereby enacted, by the authority of the same,* That all the lands belonging to the said Pamunkey Indians, lying in the county of King William, separate from the tract of land whereon they now live, shall be, and the same are hereby vested in Bernard Moore, Peter Robinson and Harry Gaines, gentlemen, who are hereby nominated and appointed trustees for managing and taking care of the same for the benefit of the said Indians; and the said trustees, or any two of them, shall and may, and they are hereby empowered and required to lease out the same in such manner, to such person or persons, and for such rent or rents as they shall, from time to time, judge reasonable, and shall apply such rents to and for the use and benefit of the said Indians, in such manner as they shall from time to time find most expedient.

II. *And be it further enacted, by the authority aforesaid,* That in case of the death, removal, or resignation of any of the said trustees, the remaining trustees shall and may, and they are hereby impowered and required to elect one or more person or persons in the room of those so dying, removing, or resigning, who shall have the same power to act in the execution of this trust as if particularly mentioned in this act.

III. *Provided always,* That the said trustees shall, and they are hereby required to insert in all leases by them to be made of the said lands a clause or clauses to prevent cutting down the timber thereon growing, in order to preserve the same for the use of the said Indians.

IV. *And be it further enacted, by the authority aforesaid,* That the said trustees shall and may, and they are hereby authorized and impowered to commence and prosecute any action or actions against any person or persons trespassing on or doing damage to the said lands, that they could or might commence to prosecute if they were seized thereof in fee simple.

V. *Provided always, and be it further enacted, by the authority aforesaid,* That the damages recovered in any such action or actions shall be applied to the use of the said Indians.

VI. *Provided also,* That no lease shall be made of the said lands to any of the said trustees or their successors, or to any other person or persons to their use or benefit, nor any lease made for a longer term than twenty-one years or three lives.

By subsequent acts found in Henning's Statutes at Large, Vol 8, page 433, and Vol. 12, page 406, other trustees were substituted in the place of those named in the above-quoted statute, who had either resigned or died.

By an act passed January 19, 1799, Acts of Assembly 1798, page 17, it was provided as follows:

Sec. I. Be it enacted by the General Assembly, That the trustees of the Pamunkey tribe, or a majority of them, be, and they are hereby authorized and empowered to make such by-laws, rules and regulations, for the government of the said Indians, as may meet with the approbation of a majority of them, and to the said trustees shall seem fit and expedient.

Sec. II. And be it further enacted, That a majority of the said Indians, above the age of twenty-one years, may, and they are hereby empowered and authorized, upon the death or resignation of any trustee, to elect another, to supply the vacancy occasioned by such death or resignation.

Sec. III. This act shall commence and be in force from and after the passing thereof.

It will be seen from the terms of this act that a majority of the Indians above the age of twenty-one years were authorized, upon the death or resignation of any trustee to elect another to supply the vacancy occasioned by such death or resignation. So far as I have been able to find, there has been no express amendment of this statute.

By an act of the General Assembly, Acts of Assembly 1893-94, page 973, in an act prescribing the duties of the trustees for the Mattaponi tribe of Indians of King William county, it was provided as follows:

1. Be it enacted by the General Assembly of Virginia, That Doctor B. Richards, R. C. Hill, Senior, L. D. Robinson, J. S. Robinson and W. T. Neale be, and they are hereby, appointed trustees for the Mattaponi Indian tribe, King William county, Virginia, formerly known as a branch of the Pamunkey Indian tribe. Said trustees shall be governed by the laws now in force in regard to Indians and their reservation in this State, and further shall have the right, upon a vote of the majority of the trustees, chief and members of the tribe above twenty-one years of age, to expel from their reservation any person who has no right upon said reservation or any member of the tribe who shall be guilty of any unlawful offense; and said Indians shall have the right to appeal from the decision of the trustees to the county court of King

William—their trustees for protection and assistance in such matters as may be necessary and legal in carrying out their by-laws and in governing their tribe and reservation.

2. This act shall be in force from its passage.

While it is true that this act names certain persons as trustees of this tribe of Indians, I am informed that these persons were named by the legislature only after they had been duly elected in the manner heretofore followed by the Indians in the selection of their trustees; and I am of the opinion that this section does not operate as a repeal of the act of 1799, above set out, which gives to the members of the tribe above twenty-one years of age the authority to appoint trustees as provided for in that act.

If the Chesapeake Pulp and Paper Company, Inc., and its agents have come upon the reservation without the consent of the tribe, I am of the opinion that a right of action exists in the trustees for the benefit of the tribe against such persons, and that the mode of procedure, if for a single trespass, will be an action of tort for the trespass. If these acts are so frequently repeated, that an action at law would afford no adequate redress, I am of the opinion that the proper procedure would be by a bill in equity to restrain the continuing tort, in which proceeding the damage suffered by the tribe could be ascertained and awarded.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

INDIANS—*Pamunkey Indians—Chapter 769, Acts of 1895–6.*—All members of the Pamunkey tribe of Indians who reside on the reservation are exempt from military service under the federal selective draft act, but such Pamunkey Indians as live separate and apart from their tribe are liable to military service under the said draft act.

RICHMOND, VA., *December 10, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter of December 8th, enclosing a copy of the rules adopted by the Commissioner of Indian Affairs in determining questions presented by claims of exemption from military service under the selective draft act, filed by Indians. The ruling reads as follows:

Indians who live separate and apart from their tribe, and have adopted the habits and ways of civilized life are to be regarded as citizens and these Indians should be considered as coming within the purview of the rules and regulations as being male citizens and male persons who are liable to military service under the draft.

You ask me to advise you whether the Pamunkey Indians are under this ruling exempt from military service under the selective draft act.

This tribe of Indians occupies a reservation on the Pamunkey river in the county of King William, Virginia. Their separate existence as an Indian tribe has been frequently recognized by Virginia when a Colony and since becoming a Commonwealth. As far back as 1658 the land now occupied by them was confirmed to them by the Governor and Council and the Grand Assemblie of Virginia. (See

Indians Colonial and State Laws, being E-93, U-58 in the State Library.) And, as late as 1896, the General Assembly passed an act recognizing the existence of the reservation and making an appropriation for losses sustained by destruction of property and expense incurred to prevent the spread of small-pox among the Indians. (Acts 1895-6, page 847.)

As a matter of fact there now reside on this reservation something more than 100 members of this tribe. They maintain a separate government and have their own code of laws enforced by their own authorities. (See "Pamunkey Indians of Virginia" by Jno. Garland Pollard—In Smithsonian Contributions to Knowledge 1894.)

In view of the ruling of the Commissioner of Indian Affairs, approved by the Provost Marshal General, and in view of the statutes of Virginia and of the well known fact that this tribe does now maintain a separate government on its own reservation, I am of the opinion that all members of the Pamunkey tribe of Indians who reside on said reservation are exempt from military service under the selective draft act; but such Pamunkey Indians as live separate and apart from their tribe are liable to military service under the said draft act.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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INSANE ASYLUMS—*Inmates of—Residence—Section 1677, Code of Virginia, 1904—Chapter 401, Acts of 1908.*—The estate or the personal representative of citizens of Virginia committed to an institution or asylum in Virginia are not to be charged with any expenses for the maintenance of such inmate therein. This is limited, however, to citizens of Virginia and does not apply to citizens of other States.

*Same.*—It is within the authority of the board of the Eastern State Hospital to enter into a contract under section 1677 of the Code of Virginia, 1904, for the admission of a non-resident to the hospital and to require of her husband an application with sufficient surety for the payment of the agreed sum.

*Same.*—The mere fact that the Superintendent of the Eastern State Hospital fails to take an obligation with surety will not defeat the right of the hospital to recover for the care and support of a non-resident patient if there was an agreement between the hospital authorities and the husband of the patient.

RICHMOND, VA., April 3, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of March 30th, to the Attorney General, with reference to the case of Mrs. Fanny Daniels, now an inmate of the Eastern State Hospital.

From this letter I note that you informed Mr. Daniels (I assume the husband of Mrs. Fanny Daniels) that inasmuch as she was a resident of the State of Illinois she would have to be returned to that State, and that in the meantime if her husband desired her cared for at the Eastern State Hospital it would be necessary for him to bear the expense of her support during that time, amounting to \$5.00 per week.

I note also that you on May 20, 1916, wrote the Chief of Police of Hopewell to the same effect.

Section 1677 of the Code of Virginia provides as follows:

On an application on behalf of any person for his admission into a hospital, the examining board may receive him as a patient therein, if the person making the application will execute and deliver an obligation, with sufficient surety (payable to the directors of such hospital by their corporate name), for the payment of such sums of money as may be agreed on between them for the maintenance and cure of such insane person while in the hospital; and for the expenses of his removal thereto or therefrom, when necessary.

Subsequent to this statute, which is found in the Acts of 1902-3-4, page 121, the legislature of 1908 passed an act providing that the estate or the personal representative of any citizen committed to an institution or asylum in Virginia shall not be charged with any expenses for his or her maintenance therein, but this last mentioned act is applicable only to citizens of Virginia.

I am of opinion, therefore, that it was within the authority of the board of your hospital to enter into a contract under section 1677 of the Code of Va., 1904, for the admission of Mrs. Daniels to the hospital and to require of her husband an obligation with sufficient surety for the payment of the agreed sum.

It does not occur to me that the mere fact that you failed to take an obligation with surety as provided in this section would defeat the right of the hospital to recover for the care and support of Mrs. Daniels, if there was an understanding between you and her husband that he should pay \$20.00 per month therefor.

In other words, the law would seem to permit you to enter into such a contract, and the question of whether or not there was a contract is, of course, a question of fact.

In this connection I beg, however, to submit to you copy of an opinion rendered by Attorney General Anderson on facts somewhat similar to those stated in your letter to the present Attorney General, but in this opinion Attorney General Anderson holds that non-resident insane persons are to be cared for as if they were residents of this State and to be returned as soon as practicable to proper authorities of the State or county from which such non-resident comes.

In the instant case, however, it would seem to be a case of a non-resident innocent person received into the hospital under a contract.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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*INSURANCE—Fires—Prosecutions for—Special attorneys—Duties of Commissioner of Insurance—Chapter 112, Acts of 1906.*—It is the duty of the Commissioner of Insurance to investigate the origin of fires but no duty is placed upon him to prosecute persons charged with the crime of arson. His duties are limited to the gathering of evidence or to the causing of the arrest of the accused and to the furnishing of evidence to the Commonwealth's attorney.

*Same—Commonwealth's attorney, duty of.*—It is the duty of the Commonwealth's attorney to prosecute persons charged with arson and such duty was not changed by chapter 112 of the Acts of 1906, the Virginia insurance law.

*Same.*—It is not a duty of the Commissioner of Insurance to prosecute for the crime of arson and he is not authorized by law to engage the services of an attorney

to conduct such prosecutions. Therefore, the payment of attorneys fees and expenses in a prosecution for arson is not one of the expenses of the Department of Insurance, and cannot properly be paid out of the public treasury.

RICHMOND, VA., November 5, 1917.

HON. CHRISTOPHER B. GARNETT, *Chairman,*  
*State Corporation Commission,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your request for my opinion as to whether you should approve for payment out of the public treasury a certain claim submitted in the following language:

State Bureau of Insurance, to  
 S. L. Kelly, Dr.

|   |          |
|---|----------|
| To fee in prosecution of case of <i>Commonwealth v. Rouse</i> , in Isle of Wight county, representing the Bureau of Insurance and also the Commonwealth (the Commonwealth's attorney being unable to act), including advising with court and Marion asylum authorities as to disposition of prisoner; preparing six indictments against Rouse, for arson, attempted arson, and house breaking, and presenting them to grand jury, continuing cases to succeeding term, preparing answer to petition of prisoner for writ of habeas corpus, and arguing the same before Judge White..... | \$350.00 |
| To expenses, two trips to Norfolk and two to Isle of Wight.....   | 26.00    |
| To eight phone calls to Norfolk and Isle of Wight.....  | 10.20    |
|   | <hr/>    |
|   | \$386.20 |

FOR BUREAU OF INSURANCE,  
 Approved

JOS. BUTTON,  
*Commissioner of Insurance.*

This claim is submitted for your approval under the provisions of section 5 of the insurance act (Chap. 112, Acts 1906, Vol. 3, Code, p. 580), where it is provided that the expenses of the Bureau of Insurance, unless otherwise provided, "shall be paid out of the public treasury, upon the order of the State Corporation Commission." The question which therefore arises is whether the claim above referred to may properly be considered as one of the expenses of the Bureau of Insurance.

The insurance act, above referred to, makes it the duty of the Commissioner of Insurance to investigate the origin of fires and places upon him certain specific duties in relation thereto. (See secs. 17, 18, 19, 20, 21 and 22.)

Section 21 provides as follows:

If the Commissioner of Insurance shall be of opinion after investigation as to the cause or origin of any fire, that there is sufficient evidence to charge any person with the crime of arson, or with incendiary burning of property, he shall cause such person to be arrested and charged with such offense, and shall furnish to the Commonwealth's attorney of the city or county all such evidence, together with the names of witnesses, and all information obtained by him, including a copy of all pertinent and material testimony taken by him touching such offense.

Neither the above quoted section nor any other section in the act makes it the duty of the Commissioner of Insurance to prosecute persons charged with the crime of arson. On the contrary, his duties are limited to the gathering of evidence, the

causing of the arrest of the accused and furnishing the evidence to the Commonwealth's attorney. Here his duties are at an end. The crime of arson is not created by the insurance act, but that crime and the duty of the Commonwealth's attorney to prosecute person charged therewith remains as fixed in the criminal statutes of the State.

There being no duty upon the Commissioner of Insurance to prosecute for the crime of arson, it follows that he is not authorized by law to engage the services of an attorney to conduct such prosecutions, especially since that duty under the general statutes devolves on the Commonwealth's attorney.

It is observed that on the face of the claim it is stated that the Commonwealth's attorney was unable in this case to act. The reason for his inability to act does not appear; but, be this as it may, there is no authority vested in the Commissioner of Insurance to designate an attorney to act for the Commonwealth.

My conclusion, therefore, is that the payment of attorney's fees and expenses in the prosecution of arson is not one of the expenses of the Department of Insurance, and that the present claim should not be ordered by your honorable body to be paid out of the public treasury.

This conclusion is reached reluctantly for the reason that the letter of the Honorable Commissioner of Insurance directed to you under date of October 12th, contains the information that such claims have heretofore been approved by former chairmen of the commission—Judges Crump and Prentis, for whose opinions I have the greatest respect.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

INSURANCE—*Marine insurance companies—Bonds to be deposited by—Section 1271-a, Code of Virginia, 1904.*—Chapter 112, Acts of 1906, was repealed by chapter 11, sub-section 14 of chapter 112 of the Acts of 1906 and therefore the insurance companies doing business in this State are required to deposit with the Treasurer of Virginia bonds equal to 5% of the capital stock of such company or not less than \$10,000 and not more than \$50,000.

*Same.*—The fact that an insurance company has enormous assets and is perfectly solvent does not except it from the operation of the law which requires every insurance company doing business in Virginia to deposit bonds with the Treasurer.

*Same.*—Marine insurance companies are required to deposit bonds with the Treasurer of Virginia as provided by chapter 112 of the Acts of 1906.

*Same.—Right of Insurance company to do business in Virginia.*—Method suggested by which the insurance company could test the validity of its claim to do business without depositing the bonds required by law.

RICHMOND, VA., *March 13, 1917.*

HON. JOSEPH BUTTON,  
*Commissioner of Insurance,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of March 9th, enclosing a letter from Messrs. Appleton & Cox, attorneys for the subscribers of United States Lloyds, with the request that I give the same careful perusal, and inform you if there is any suggestion I can make with regard to the contents of the letter.

This letter has reference to an opinion rendered by Assistant Attorney General Leslie C. Garnett on July 21, 1916, in which he holds that section 1271-a of the Code, 1904, providing that insurance companies doing exclusively a marine business in this State shall not be required to deposit security with the Treasurer is repealed by the Acts of Assembly, 1906, being an act concerning the Bureau of Insurance, chapter 11, sub-section 14, Code of Va., 1910, Vol. 3, page 595, which provides that unless otherwise provided in this chapter, every insurance company shall deposit with the Treasurer of the State of Virginia bonds equal to 5% of the capital stock of said company or not less than \$10,000.00 and not more than \$50,000.00.

The opinion of the assistant attorney general also holds that companies doing exclusively a marine business do not come within the exceptions provided in this act, and that sub-section 39 of chapter 8 of the act, providing that all acts and parts of acts in conflict with this act are repealed, repeals section 1271-a of the Code as aforesaid.

Upon an examination of the statute, I concur in the opinion of the assistant attorney general, and while the unquestioned solvency and enormous assets of Lloyds is, to an extent, a protection to the people of Virginia dealing with that company, this does not warrant me in holding this company to be an exception to the law which requires every insurance company doing business in Virginia to deposit bonds with the Treasurer.

It was suggested by your correspondents that you confer with the Attorney General to ascertain whether under the Virginia procedure and practice any proceeding would lie to obtain a court review of the holding of the Attorney General's office and a judicial construction of the statute.

Of course, we shall not undertake to advise the attorneys for these parties how to proceed, but if the Commissioner of Insurance should refuse to issue certificates to the subscribers of United States Lloyds to do business in Virginia on the ground that they had not complied with the statute requiring insurance companies to deposit bonds with the Treasurer, a mandamus would perhaps be the proper remedy to test the question.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

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*INSURANCE—Power of attorney of insurance company—Chapter 112, Acts of 1906.*—The power of attorney given the Commissioner of Insurance by an insurance company or a fraternal benefit association under section 6 of chapter 5 of chapter 112 of the Acts of 1906 by which the Commissioner of Insurance is constituted the true and legal attorney of said company or association for the service of process, continues in force so long as any liability remains outstanding in this State against any such company or association and the fact that such company or association withdraws from this State and reorganizes does not nullify the power of attorney given the Commissioner of Insurance, so long as any liability against it exists in this State.

RICHMOND, VA., *March 13, 1917.*

HON. JOSEPH BUTTON,  
*Commissioner of Insurance,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter to the Attorney General, enclosing a copy of your letter to Mr. J. Crawford, secretary, Brotherhood Accident Company,

of Boston, Mass., also a letter of February 6, 1917, from Hon. Frank H. Hardison, Insurance Commissioner of the State of Massachusetts.

From these communications it appears that the Brotherhood Accident Company was formerly licensed to transact business in Virginia as a fraternal beneficial association and filed its power of attorney appointing the Commissioner of Insurance its statutory agent. After doing business in Virginia for some years and issuing insurance to policy holders in this State it withdrew and was later reorganized as a stock company. It is suggested in the letter of the Insurance Commissioner of the State of Massachusetts that the reorganization of the fraternal company as a stock company nullifies the power of attorney given you in 1906, while you insist that the authority imposed upon you by the power of attorney continues so long as any liability remains outstanding in this State, and such service in this State shall alone be a legal service.

So far as the assets of the Brotherhood Accident Company are concerned and for the purpose of giving jurisdiction to the courts of this State, I am of the opinion that your construction of the law is clearly right and that the power of attorney given you by this company under section 6 of chapter 5 of the act approved March 9, 1906, by which you were constituted its true and lawful attorney for service of process, continues in force "so long as any liability remains outstanding in this State."

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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INSURANCE—*Policies—Applications for—Type in which printed.*—Under the insurance laws of Virginia while it would seem that the copy of the application for a policy of insurance against bodily injury or disease is made a part of the policy if the application is printed in less than ten point type and the copy of the application is printed in ten point type or larger although this purports to be a copy of the application it is not such a copy and because the original is in smaller type than permitted by law, although a part of the policy, would not be binding on the insured as to restrictions and conditions printed in smaller type than that required by law.

*Same.*—The Commissioner of Insurance has the power to require insurance companies issuing policies of insurance against bodily injury or disease to provide application blanks printed in at least 10 point type.

RICHMOND, VA., June 1, 1917.

HON. JOSEPH BUTTON,  
*Commissioner of Insurance,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of the 31st ultimo to the Attorney General, in which you desire to be advised as to whether under the insurance laws of Virginia a policy is within the law if the type in which the original application is printed is less than ten point type, while the copy of the application printed on the policy complies with the law and is in ten point type or larger.

By reference to the act regulating policies of insurance against bodily injury or disease, page 85 of the insurance laws, to which you direct my attention, it is provided that no such policy shall be issued or delivered in this State in substance un-

less it contains a provision that such policy, with a copy of the application therefor, if any, and of such other papers as may be attached to or annexed thereto, shall constitute the entire contract of insurance.

Under this provision it would seem that the copy of the application is made a part of the policy. However, if the application itself is printed in less than ten point type and the copy of the application is printed in ten point type or larger, manifestly although this purports to be a copy of the application, it is not such a copy.

I am of opinion that if the insured were to dispute that the printed form attached to the policy purporting to be a copy of the application was not such a copy, and demanded the production of the original in any dispute, and it appeared that the original application was in smaller type than permitted by the law, the court would have to say that the original was a part of the policy, for the reason that it is that portion of the contract which the insured signed, and if that portion of it was in such small type as not to call to the insured's attention restrictions and conditions, the object of the law in requiring the policy and the copy of the application to be in ten point type, would be entirely defeated.

I am of opinion, therefore, that even though the law requires that the copy of the application, together with the policy and other papers attached to the policy, shall constitute the entire contract of insurance, for a company to be permitted to print the application in small type and the copy thereof in the type required by law would be to work a fraud upon the insured and that, therefore, you would be justified in requiring insurance companies doing this character of business to provide application blanks in at least ten point type.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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INSURANCE—*Statutes—Construction of—Section 8, Chapter 2 of Chapter 112 of the Acts of 1906, as amended—Chapter 5 of Chapter 112 of the Acts of 1906—Section 17 of Chapter 5 of Chapter 112 of the Acts of 1906.*—When chapter 5 of chapter 112 of the Acts of 1906 was amended by chapter 229 of the Acts of 1914 all parts of the original act not expressly re-enacted were intended by the legislature to be repealed. Therefore, under the provisions of chapter 5 of chapter 112 of the Acts of 1906, as amended by chapter 229 of the Acts of 1914 the Commissioner of Insurance cannot require the payment of \$2.50 upon the service of process on him under the statute in actions against societies and associations as provided for in this chapter of the insurance act prior to its amendment and re-enactment.

RICHMOND, VA., August 2, 1917.

HON. JOSEPH BUTTON,  
*Commissioner of Insurance,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your request that this office advise you whether or not you can require the deposit of \$2.50 provided for by section 8 of chapter II of chapter 112 of the Acts of 1906, as amended, in the case of service of process upon a fraternal beneficial association or other order or society, provided for by chapter 5 of chapter 112 of the Acts of 1906, as amended by chapter 229 of the Acts of 1914.

As chapter 5 of chapter 112 of the Acts of 1906 read, prior to its amendment, it was provided by section 6 of chapter 5, in addition to the present provisions of

section 17 of chapter 5 that when legal process against any such order was served upon the Commissioner of Insurance, the plaintiff in such process should pay to the Commissioner of Insurance at the time of such service a fee of \$2.50, which should be recovered by him as a part of the taxable costs if the plaintiff finally prevailed in the suit. As amended and re-enacted by chapter 229 of the Acts of 1914, the provisions of section 6 of chapter 5, as originally enacted was amended, and embodied in section 17 of the amended statute, which section in its present form reads as follows:

Every society, whether domestic or foreign, now transacting business in this State shall, within thirty days after the passage of this act, and every such society hereafter applying for admission, shall, before being licensed, appoint in writing the Commissioner of Insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society and that the authority shall continue in force so long as any liability remains outstanding in this State.

Copies of such appointment, certified by said Commissioner of Insurance, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the Commissioner of Insurance, or in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society; provided, however, that no such service shall be valid or binding against any society when it is required thereunder to file its answer, pleading or defense in less than thirty days from the date of mailing the copy of such service to such society. When legal process against any such society is served upon said Commissioner of Insurance he shall forthwith forward by registered mail one of the duplicate copies prepared and directed to its secretary or corresponding officer. Legal process shall not be served upon any such society except in the manner provided herein.

The title of chapter 229 of the Acts of 1914 is as follows:

An act to amend and re-enact chapter 5 of an act entitled an act concerning the Bureau of Insurance, and insurance, guaranty, trust, indemnity, fidelity, security and fraternal benefit companies, associations, societies and orders, and imposing penalties for its violation, approved March 9, 1906, and acts amendatory thereof.

The enacting clause of the act reads as follows:

Be it enacted by the General Assembly of Virginia, That chapter 5 of an act entitled an act concerning the Bureau of Insurance, and insurance, guaranty, trust, indemnity, fidelity, security, and fraternal benefit companies, associations, societies and orders, and imposing penalties for its violation, approved March ninth, nineteen hundred and six, and acts amendatory thereof, be amended and re-enacted so as to read as follows.

It will, therefore, be seen that chapter 5 of chapter 112 of the Acts of 1906 was by this act amended, and under the decision of the Court of Appeals in *Somers' Case*, 97 Va. 759-761, all parts of the original act not expressly re-enacted were intended by the legislature to be repealed. It therefore follows that under the provisions of chapter 5 of chapter 112 of the Acts of 1906, as amended by chapter 229 of the Acts of 1914, you cannot require the payment of \$2.50 as provided for in this chapter of the insurance act prior to its amendment.

You have called my attention, however, to section 8 of chapter II of chapter 112 of the Acts of 1906, as amended by the Acts of 1912, which reads as follows:

Whenever lawful process against any such company shall be served upon the Commissioner of Insurance, he shall forthwith mail a copy of such process to the company, or in case of companies of foreign countries, to the resident manager, if any, in this country. For each copy of process the commissioner shall collect two dollars and fifty cents, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable costs if he prevails in the suit. A judgment, decree or order of a court entered or made against any such company after service of process or notice as aforesaid shall be as valid and binding on said company as if it had been incorporated under the laws of this State and served with process or notice therein. (As amended by act approved March 13, 1912.)

This section is embraced in chapter II of chapter 112 of the Acts of 1906, which is entitled "General Provisions," which chapter contains provisions intended to apply to insurance companies generally.

While the question may not be free from doubt except for the provisions of section 4 of chapter 5 of chapter 112 of the Acts of 1906, as amended by chapter 228 of the Acts of 1914, I am of the opinion that in view of this latter section, that section 8 of chapter II of chapter 112 of the Acts of 1906 does not apply to the case in question. Section 4 of chapter 5 of the insurance laws, as amended by the Acts of 1914, reads as follows:

Except as herein provided, such societies shall be governed by this act and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relation with the State, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.

It will be observed that chapter 5 of the insurance law was amended and re-enacted in 1914 while section 8 of chapter II of the insurance laws was amended and re-enacted in 1912. Therefore, anything contained in the latter statute in conflict with the provisions of the former must be construed as repealed by implication or so far as relates to the provisions of the latter act in conflict therewith, or must be construed as inapplicable to the provisions of the latter act.

It being expressly provided by section 4 of chapter 5 of the insurance laws, as amended, that except as therein provided, such societies should be exempt from all provisions of the insurance laws of the State, not only in governmental relations with the State, but for every other purpose, I am of the opinion that section 8 of chapter II of the insurance laws cannot be construed as relating to the service of process upon societies and associations, provided for by chapter 5 of the insurance laws, as amended, and, therefore, that upon service of process upon you in suits against such associations, you are not entitled to demand the \$2.50 provided for in section 8 of chapter II of the insurance laws, as amended.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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INTOXICATING LIQUORS—*Object of Virginia prohibition law—Chapter 146—Acts of 1916.*—Chapter 146 of the Acts of 1916 is a general prohibitory measure designed to prevent the sale and use of ardent spirits and by the terms of the statute itself its provisions must be liberally construed to effect these objects.

*Same—Keeping of ardent spirits—Bona fide home.*—It is unlawful to keep ardent spirits except in a *bona fide* home and by the definition of the word home as found in section 61 of chapter 146 of the Acts of 1916 it is clear that a person cannot have such a *bona fide* home in a hotel or boarding house, as to permit the keeping there of ardent spirits. Therefore, a permanent roomer or guest in a hotel who has ardent spirits therein violates the prohibition law.

RICHMOND, VA., December 18, 1916.

HON. J. SIDNEY PETERS,  
Prohibition Commissioner,  
Richmond, Va.

DEAR SIR:

Referring to my conversation with you and Hon. Guy T. Horner, attorney for your department, on December 12th, and my subsequent conferences with Mr. Horner on December 13th, will say that I have taken under consideration the question propounded, which I re-state as follows:

A married man, employed in the powder plant at Hopewell, occupies a room in the hotel at that place. His family resides in another city. There is found in his room whiskey in excess of one quart, and that he is a permanent and not a transient guest in said hotel. Under these circumstances you wish me to advise you whether there has been a violation of any provision of the prohibition law.

Chapter 146 of the Acts of 1916 is a general prohibitory measure, designed to prevent the sale and use of ardent spirits, and section 58 thereof declares that its provisions shall be liberally construed to effect these objects.

Section 3 of the act declares "it shall be unlawful for any person in this State to \* \* \* keep \* \* \* ardent spirits" except as afterwards provided in the act. It is necessary, therefore, in order to lawfully "keep" ardent spirits, to look to the terms of the act permitting the keeping thereof.

Section 16 provides that it shall be unlawful for ardent spirits to be kept in certain enumerated places (club houses, etc.) and adds "or in any place, except in a *bona fide* 'home' as hereinafter provided.

Section 17 provides that it shall be unlawful to keep ardent spirits in a place reputed to be a house of prostitution, "or in any place except as provided in this act."

From these sections it is the clear intention of the act to make the keeping of ardent spirits unlawful except as permitted by the act, and by section 16, as above mentioned, it is expressly declared unlawful to keep ardent spirits except in a *bona fide* "home" as afterwards provided in the act.

Section 61 defines the word home as follows:

\* \* \* the word "home," as used herein, shall be the permanent residence of the person and his family, and shall not be construed to include a club, fraternity house, lodge room or rooms, or place of common resort, or room of a guest in a hotel or boarding house, provided that any transient guest may carry in his baggage for the *bona fide* use of himself or family not in excess of one quart of ardent spirits, the same not to be opened or used, or given away by such transient guest during his stay in said hotel or boarding house.

It is perfectly manifest from this definition that the legislature intended to forestall the claim that a person could have such a *bona fide* home in a hotel or boarding house as to permit the keeping there of ardent spirits, and was designed to prevent the keeping and using of such liquors in public places.

Under the state of facts submitted by you, it is unnecessary to give any opinion as to the general question of what or what is not a home, and indeed it is doubtful if any general opinion could or should be given as to this question, for each case arising might present different facts.

Even upon the strictest construction, the definition of a home, set out in section 61, however, expressly excludes the idea that a man, with or without his family, can establish such a *bona fide* home in a hotel as to permit him to keep there ardent spirits.

I am, therefore, of opinion that the permanent roomer or guest in a hotel at Hopewell who has ardent spirits therein violates the prohibition law, and that the keeping of ardent spirits in such a place is in conflict with both the spirit and the letter of the act.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

INTOXICATING LIQUORS—*Bona fide home*.—Chapter 146 of the Acts of 1916 prohibits a guest even with a family from establishing in any hotel such a *bona fide* home as will permit him to keep ardent spirits therein, the evident purpose of the legislature being to prevent the keeping and use of ardent spirits in public places. The one exception to this is that a transient may keep in his baggage one quart of ardent spirits not to be used or opened in the hotel.

*Same*.—Form of instruction to jury in such case.

RICHMOND, VA., December 19, 1916.

HON. J. SIDNEY PETERS,  
*Prohibition Commissioner,  
Richmond, Va.*

DEAR SIR:

I acknowledge your request for an opinion upon the correctness of an instruction offered by Hon. Guy T. Horner, of the legal force of your office, in the case of *Commonwealth v. Sam Harmon*, charged in the corporation court of Hopewell with unlawful keeping of ardent spirits.

Ordinarily it would be improper for me to express an opinion upon a matter in this form, and I hesitate to do so under any circumstances, but being assured by you that Judge Devaney desires my opinion in the premises, I shall depart from the usual rule.

According to the notes I have before me, the instruction Mr. Horner offered is as follows:

Should the jury believe from the evidence that the defendant, Sam Harmon, was a guest in the Chesterfield Hotel and had in his room and possession the ardent spirits exhibited, you must find him guilty.

I understand that it is urged against this instruction that the prohibition act permits a person to have in his possession in his home a gallon of whiskey and that if the room in the hotel constituted a home and permanent place of abode for the defendant, and constructively for his family, he could not be convicted.

My opinion as to this proposition of law is set forth in a letter to you of December 18, 1916, in which it is held that the legislature expressly prohibits a guest, even with his family, from establishing in a hotel such a *bona fide* home as will permit him

to keep ardent spirits therein. The evident object of the legislature was to prevent the keeping and use of ardent spirits in such public places, and, therefore, forbids its keeping in such hotel except it permits a quart to be kept by transients in their baggage but not to be used or opened in the hotel.

I assume that the defendant in this case was not a transient guest, and that perhaps more than one quart was found in his possession, which precluded the setting up of the defense that he was a transient guest, and I therefore think the instruction correct.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

It might be well to offer the instruction in the next trial somewhat as follows, suiting the instruction to the facts of the case, of course:

The court instructs the jury that no person can have such a home in a room or rooms in a hotel as to permit the keeping therein of the ardent spirits permitted by law to be kept in a *bona fide* home, and therefore if the jury believe that the defendant had in his possession in his room in the Chesterfield Hotel ardent spirits, they must find him guilty.

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INTOXICATING LIQUORS—*Destruction of—Chapter 146, Acts of 1916.*—The Governor has no authority to reverse any order of a court in any given case directing the destruction of ardent spirits, which have been seized for violation of the prohibition law. The only way by which ardent spirits so seized can be kept until disposed of by the legislature is by the courts continuing the cases upon their dockets and not entering an order directing the destruction of such ardent spirits until the legislature has an opportunity to meet and provide for the disposal of such ardent spirits in some manner for the general good.

RICHMOND, VA., *June 2, 1917.*

HON. HENRY C. STUART,

*Governor of Virginia,*

*Richmond, Virginia.*

DEAR SIR:

I beg to acknowledge receipt of the communication to the Attorney General from the secretary to the Governor, enclosing correspondence between himself, Mr. Judson C. Dickerman, engineer of the State Corporation Commission, and the Commissioner of Prohibition, with the request that the Attorney General advise you whether or not you have authority to follow the suggestions made by Mr. Dickerman to prevent the destruction of whiskey seized under the prohibition law until the legislature meets, and a provision can be made for utilizing stock on hand. Mr. Dickerman suggests that the destruction of this whiskey is an unwarranted waste of useful war material, and that inasmuch as there are many hundreds of gallons collected in the State, it should be conserved for the public good and the manufacture of munitions and in the manufacture and use of valuable food products.

Section 28 of the prohibition act provides that the liquor found upon any searched premises "shall be destroyed, by order of the court, and the containers shall be sold or destroyed." I am of the opinion that you have no authority to reverse any order of the court in any given case directing the destruction of liquor which has been seized for violation of the prohibition law.

This is a matter which, it seems to me, can be taken care of only by the judiciary of the State. There is great force in the suggestion made by Mr. Dickerman that this is a useless waste of very valuable material, and if the judges of the State, in whose courts ardent spirits are now held by seizure, agree with Mr. Dickerman that it is a very unnecessary waste of useful material, I do not believe that any objection could be urged to the courts continuing the cases upon their dockets and not entering an order destroying such ardent spirits until the legislature has an opportunity to meet and provide for the disposal of these ardent spirits in some manner for the general good.

As I have said, this matter, however, must be addressed to the discretion of the courts in the cases as they arise.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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**INTOXICATING LIQUORS—Storage of seized ardent spirits—Administrative board of city of Richmond, powers as to.**—Ardent spirits stored in violation of law must be seized under the terms of chapter 146 of the Acts of 1916 and eventually destroyed by an order of court. Pending the final order of the court in such cases the ardent spirits are in the custody of the court under whose jurisdiction they were seized. Therefore, it necessarily follows that the court has the authority to store such ardent spirits pending a final order in the case and a proper enforcement of the law requires that courts be given sufficient storage space where seized ardent spirits can be safely held pending the order for destruction thereof or its return to the person from whom seized.

RICHMOND, VA., June 2, 1917.

ADMINISTRATIVE BOARD,  
*Richmond, Virginia.*

DEAR SIR:

In the necessary absence of the Attorney General, I have before me for consideration a letter of the clerk to your board, of May 29th, requesting that the Attorney General be kind enough to render the board an opinion as to whether or not the board can provide, under the prohibition act, sufficient storage space to take care of alcoholic liquors in the custody of the police justice of the city of Richmond.

Under the provisions of the prohibition act, the right of search for ardent spirits is given, and when such ardent spirits are found in violation of the law, the ardent spirits found upon the premises searched are required to be seized and eventually destroyed by an order of the court. Therefore, pending the final order of the court in such cases, the ardent spirits should properly be considered in the custody of the court, under whose jurisdiction they were seized. This being true, it would seem to be a very necessary implication that the court has the authority to store these ardent spirits pending a final order in the case. Indeed, a proper enforcement of the law would seem to require that the courts should be given sufficient storage space where seized ardent spirits can be safely held pending the order for its destruction or its return to the person from whom seized, as the case may be.

In this connection, I am sending a copy of my letter today written the Governor of Virginia on a kindred question.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General*

*INTOXICATING LIQUORS—Prescriptions and affidavits—Fees of clerks of courts—Chapter 146, Acts of 1916—Duty of the Attorney General.*—Inasmuch as charges made by clerks of courts for filing applications, entering orders and issuing certificates for licenses to sell soft drinks cannot come out of the public treasury, the right of clerks to charge for the same is not a question upon which the Attorney General should pass but is a matter solely between the applicant and the clerks.

*Same—Section 3505, Code of Virginia, 1904, as amended.*—In view of the provision of section 3505 of the Code of Virginia, 1904, as amended, permitting clerks to charge a fee for entering and copying an order granting a license and administering an oath where necessary it would not seem unreasonable for the clerk to claim the fee specified in this section for entering and copying an order granting a license to sell soft drinks.

*Same.*—It is no part of the duty of the Attorney General to express an opinion as to whether or not clerks of courts may lawfully charge for receiving and filing prescriptions and affidavits under chapter 146 of the Acts of 1916.

RICHMOND, VA., November 28, 1916.

HON. J. SIDNEY PETERS,  
*Prohibition Commissioner,  
Richmond, Va.*

DEAR SIR:

I beg to acknowledge your letter to the Attorney General, enclosing letter from Mr. H. H. Holt, clerk of the circuit court, Hampton, Va., letter of Mr. Harry Burnett, clerk of the circuit court of Augusta county, and correspondence with the Auditor of Public Accounts.

You desire to be advised:

(1) As to whether the clerks of the circuit courts are permitted to make charges of fees for filing applications, entering orders and issuing certificates for licenses to sell soft drinks.

(2) Whether such clerks may lawfully make charge for receiving and filing prescriptions and affidavits under chapter 146 of the Acts of Assembly, 1916.

Inasmuch as any charges made by the clerks in the foregoing instances cannot come out of the public treasury, you will appreciate that this is a matter upon which this office would not feel at liberty to express an official opinion. It is a matter solely between the applicant and the clerks, and if the parties in interest are not satisfied their redress, of course, is by application to the proper court for relief.

For your information, however, I call attention to section 3505 of the Code, volume 4, page 496, which specifies certain cases in which clerks are entitled to fees. In this section I find the following: "For entering and copying an order granting a license and administering an oath where necessary seventy-five cents."

In view of this provision of this section, it would not seem unreasonable for the clerk to claim a fee of 75 cents for entering and copying an order granting a license to sell soft drinks. I find no other section allowing any other fee to the clerk in the issuing of licenses.

I find also in the same section of the Code that the clerk is entitled to a fee of twenty cents for filing a paper on the side of the plaintiff or defendant, for which no particular fee is allowed. This is evidently the section under which the clerk in Hampton claims a fee of twenty cents for filing the affidavit or prescription under

chapter 146 of the Acts of 1916, but as to the right of the clerks to fees in the premises I am, as above stated, unwilling to advise you, because the matter is not within your jurisdiction nor mine.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

INTOXICATING LIQUORS—*Stamp tax—Chapter 146, Acts of 1916.*—The stamps required by chapter 146 of the Acts of 1916 are to be placed only on those affidavits required for the purchase or delivery of ardent spirits. Therefore, no stamp should be required on the reports made by managers of hotels, chemical laboratories, hospitals and drug stores licensed under chapter 146 of the Acts of 1916 to buy, store and use, ardent spirits.

RICHMOND, VA., *March 6, 1917.*

HON. J. SIDNEY PETERS,  
*Prohibition Commissioner,  
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your recent inquiry, which is in the following terms:

Under the provisions of the Mapp prohibition law, chapter 146, Acts of 1916, managers of hotels, chemical laboratories, hospitals and drug stores licensed under the said act to buy, store and use ardent spirits and all druggists are required to file with the clerk of the circuit court having jurisdiction a monthly report, or inventory, setting forth:

- (1) Amount of ardent spirits on hand the first of the previous month.
- (2) The amount of ardent spirits acquired during the next previous month.
- (3) The amount of ardent spirits on hand the first day of the month of the report.

The law requires that these reports be sworn to by the persons submitting them. Does the law require that a five cent Virginia State revenue stamp must be affixed to the aforesaid reports?

Section 67, chapter 146 of the Acts of 1916, reads as follows:

Every prescription and affidavit required by this act shall have affixed thereto and duly cancelled by the initials in ink of the person affixing the same, a five cent stamp, to be furnished to druggists, transportation companies and other persons handling such prescriptions and affidavits, who shall keep such stamps for that purpose in stock. Said stamps shall be prepared by the commissioner and sold by him to the parties required by law to handle the same. The persons for whom the prescriptions are given and the persons making the affidavit shall pay for the stamps affixed thereto. All money received by the commissioner from the sale of stamps or otherwise under this act shall be paid into the treasury of the State, and shall there be accounted for as a separate fund.

And by section 14 of chapter 146 of Acts of 1916, which so far as is applicable to the question here under consideration reads as follows:

Each retail and wholesale druggist shall file a sworn statement with the circuit court on or before the fifth of each month, stating the amount of pure

fruit, ethyl, and grain alcohol, pure whiskey and pure brandy and wine on hand on the first of the previous month, and amount received during the previous month, and the amount on hand on the date the statement is made. Nothing in this act shall prevent the superintendent of a hospital from ordering, purchasing or receiving ardent spirits, or the superintendent of a chemical laboratory from ordering, purchasing or receiving pure grain, ethyl or pure fruit alcohol for the use of the hospital or laboratory, not to be used contrary to the provisions of this act, and nothing shall prevent common carriers from transporting and delivering such ardent spirits and alcohol to such hospitals or laboratories having license to order and receive the same, but before ordering or receiving said ardent spirits or alcohol the hospital or laboratory shall procure license from the court under the same conditions as license is granted to druggists; provided, further, that it shall be unlawful for any hospital to sell ardent spirits except upon prescription to its own patients under the same restrictions and reports required of druggists; and provided, further, that chemical laboratories shall make report as required of druggists of the disposition and use of all alcohol received by them.

Each manager of any licensed hotel shall file a sworn statement, with the clerk of the court which granted the license, on the first of each month, stating the amount of ardent spirits, wines and alcohols on hand on the first of the previous month, and the amount received during the previous month, and the amount on hand on the date the statement is made.

It would seem from the first clause of section 67 above quoted that a stamp must be affixed to *every affidavit*, which term, if it were not for the context, would be construed to include such sworn statements as are referred to in section 14, but a careful examination of the context shows that it was the intention of the General Assembly to require the stamp only on those "affidavits" required in the purchase or delivery of ardent spirits.

I am, therefore, of the opinion that no stamps should be required on the reports referred to.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

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INTOXICATING LIQUORS—*Advertisement of—Chapter 146, Acts of 1916.*—Under the provisions of chapter 146 of the Acts of 1916 a label containing the name and address of the shipper of ardent spirits to a Virginia consignee is in violation of the law against advertising the person from whom or the firm or corporation from which or the place where ardent spirits may be obtained.

*Same—Section 10410 U. S. Comp. Stats. 1916—(Cr. Code section 240.)*—The federal law governing the transportation of liquor in interstate commerce merely requires the same to be labeled on the outside cover, so as to show the name of the consignee, the nature of the contents of the package and the quantity contained therein and does not conflict with the provisions of section 19 of chapter 146 of the Acts of 1916, prohibiting the advertisement of the person from whom or the firm or corporation from which or the place where ardent spirits may be obtained.

Therefore, a label on a package containing ardent spirits which has the quantity of spirits printed thereon is in violation of the Virginia law, if the name and address of the consignor is on such label.

RICHMOND, VA., June 6, 1917.

HON. J. SYDNEY PETERS,  
*Commissioner of Prohibition,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication of May 22nd, enclosing letter with attached label from Hagerstown Brewing Co., Inc., together with a letter from that company, which letter is in the following terms:

We take the liberty of addressing you regarding the prohibition law of your State to ask if the combination of the two enclosed labels on a shipment of 32 12 oz. bottles of beer (3 gallons) is within the law and covering the provisions thereof?

The enclosed labels pasted together so as to form one label read as follows:

ALL BOTTLES AND CASES NOT RETURNED ARE CHARGED FOR.  
RETURN EMPTY CASES AND BOTTLES PROMPTLY.

If received by Freight, Return by Freight  
If by Express, by Express.

TO  
HAGERSTOWN BREWING CO.,  
(Incorporated)  
Cor. Franklin and Foundry Sts.,  
HAGERSTOWN, MARYLAND.

FOR.....

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Leave this label on—it shows who returned the case.

3 GALLONS BEER.

This question is governed by the provisions of section 19 of chapter 146 of the Acts of 1916. This section, so far as is applicable to the question here under consideration, provides as follows:

Sec. 19. It shall be unlawful (1), to advertise upon any street car, railroad car or other vehicle of transportation, or any public place or resort, or upon any sign or billboard, or by circular, poster, price list, newspaper, periodical, or otherwise within this State ardent spirits, or to advertise the manufacture, sale, keeping for sale or furnishing of the same, or the person from whom, or the firm or corporation from which, or the place where, or the price at which, or the method by which the same or any of them may be obtained; provided that manufacturers and wholesale druggists licensed under this act shall be permitted to send price lists to those to whom they are permitted to sell ardent spirits under this act; (2) to circulate or publish any written or printed matter, other than newspapers and periodicals published beyond the confines of this State for which an obligation has been incurred or money paid, in which any advertisement in this section specified shall appear, or to permit any sign, or billboard, containing such advertisement to remain upon one's premises; or to circulate any price list, order blank or other matter for the purpose of inducing or securing orders for such ardent spirits no matter where located. Any sheriff, constable or police officer is authorized to remove any such advertisement from any sign, billboard, or other public place when it comes to his notice, and shall do so upon demand of any citizen.

It will be observed that section 19, among other things, makes it unlawful to advertise "the person from whom, or the firm or corporation from which, or the place where, or the price at which, or the method by which ardent spirits may be obtained." Also, it is unlawful "to circulate or publish any written or printed matter, other than newspapers and periodicals published beyond the confines of this State for which an obligation has been incurred or money paid in which any advertising in this section specified shall appear." Under these provisions of the law, I am of the opinion that a label similar to the one above set out, which contains the name and address of the vendor or manufacturer of ardent spirits contained in the package violates the above quoted provisions of section 19 of chapter 146 of the Acts of 1916, since such label advertises the person from whom, or the firm or corporation from which, or the place where ardent spirits may be obtained. It, therefore, follows that unless the name and address of the consignor of ardent spirits is required to be placed on packages offered for interstate shipment by some federal law, which, so far as interstate commerce is concerned, would be paramount to a State law applying to the same subject, I am of the opinion that such label violates section 19 of chapter 146 of the Acts of 1916. So far as I have been able to discover, the only federal law governing the subject of this opinion is found in section 10410 U. S. Comp. Stats. 1916 (Cr. Code, section 240). This section provides as follows:

Whoever shall knowingly ship or cause to be shipped from one State, territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, territory or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country, into any State, territory or district of the United States or place non-contiguous to but subject to the jurisdiction thereof, any package of or package containing any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States and may be seized and condemned by like proceedings, as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.

This law merely provides that liquor offered for interstate transportation shall be "so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents and the quantity contained therein" in no way conflicts with the provisions of section 19 of chapter 146 of the Acts of 1916, so far as the question under consideration here is concerned, and, therefore, I conclude that such label cannot be lawfully used on shipments of intoxicating beverages made into this State.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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INTOXICATING LIQUORS—*Advertisement of—Chapter 146 of the Acts of 1916.*—

An advertising circular designed for the discouragement of the use of intoxicating liquors, showing the picture of a bar room, the sign of which advertises "Brook Hill Whiskies" and which contains printed matter on the same page discouraging the use of ardent spirits is not in violation of section 19 of chapter 146 of the Acts of 1916, as the evident effect of the circular is not to promote the use of intoxicating liquors, but the contrary.

**FLAG**—*Flag of the United States—Use of for advertising purposes—Chapter 356 of the Acts of 1916.*—Chapter 356 of the Acts of 1916 governs the use of the United States Flag in this State for advertising purposes.

**GAMBLING**—*Country fairs and church bazaars.*—The statutes of Virginia prohibit gambling in all places and make no exception in favor of country fairs and church bazaars.

RICHMOND, VA., December 19, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of December 12th, enclosing communication from Mr. Joe Beatty Burtt propounding the following questions which you request me to answer:

1. Has Virginia any statute governing the use of the United States Flag for advertising purposes?

*Ans.*—The General Assembly of 1916 passed the following act to prevent the desecration of the Flag of the United States:

1. Be it enacted by the General Assembly of Virginia that any person who in any manner, for exhibition or display, shall place, or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away, or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise, upon which shall have been printed, painted, attached, or otherwise placed a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark or distinguish the article, or substance, on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for not more than thirty days, or both, in the discretion of the court.

2. The words flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be either of said flag, standard, color or ensign, of the United States of America, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, standard, or ensign of the United States of America.

3. This act shall not apply to any act permitted by the statutes of the United States of America or by the United States Army and Navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in correspondence, on any of which shall be printed, painted or placed said flag, disconnected from any advertisement. (Chapter 356, Acts 1916; volume 4, Va. Code, p. 1170.)

2. Is it a violation of the advertising section of the prohibition act (section 19, chapter 146, Acts 1916; volume 3 of Va. Code, p. 1110) to send the circular enclosed in Mr. Burt's letter to citizens of Virginia?

*Answer.*—The pictures on said circular show the entrance to the liquor saloon in the Masonic Temple in Chicago; the sign at the entrance reads "Masonic Temple Buffet-Brook Hill Whiskies;" one picture shows the sign in place at the saloon entrance; another picture shows the workmen in the act of taking down the sign; and a third picture shows the sign removed from the building. The printed matter going with the pictures and printed on the same page shows clearly that the purpose of the pictures is to show that the Masonic order in Chicago has directed that liquors should not be sold on their properties. The circular referred to was used by the National Crime Prevention Committee, an organization which from said circular seems to be conducting a movement against saloons and gambling houses.

Although the circular matter enclosed shows the picture of a barroom, the sign of which advertises Brook Hill Whiskies, yet, when taken together with the printed matter on the same page it appears plainly that the circular would not serve to advertise ardent spirits; but on the other hand is calculated to discourage the use of such spirits. The evident effect of the circular is not to promote the use of intoxicating liquors but quite to the contrary.

I am, therefore, of the opinion that the circular enclosed in Mr. Burt's letter may be lawfully distributed in Virginia.

3. What is the law of Virginia governing gambling at county fairs and church bazaars?

*Answer.*—The statutes of Virginia prohibit gambling in all places, and make no exceptions in favor of county fairs and church bazaars.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

INTOXICATING LIQUORS—*Justices of the peace—Jurisdiction of—Chapter 146, Acts of 1916.*—A justice of the peace has the right to issue warrants for the arrest of persons suspected of violating the Virginia prohibition law and is also authorized to hold a preliminary examination in such case. Section 24 of chapter 146 of the Acts of 1916 merely gives to courts of record the exclusive power to punish violators of the act.

RICHMOND, VA., *September 21, 1917.*

JOHN H. STUMP, ESQ., J. P.,  
*East Radford, Va.*

DEAR SIR:

Acknowledgment is made of your letter of September 19, 1917, in which you request me to advise you whether a justice of the peace has authority to issue a warrant for a violation of chapter 146 of the Acts of 1916 and to hold preliminary hearings in such cases.

It is provided by section 24 of chapter 146 of the Acts of 1916, that the circuit, corporation or hustings courts having jurisdiction of the trial of criminal cases shall have exclusive original jurisdiction for the trial of all cases arising under this act except that mayors, police justices and others having jurisdiction for the trial of cases for the violation of ordinances of cities and towns shall have jurisdiction to try cases arising under ordinances passed by their respective cities and towns as provided for in this act.

This does not mean, however, that a justice of the peace has no right to issue warrants for the arrest of persons suspected of violating this law nor does it prevent a justice of the peace from holding a preliminary examination in such case. This section of the act merely gives to courts of record the exclusive power to punish violations of the act.

It is provided by section 22 of the act that every justice of the peace, upon complaint and information given under oath, that any person is manufacturing, selling, offering, exposing, keeping or storing for sale, barter, gift or use of ardent spirits contrary to the law, etc., "shall issue warrant requiring any person suspected to be brought before him or some other justice of the peace" and the house or other building to be searched.

In addition to this, the right of a justice of the peace to issue warrants for violations of chapter 146 of the Acts of 1916 and to hold preliminary examination in such cases, is recognized by section 23 of the act which provides as follows:

If upon examination of any person charged with the violation of any of the provisions of this act, it shall appear to the justice, judge, or mayor before whom the warrant is returned that there is probable cause to believe the accused guilty, he shall be required to enter into a recognizance in the penalty and with security to be approved by the said justice, mayor or judge to appear before the next term of the circuit, hustings or corporation court having jurisdiction to answer any indictment found against him. All material witnesses shall also be recognized, with or without security, as the justice, judge or mayor may deem proper, to appear before the grand jury, at the next term of the court having jurisdiction, to give evidence, and if the person so charged shall have been previously convicted of the violation of this act, the justice, judge or mayor may require of the person so charged to give bond with penalty and security, to be approved by said justice, judge or mayor, conditioned that he will not violate any of the provisions of this act until the charge against him has been tried or dismissed, and upon failure to give such bond, he shall be committed to jail until the bond is given, or he is discharged by the court.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

*INTOXICATING LIQUORS—Reed amendment of the post office appropriation bill—Duty of the Attorney General—Duty of the Commissioner of Prohibition—Federal question.*—Questions relating to the transportation of ardent spirits arising under the Reed Amendment to the post office appropriation bill are federal questions and do not come within the jurisdiction of the State authorities. Therefore, it is no part of the duty of the Attorney General or of the Commissioner of Prohibition to advise transportation companies as to their rights and duties under such statute.

*Same—Duty of Commissioner of Prohibition.*—The jurisdiction of the Commissioner of Prohibition in the enforcement of the Virginia prohibition law remains the same as before the adoption of the Reed amendment to the post office appropriation bill.

RICHMOND, VA., June 26, 1917.

HON. J. SYDNEY PETERS,  
*Commissioner of Prohibition,*  
*Richmond, Va.*

DEAR SIR:

On my return to my office this morning, I find your letter of June 22, stating that at the request of the Southern Express Company you are propounding the questions contained in your letter.

You will please inform said company that all of the questions upon which they desire your ruling are federal questions, and not within the jurisdiction of the State authorities, and if said company desires guidance in the premises, they must seek the same from their own counsel and from such rulings as may be made by the federal authorities.

Your jurisdiction in the enforcement of the Virginia law remains the same as before the adoption of the new federal act.

Yours truly,

JNO. GARLAND POLLARD,

*Attorney General.*

**JAILS AND PRISONERS**—*Conflicting rights of city and State to labor of jail prisoners*—Section 3933, Code of Virginia, 1904—Sections 3932, 3532, 3924, 3925 and 3936, Code of Virginia, 1904, as amended.—The State has a prior claim to the services of prisoners confined in jail for a misdemeanor or other violations of a State law to the right of a city or town to the services of such prisoners. Such prisoners are a part of the State convict road force upon the demand of the Superintendent of the Penitentiary and when demanded for such work by the Superintendent of the Penitentiary pursuant to law it is the duty of the court to comply with the request unless the prisoner should show to the judge good cause to the contrary, notwithstanding, however, that the city or town council may desire to have such prisoners work on the public works of the city or town.

*Same.*—Section 3932, Code of Virginia, 1904, as amended, has been modified by chapter 58 of the Acts of 1912, so that the State has the prior right to work jail prisoners convicted of the violation of State laws.

RICHMOND, VA., October 19, 1917.

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

DEAR SIR:

You inform me that the attorney for the city of Portsmouth claims that that city has a prior right to work on the streets and public works of that city prisoners confined in the city jail for offenses against the State laws, although the State may desire to work said prisoners on the roads. In support of this contention you inform me that he cites the following statutes:

Section 3932 of the Code (1910)  
Section 3933 of the Code (1904)  
Section 3532 of the Code (1910),  
Section 3924 of the Code (1910)  
Section 3925 of the Code (1910)  
Section 3936 of the Code (1910)

some of which are evidently referred to by mistake.

Section 3532 of the Code (volume 3) relates to the fees of the jailors for receiving, keeping and supporting prisoners and has no bearing on the question; section 3924 refers to vacancies in the office of county police and has no bearing on the question; section 3925 refers to the oath of police; and section 3936 refers to the working out of fines by members of chain-gangs and has no bearing on the question.

The only pertinent citations seem to be section 3932 of the Code (volume 3) and section 3933 (volume 2.)

The first section cited provides that the council of a city may establish chain-gangs.

For the purpose of working on the streets, roads and public property therein, and of working in or on any public property or works owned, leased or operated by such city \* \* \* Every male person above the age of sixteen years, convicted of a misdemeanor, or of an offense deemed infamous in law, and sentenced to confinement in jail as a punishment, or part punishment for such offense, or who is imprisoned for failure to pay any fine or penalty imposed upon or assessed against him upon such conviction, or upon conviction for any violation of an ordinance of any such city or town which by such ordinance is punishable by confinement in jail or fine, or any male person over sixteen years of age who has been convicted of being a vagrant, may be required to work in such chain-gang. \* \* \*

The section above quoted in its present form may be found in Acts 1908, p. 389, and went in force June 26, 1908.

Section 3933 providing for the government of chain-gangs remains as it appeared in the Code of 1904.

It should be seen from the above quotation that if the section quoted (3932) has not been changed by subsequent acts, the city of Portsmouth has the right to work its jail prisoners charged with offenses against the State laws, but I am of the opinion that the statute has been modified by subsequent legislation hereinafter referred to. I agree with my predecessor in office, Hon. Samuel W. Williams, in the opinion expressed by him in his report of 1913, p. 72, where he says:

No city or town has the right to work upon the local chain-gang any person confined in jail for a misdemeanor or other violation of a State law where there has been a demand made by the Superintendent of the Penitentiary for the delivery of such person to the State convict road force.

I base this opinion on the ground that section 3932 has been modified by chapter 58 of Acts of 1912, p. 100, volume 4 of Code, p. 647, wherein is amended section 1 of the State convict road force act, originally enacted as chapter 74 of Acts of 1906, (volume 3 of Code, p. 566, amended volume 4 of Code, p. 647.) The amendment referred to sets out how the State convict road force shall be constituted and provides that among said force shall be

"All persons now confined in our public jails, or who may be hereafter convicted and so confined shall, when delivered to the Superintendent of the Penitentiary \* \* \* constitute the State convict road force."

Section 3 of the State convict road force act provides that

Upon the written request of the Superintendent of the Penitentiary, the judge \* \* \* of the corporation or hustings court of any city shall in term or vacation, unless such prisoner shows to said judge good cause to the contrary, order any male person convicted of misdemeanor, etc. \* \* \* to be delivered by the jailor \* \* \* to or upon the order of the Superintendent of the Penitentiary to work in the State convict road force \* \* \* *provided, further, that prisoners convicted for the violation of city or town ordinances shall be liable primarily to work in the chain-gang on public works within said cities or towns at the request of the proper authorities thereof.*

Thus it will be seen by acts subsequent to that giving cities the right to work State prisoners from their jails on the public works of the city the General Assembly

made such prisoners a part of the State convict road force upon the demand of the Superintendent of the Penitentiary. If, therefore, the Superintendent of the Penitentiary should, in pursuance of statute, request the judge of the corporation or hustings court of the city of Portsmouth to deliver to or upon his order prisoners in the Portsmouth jail convicted of offenses against the laws of the State, I am of opinion that it would be incumbent upon the court to comply with the request (unless such prisoner should show to the judge "good cause to the contrary") notwithstanding the fact that the council of Portsmouth might desire to have said prisoners work on the public works of that city. In other words, I am of the opinion that the State has the prior right to work jail prisoners convicted of the violation of State laws.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

JAILS AND PRISONERS—*Peace bonds—Imprisonment for failure to give—When to be discharged—Section 4095, Code of Virginia, 1904.*—A prisoner committed to jail for failure to give a peace bond is to be discharged when the period for which the bond to keep the peace was required has elapsed.

RICHMOND, VA., May 18, 1917.

HON. J. B. WOOD,

*Superintendent, State Penitentiary,  
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your communication in which you request my opinion on the following state of facts:

I am sending you my file in reference to one Will Slemph, who you will note from the jailor's report of this county and also from the sheriff's letter of explanation was sent to us for twelve months in default of giving a bond of \$100.00. That is, he was tried as a vagrant and was required to give bond for \$100.00 in lieu of twelve months. He could not give the bond and was turned over to us.

Now there is some question as to whether we can hold a man on the roads under these conditions. Please give me your opinion in this matter and I would like to have it promptly, because if it is not right to hold him, I don't want to keep him a day longer, therefore, I will appreciate it if you will at your earliest convenience give me your reply.

An examination of the jailor's report and the correspondence enclosed with your letter shows that this man is not being confined as a vagrant, but for his failure to give a peace bond of \$100.00. Therefore, the term of his imprisonment is governed by the provisions of section 4095, Code of Va., 1904, which reads as follows:

A person not giving, and for whom no other person gives, a recognizance required, shall be committed to jail. He shall be discharged therefrom when such recognizance is given before the court or a conservator of the peace; or, if it be to appear and give evidence, when such evidence is given; or, if it be to keep the peace and be of good behavior, when the period for which it was required has elapsed; or, in any case, when the discharge of such person is directed by the court in whose jail he is.

You will, therefore, see that he is to be discharged when the period for which the bond to keep the peace was required has elapsed. The correspondence enclosed does not show what this date is.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

JUSTICES OF THE PEACE—*Jursidiction of*—Chapter 4106, Code of Virginia, 1904, as amended—Section 3956, Code of Virginia, 1904—Section 3958, Code of Virginia, 1904—Section 2942, Code of Virginia, 1904, as amended—*Issuance of warrants*.—Any justice of the county may issue warrants in case of either felony or misdemeanor regardless of the district in which the offense was committed.

*Same*—*Return of warrants*.—In felony cases the warrants may be made returnable to any justice of the county regardless of the district in which the offense was committed. In misdemeanor cases the warrant must be made returnable to and tried in and by a justice of the magisterial district in which the offense was committed.

*Same*—*Trial of warrants outside of district*.—(1) A justice may try a misdemeanor case outside of his magisterial district where the warrant was returnable to him and is removed by him to another magisterial district for good cause shown upon affidavit of the defendant.

(2) A justice may sit in another district than his own when associated by another justice to sit with him in accordance with section 2942 of the Code of Virginia, 1904.

RICHMOND, VA., September 4, 1917.

HON. H. CARLIN COCKRELL,  
*Justice of the Peace,*  
*Vienna, Va.*

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of August 31, 1917, in which you ask what jurisdiction a justice of the peace of one magisterial district of a county has in the other magisterial districts of the county in regard to felonies and misdemeanors committed in the county.

Section 4106 of the Virginia Code (Pollard's Supplement, 1910), in prescribing the jurisdiction of justices of the peace in criminal matters, provides:

The several police justices and justices of the peace, in addition to the jurisdiction exercised by them as conservators of the peace, shall have concurrent jurisdiction with the circuit courts of the counties and the corporation or hustings court of the corporations of the State in all cases of violation of the revenue and election laws of the State, and of offenses arising under the provisions of chapter one hundred and eighty-seven, sections thirty-eight hundred and one, thirty-eight hundred and two, thirty-eight hundred and three, and thirty-eight hundred and four of the Code of Virginia; and except when it is otherwise specially provided, *shall have exclusive original jurisdiction for the trial of all other misdemeanor cases occurring within their jurisdiction in their respective magisterial districts*, in all of which cases the punishment may be the same as the circuit courts of the counties and the corporation or hustings courts of the corporations are authorized to impose. \* \* \*

Section 3956 of the Code provides:

On complaint of a criminal offense to any such officer (*i. e.*, judge of a circuit or corporation court, or justice of the peace) he \* \* \* shall issue his warrant reciting the offense and requiring the person accused to be arrested and brought before a justice of the county or corporation, and in the same warrant, require the officer to whom it is directed to summon such witnesses as shall be therein named to appear and give evidence on the examination \* \* \* and provided further, that in cases of misdemeanor, where the warrant is issued by a justice or other person lawfully authorized to issue the said warrant in the county wherein the offense has been committed, the warrant shall be made returnable and tried in the magisterial district in which the offense was committed by a justice of the said district unless for good cause, shown by affidavit of the defendant, the justice before whom the said warrant is made returnable shall, in his discretion, remove the trial to some point in another magisterial district of the said county.

and section 3958 of the Code of Virginia provides:

An officer arresting a person under a warrant for an offense, shall bring such person before and return such warrant to a justice of the county or corporation in which the warrant issued, unless such person be let to bail as herein-after mentioned, or it be otherwise provided. In case of an arrest for a misdemeanor under a warrant issued by a justice or other person lawfully authorized to issue the said warrant in the county wherein the offense is committed, *the officer making the arrest shall bring such person before and return such warrant to a justice in the magisterial district of the county in which the offense was committed, as may be directed in the warrant.*

From these provisions, it will be readily seen that any justice of a county can issue a warrant in case of either felony or misdemeanor, regardless of the magisterial district in which the alleged offense was committed. If the offense complained of is a felony, then the magistrate may issue a warrant requiring the person accused to be arrested and brought before him, regardless of the magisterial district in which the offense complained of was committed, and of course, such magistrate may examine the witnesses in the case.

But in case of misdemeanors, the warrant must be made returnable and tried in the magisterial district in which the offense was committed and by a justice of that district. If, however, the defendant produces good cause to such justice for the removal of the *trial of the case*, the justice before whom the warrant is made returnable shall, in his discretion, remove the trial to some point in some other magisterial district of the county. In case of such removal, it would appear that the justice removing the trial of the case out of his magisterial district would have a right to try the case in the district to which it was removed.

It is provided by section 2942, as amended (1904, p. 44) that in trial of all warrants, both civil and criminal, upon application of the defendant at any time before the trial before a justice of the peace who issued said warrant and before whom it was returnable, the said justice of the peace who issues said warrant, shall associate with himself two other justices of the county who shall try said warrant.

It will be noted that this section provides that the justice of the peace shall associate with two other justices "of the county" and not "of the district," so that it is not necessary for the justice to select the other justices in such a case from his magisterial district. The conclusion must therefore be reached, that a justice of the peace is authorized to sit in another district than his own when requested by another justice to sit with him, and while he is selected for a district, he can act as such in another district of the county.

To sum up:

*Issuance of warrants.*—Any justice of the county may issue warrants in either felonies or misdemeanors, regardless of the district in which the offense was committed.

*Return of warrants.*—In felonies, the warrants may be made returnable to any justice of the county, regardless of the district in which the offense was committed.

In misdemeanors, the warrant must be made returnable to, and tried in, and by a justice of, the magisterial district in which the offense was committed.

*Trial of warrants outside of district.*—(1) A justice may try a misdemeanor outside of his magisterial district where the warrant was returnable to him and is removed by him for trial to another magisterial district for good cause shown upon affidavit of the defendant.

(2) A justice may sit in another district than his own when associated by another justice to sit with him in accordance with section 2942 of the Code.

Yours very truly,

J. D. HANK, JR.,  
Assistant Attorney General.

JUSTICES OF THE PEACE—*Juvenile and domestic relations courts—Police courts—Jurisdiction of—Chapter 56, Acts of 1914.*—Sub-section 3 of section 7 of chapter 57 of the Acts of 1914 is not broad enough to give the juvenile and domestic relations court of the city of Richmond jurisdiction in a case of a man charged with felonious assault on a child nor in prosecutions against persons charged with murder or manslaughter of a child. Such court has no jurisdiction over felonies committed by persons over the age of eighteen years.

*Same—Words and phrases—Ill treatment, abuse, abandonment or neglect.*—While the words ill treatment, abuse, abandonment or neglect as used in sub-section 2 of section 7 of chapter 57 of the Acts of 1914 have a broad meaning they were not used in the statute with the intent to confer jurisdiction upon the juvenile and domestic relations courts to hold preliminary hearings in felony cases, even where the prosecution is against the husband of the injured person.

RICHMOND, VA., June 25, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter addressed to the Attorney General, in which you request him to advise you on the following state of facts:

"A question has arisen between Judge Crutchfield, of the police court, and myself with regard to which court has jurisdiction in certain classes of cases.

Section 7 of chapter 57, Acts of General Assembly of 1914, page 82, prescribed the jurisdiction of this court. Of course, I know that this court does not have the power to finally determine any *felony* case (except to dismiss when there is no probable cause). The question has arisen, however, as to whether this court does not have the power to give a preliminary hearing in certain felony cases and certify them to the grand jury, just as the police court used to do in such cases.

The mooted question is:

1. (a) Does sub-section 2, section 7, cover case of a man charged with a felonious assault on his wife? (b) Does said sub-section cover case of a man charged with murder of his wife? In other words, do the words "ill-treatment, abuse, abandonment" give this court jurisdiction to hold preliminary hearing in a felony case?

2. Does sub-section 3, section 7, give jurisdiction in case of a man charged with a felonious assault on a child, such as rape, seduction or the like? (b) Does said sub-section cover case of a man charged with manslaughter or murder of a child?

It is provided by section 7 of chapter 57 of the Acts of 1914 (Va. Code, volume 4, page 907), as follows:

The special justices elected or appointed under this act shall be conservators of the peace within the corporate limits of the cities for which they are respectively appointed and within one mile beyond the corporate limits of

such cities; and shall have, within the corporate limits, exclusive original jurisdiction, and, within the territory one mile beyond said corporate limits, concurrent jurisdiction with the justices and the circuit courts of the counties of all the offenses following, that is to say:

(1) All offenses committed by children under the age of eighteen years against the laws of this Commonwealth or against ordinances of the respective cities for which each justice shall be elected.

(2) All prosecutions against men charged with ill-treatment, abuse, abandonment or neglect of their wives, and all prosecutions against parent, guardians or custodians charged with ill-treatment, abuse, abandonment or neglect of their children or wards.

(3) All cases involving the prosecution and punishment of persons over the age of eighteen years who are charged with offenses against children under that age, or with causing, aiding in or contributing to the delinquency or dependency of such children; and,

(4) All cases affecting the protection, care, custody or control of children under the age of eighteen years, of which justices of the peace or police justices now have or shall be given jurisdiction; and said special justices shall, in all such cases, possess the jurisdiction and exercise all the powers conferred upon justices of the peace and police justices by the laws of this State. Such justices shall have such other powers and jurisdiction as may be conferred upon them by the councils of their respective cities, not in conflict with the Constitution and laws of the United States and of the State of Virginia. There shall be an appeal from the judgment of such special justice to the corporation or hustings court of the corporation, as now or hereafter provided by law from the judgments of justices of the peace or police justices.

You will observe from the above quoted provisions of section 7 of chapter 57 of the Acts of 1914 that the justices of juvenile and domestic relations courts, elected or appointed under the provisions of this act, are made conservators of the peace, and are given within the corporate limits of their cities and certain adjoining territory "exclusive original jurisdiction \* \* \* of all the offenses following," viz., those set out in the above quoted sub-sections.

Replying to your questions in the inverse order, I am of the opinion that sub-section 3 of section 7 of this statute is not broad enough to give you jurisdiction in the case of a man charged with a felonious assault on a child such as the classes named in your letter. I am also of the opinion that this section does not give you jurisdiction in prosecutions against persons charged with murder or manslaughter of a child. This section, you will note, gives your court jurisdiction of "all cases involving the prosecution and *punishment* of persons over the age of eighteen years who are charged with offenses against children under that age, or with causing, aiding in, or contributing to the delinquency of such children." Murder, manslaughter, rape and seduction all being felonies, cannot be punished in your court, and, therefore, I am of the opinion that you have no jurisdiction of such cases.

As to your first question, I am of the opinion that although the words "ill-treatment, abuse, abandonment or neglect" have a broad meaning, that they were not used by the legislature with an intent to confer jurisdiction upon your court to hold preliminary hearings in felony cases, even where the prosecution is against the husband of the injured person.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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JUSTICES OF THE PEACE—*Juvenile and domestic relations courts—Chapte 228, Acts of 1914—Chapter 57, Acts of 1914.*—A person over eighteen charged with a misdemeanor relating to the subjects of which the juvenile and domestic relations

courts are given jurisdiction may be tried for such offense by such court. If the offense charged, however, is a felony the juvenile and domestic relations courts have no jurisdiction. The juvenile and domestic relations courts have no jurisdiction over an adult charged with a felony committed against a child nor has such court jurisdiction in cases arising out of offenses committed against a wife by her husband when the offense amounts to a felony.

RICHMOND, VA., July 16, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of July 14th, addressed to the Attorney General, in which you request an opinion on the following state of facts:

One Ernest L. McCarty, white, age twenty-three, has been arrested on warrant charging that he "did unlawfully assist or cause the escape of Eva Brock and Sallie Bland from the juvenile detention home."

Both of these girls were under the age of eighteen years.

Chapter 228 of Acts 1914 provides for the punishment of any person over eighteen years of age "who shall cause or encourage any child under the age of eighteen to commit any misdemeanor."

I take it that the offense of assisting a child who is in custody to escape comes squarely under the provision of this act and therefore under the jurisdiction of this court. Judge Crutchfield, however, in view of the opinion of Mr. Garnett of a few days ago takes the position that the case is within the jurisdiction of his court. He has continued the case for final hearing until next Saturday.

It is provided by sub-section 3 of section 7 of chapter 57 of the Acts of 1914 that, among other offenses, your court shall have jurisdiction of:

3. All cases involving the prosecution and punishment of persons over the age of eighteen years who are charged with offenses against children under that age, or with causing, aiding in or contributing to the delinquency or dependency of such children.

It is provided, further, by sub-section 4 of section 7 of this statute that your court shall have jurisdiction of:

All cases affecting the protection, care, custody or control of children under the age of eighteen years, of which justices of the peace or police justices now have or shall be given jurisdiction, and said justices shall, in all such cases, possess the jurisdiction and exercise all the powers conferred upon justices of the peace and police justices by the laws of this State.

Without passing on the question as to the nature of the offense committed by McCarty, it is sufficient for me to say that if the offense with which he is charged is a misdemeanor, that under the terms of chapter 57 of the Acts of 1914 you have jurisdiction of the case. If, on the other hand, the offense charged is a felony, you have no jurisdiction.

The opinion given you by this office on June 25, 1917, merely expressed the view that you had no jurisdiction over an adult charged with a felony committed against a child; and, further, that you had no jurisdiction in cases arising out of offenses committed against a wife by her husband when the offense amounted to a felony.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

JUSTICES OF THE PEACE—*Juvenile and domestic relations courts—Police courts—Chapter 57, Acts of 1914.*—Juvenile and domestic relations courts created by chapter 57 of the Acts of 1914 have jurisdiction of all offenses committed by children under the age of eighteen years against the laws of this State, whether such offenses be felonies or misdemeanors.

RICHMOND, VA., August 4, 1917.

HON. JNO. J. CRUTCHFIELD,  
Police Justice,  
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your request that this office advise you as to whether your court or the juvenile and domestic relations court has jurisdiction over the preliminary hearing of an infant under the age of eighteen years, charged with the commission of a felony.

It is provided by section 7 of chapter 57 of the Acts of 1914, the statute providing for the creation of a juvenile and domestic relations court in certain cities of this State and prescribing the jurisdiction and duties of such court that the special justices elected or appointed to such office shall have within the corporate limits of the city, exclusive original jurisdiction, and within the territory one mile beyond said corporate limits concurrent jurisdiction with the justices and circuit courts of the counties of all offenses committed by children under the age of eighteen years against the laws of this Commonwealth. Sub-section 1 of section 7 of chapter 57 of the Acts of 1914, the section relating to this subject, reads as follows:

All offenses committed by children under the age of eighteen years against the laws of this Commonwealth or against ordinances of the respective cities for which each justice shall be elected.

The language, "all offenses committed by children under the age of eighteen years against the laws of this Commonwealth," is very broad, and I am of the opinion was intended to give the juvenile and domestic relations courts, provided for by chapter 57 of the Acts of 1914, jurisdiction of both felonies and misdemeanors committed by children under the age of eighteen years against the laws of this Commonwealth.

The opinion is not in conflict with that given Hon. Jas. Hoge Ricks by this office on June 25, 1917, in which it was held that sub-section 3 of section 7 of chapter 57 of the Acts of 1914 was not broad enough to give the juvenile and domestic relations court of the city of Richmond jurisdiction in the case of an adult charged with a felonious assault on a child, the opinion on that subject being based upon the peculiar wording of sub-section 3 of section 7 of the statute, which provided that the juvenile and domestic relations court should have jurisdiction of "all cases involving the prosecution and *punishment* of persons over the age of eighteen years who are charged with offenses against children under that age, or with causing, aiding in or contributing to the delinquency or dependency of such children."

The juvenile and domestic relations court being given jurisdiction of cases against persons over the age of eighteen years who are charged with offenses against children of that age, only in those cases which involve the prosecution and punishment of such persons, it was held that under sub-section 3 of section 7 of chapter 57 of the Acts of 1914, the juvenile and domestic relations courts have no jurisdiction of such cases.

The question here is different, however, as the statute gives the justices of domestic relations courts jurisdiction of all offenses committed by children under the age of eighteen years against the laws of the Commonwealth without any qualifying limitation.

Very truly yours,

LEON M. BAZILE,

*Law Assistant.*

**JUSTICES OF THE PEACE—Associate justices—Section 3972, Code of Virginia, 1904.**—In a criminal proceeding before a justice of the peace, the accused has no authority to summon of his own accord other justices to sit in the trial of the case with the presiding justice. Section 3972 of the Code of Virginia, 1904, merely authorizes the justice to whom the complaint is made or before whom the prisoner is brought of his own accord to associate with himself other justices of his county or corporation not exceeding two. When so associated by such justice the associate justices become a part of the court and as such are entitled to the fees prescribed by law.

**Same—Section 2942, Code of Virginia, 1904, as amended.**—Under section 2942 of the Code of Virginia, 1904, as amended, in the trial of all warrants whether civil or criminal, upon the application of the defendant at any time before trial the justice who issued the warrant is required to associate with himself two other justices of the peace of the county to try the case with him. It is not necessary to accompany such application by an affidavit. The party is entitled to have two justices of the peace sit in the trial with the justice who issued the warrant and before whom it is to be tried, merely upon his application requesting that such justices be associated in the trial of the case.

RICHMOND, VA., November 23, 1916.

ERNEST L. ALGER, ESQ.,

*Millwood, Va.*

DEAR SIR:

Acknowledgment is made of your letter of November 20, 1916. Your first inquiry is as to section 3972, Code of Virginia, 1904, which section reads as follows:

A justice to whom complaint is made, or before whom a prisoner is brought, may associate with himself other justices of the county or corporation, not exceeding two, and they may together execute the powers and duties before mentioned, but in case of disagreement in opinion, the opinion of the justice to whom the complaint is made, or before whom the prisoner is brought, shall prevail when one justice is so associated with him, but in case there be two justices associated with him, the opinion of the majority shall prevail.

Under the provisions of this section in a criminal proceeding before a justice of the peace the accused has no authority to summons of his own accord other justices to sit in the trial of the case with the presiding justice. This section merely authorizes the justice before whom the complaint is made, or before whom the prisoner is brought, of his own accord, to associate with himself other justices of his county or corporation not exceeding two. When so associated by the justice to whom complaint is made or before whom the prisoner is brought the associate justices become a part of the court and as such are entitled to the fees prescribed by law.

The questions asked in your letter are also affected by the provisions of section 2942 of the Code of Virginia, 1904, as amended by the Acts of 1914. This section as amended reads as follows:

The justice shall try such warrant according to the principles of law and equity, and give judgment for the sum due to either party, with interest, or for the property to which the plaintiff is entitled (or its value), with damages and costs shall be awarded or refused to either party on like principles; provided, 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 is returnable, the said justice of the peace who issued said warrant shall associate with himself two other justices of the peace of the county who shall try said warrant, and in case of disagreement in opinion, the opinion of the majority shall prevail; provided, further, that no such trial of any civil warrant shall be had within five days after the service of the warrant, except with the consent of the parties.

You will, therefore, see that under the provisions of this latter section in the trial of all warrants, whether civil or criminal, upon application of the defendant at any time before trial to the justice of the peace who issued the warrant and before whom it is returnable the said justice who issued the warrant is required to associate with himself two other justices of the peace of the county to try the case with him. This section before its amendment applied only to civil cases, and it was necessary for the defendant to make an affidavit stating that he believed that he could not obtain justice before the justice of the peace who issued the warrant but before whom it was returnable. In the amendment to this section this provision was left out, and, therefore, under the law as it stands at present it is unnecessary for a defendant in either a civil or a criminal warrant to make such affidavit, but he is entitled to have two justices of the peace sit in the trial with the justice issuing the warrant and before whom it is to be tried merely upon his application requesting that such justice be associated in the trial of the case.

Very truly yours,

JNO GARLAND POLLARD,

*Attorney General.*

JUSTICES OF THE PEACE—*Associated justices in the trial of cases*—Section 3972, Code of Virginia, 1904.—A justice to whom complaint is made or before whom the prisoner is brought may of his own accord associate with himself other justices of his county or corporation not exceeding two. When so associated the associate justices become a part of the court and as such are entitled to the fees prescribed by law for a justice for the trial of a case.

*Same.*—*Fees to be taxed for clerk of court by justice of the peace.*—The proper fees to be taxed by a justice of the peace for a clerk of court in a misdemeanor case where the defendant is fined is \$1.25.

RICHMOND, VA., March 22, 1917.

ERNEST L. ALGER, ESQ.,

*Milkwood, Va.*

DEAR SIR:

Acknowledgment is made of your letter of March 13, 1917, addressed to the Attorney General in which you request him to answer the following questions:

1. Section 3972, Code of Va., says a justice may associate with himself other justices of the county not exceeding two, and these so associated may

form a full court. Please advise if the presiding justice has the power to call these two justices of his own accord if he deems the case requires it in behalf of the Commonwealth.

2. Also advise what fee these two justices are entitled to, they being called away from their place of business to the place of court, both in a misdemeanor as well as a felony charge.

3. Also in taxing up costs, what is the proper cost to be taxed up as clerk's fee in a case of misdemeanor where the defendant is fined.

Section 3972 of the Code reads as follows:

A justice to whom complaint is made, or before whom a prisoner is brought, may associate with himself other justices of the county or corporation, not exceeding two, and they may together execute the powers and duties before mentioned, but in case of disagreement in opinion, the opinion of the justice to whom the complaint is made, or before whom the prisoner is brought, shall prevail when one justice is so associated with him, but in case there be two justices associated with him, the opinion of the majority shall prevail.

It seems very clear from the provisions of this section of the Code that the justice before whom the complaint is made, or before whom the prisoner is brought may of his own accord associate with himself other justices of his county, or corporation, not exceeding two. As the Attorney General wrote you under date of November 23, 1916, "when so associated by the justice to whom the complaint is made, or before whom the prisoner is brought, the associate justices become a part of the court, and as such are entitled to the fees prescribed by law." This answers your second question, the associate justices being entitled to the regular fees prescribed for a justice for the trial of a case.

In reply to your third question, the fee in such a case is \$1.25.

Yours very truly,

LEON M. BAZILE,  
*Law Assistant.*

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JUSTICES OF THE PEACE—*Fees of*—Section 3530, Code of Virginia, 1904, as amended.—A justice of the peace who issues a warrant is entitled to receive 50 cents therefor whether the warrant charges a misdemeanor or a felony. For trying or examining a case of misdemeanor a justice is entitled to 50 cents. For examining a charge of felony he is entitled to receive \$1.00. If in the trial of a felony case other justices are associated with the presiding justice each justice is entitled to receive \$1.00 for the trial of the same. If the case is a misdemeanor the fee of each justice would be 50 cents for the trial of the same.

RICHMOND, VA., April 10, 1917.

ERNEST L. ALGER, ESQ.,  
*Millwood, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter of April 9th, addressed to the Attorney General, in which you acknowledge receipt of his letter of March 22, 1917, and request him to advise you as to the following question, which you state thus:

That is, what fees these two justices are entitled to that leave their place of business and set with you forming a full court. Now as a matter of explanation is this—it has been the custom among the older magistrates

in a case like this to tax up \$1.00 for each one of these justices as their fee for service, and recently I have had a full court and did likewise and have been severely criticized by one of our lawyers and demanded to pay it back, which according to your reply I suppose was right, although the two older justices refused to return to me the 50 cents each that I overtaxed, and in order to settle this I have been asked by them to get your decision on this question, as they left their place and came two miles to my court. I received one dollar you know that is 50 cents for the warrant and 50 cents for service. These gentlemen claim they are entitled to the same and insist that that was what you meant. Kindly give me your decision.

This question is governed by the provisions of section 3530 of the Code of 1904, as amended by Acts of 1916, volume 4, Code, page 506, which so far as applicable to this question reads as follows:

For issuing warrant of arrest 50 cents; for trying or examining a case of misdemeanor 50 cents; for examining a charge of felony \$1.00 \* \* \*  
The said fees shall be in full of all services rendered in each case by a justice.

You will, therefore, see that a justice of the peace who issues a warrant is entitled to receive 50 cents therefor, whether the warrant charged is a misdemeanor or a felony; that for trying or examining a case of misdemeanor, a justice is entitled to receive 50 cents; for examining a charge of felony he is entitled to receive \$1.00. If the case tried was a felony case the justices who were associated with you were entitled to receive \$1.00 each. If it was a misdemeanor case, then they were entitled to only 50 cents each. The justice who issued the warrant was entitled to 50 cents for issuing the same, and if he sat in the trial of the case he was entitled to an additional 50 cents or \$1.00, depending upon whether the case was a misdemeanor or a felony.

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

Very truly yours,

LEON M. BAZILE,

*Law Assistant.*

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LIBRARY—*State manuscripts belonging to—Removal of same from library—Section 260, Code of Virginia, 1904.*—While in its broadest sense the word manuscript means anything written by hand in contra-distinction to that which is printed, it was not the legislative intent to prevent the removal from the State Library of anything that happens to be written rather than printed, regardless of whether it is an original or whether other copies of the same are in existence. The legislative purpose was to protect original manuscripts which cannot be replaced and therefore the State Library Board has the right in its discretion to lend out copies of the transcripts of the records of certain counties under such reasonable rules and regulations as the board may prescribe.

RICHMOND, VA., June 30, 1917.

MR. HENRY R. McILWAINE,

*State Librarian,*

*Richmond, Va.*

DEAR SIR;

I beg to acknowledge reference to the Attorney General of the letter of Honorable Armistead C. Gordon, accompanied by a copy of a letter to the State Library Board from Judge Alvin T. Embrey and Mr. Gordon's request that the Attorney General advise the State Library Board whether the board has the right to comply with Judge Embrey's request that copies of the transcripts of the records of Essex and

Rappahannock counties, which copies are now in the library, be permitted to be removed by him for the purpose of indexing same for the use of the county of Spotsylvania and the city of Fredericksburg.

The Attorney General is also in receipt of a letter from Judge Embrey bearing upon this subject, in which Judge Embrey takes the position that the purpose of section 260 of the Code was to prevent an original manuscript from being taken from the library, and not any manuscript when there were other copies or originals in existence.

The provision of section 260 of the Code, in point, is as follows:

Provided, that no manuscript of record of any kind, and no book, portrait, or relic of rare or historic value shall be taken from the library room by anyone, and no book shall be kept out of the library for more than two weeks.

Judge Embrey refers this office to two cases in which the word "manuscript" has been discussed, and I have examined the law under this heading in *Cyc. Bouvier*, *Black*, and "Words and Phrases," and the cases cited by Judge Embrey are practically the only cases referred to and I am not sure that they are very helpful in arriving at any solution of the question.

In its broadest sense, the word "manuscript" means anything written by hand, in contra-distinction to that which is printed. I cannot think, however, that the legislature intended to prevent the removal from the library of anything that happens to be written rather than printed, regardless of whether it was an original or whether there were other copies in existence.

The evident purpose of the legislature was to protect original manuscripts which could not be replaced, and I am therefore of the opinion that the State Library Board has the right, in its discretion, to comply with Judge Embrey's request under such reasonable rules and regulations as they may prescribe in the premises.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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*LICENSES—Commission merchants—Chapter 77, Acts of 1916—Virginia tax bill—Sections 48, 49.*—A person who sells farm produce on commission must register, as provided in section 2 of chapter 77 of the Acts of 1916, and in addition thereto, is required to pay the license tax provided for by sections 48 and 49 of the Virginia tax bill.

*Same.*—There is no distinction made between a person selling on commission farm produce turned over to him by a railroad and farm produce turned over by anyone else.

*Same.*—The law makes no distinction between a person selling on commission once a year and selling daily, and therefore, the infrequency of the act will not excuse a person selling on commission farm produce from complying with the law in regard to a commission merchant.

*Same.*—The fact that farm produce sold on commission is perishable and about to decay, does not justify one in acting as a commission merchant without first complying with the laws in regard thereto.

RICHMOND, VA., *September 24, 1917.*

HON. G. W. KOINER,  
*Commissioner of Agriculture,*  
*City.*

DEAR SIR:

Acknowledgment is made of your letter of September 21, which says:

H. G. LECKIE, Abert, Va., shipped a lot of peaches by express to "John Doe," a fruit dealer in Lynchburg. "John Doe" refused to take the peaches. The Southern Express Company at the request of H. G. Leckie, the consignor, delivered the peaches to the Lee Produce Company to be sold to the best advantage. The Lee Produce Company sold the peaches, rendered account sales and charged a commission. This seems to be a common practice.

Does such a transaction bring the Lee Produce Company under the provisions of the law in relation to the sale of farm produce on commission?

An act in relation to farm produce on commission, approved February 29, 1916, and contained in Pollard's Code, 1916, volume 4, p. 1082, provides in section 2 as follows:

On and after the first day of May, nineteen and seventeen, no person, firm, exchange, association or corporation shall receive, sell or offer for sale on commission within this State any kind of farm produce without having first obtained from the Commissioner of Agriculture and Immigration of the State of Virginia, a certificate of registration, as hereinafter provided.

Section 8 of the same act provides:

Any person, firm, exchange, association or corporation who shall receive or offer to receive, sell or offer to sell on commission, within the State, any kind of farm produce without a registered certificate, except as in this chapter permitted \* \* \* shall be guilty of a misdemeanor and shall be subject to a fine of not less than twenty-five dollars, or to exceed five hundred dollars, in the discretion of the court or jury trying the case.

Section 9 of the act provides:

Any law now existing requiring the licensing and the payment of a fee by commission merchants before doing business in the State of Virginia shall remain in force, the requirements of the act being in addition thereto.

Section 48 of the State tax bill, contained in Pollard's Code, 1916, volume 4, p. 600, provides that:

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

and section 49 provides that:

Every person, firm or corporation shall pay for the privilege of transacting the business of a commission merchant the sum of \$50.00, etc.

It will be seen, therefore, that where a person sells on commission farm produce he must register as provided in section 2 of the Acts of 1916, a portion of which is quoted above, and fulfill the other requirements of this act, and he must also, in accordance with the tax bill, sections 48 and 49, which are quoted from above, pay a license.

There is no distinction made between a person selling on commission produce turned over by a railroad and produce turned over by anyone else, and I am of the opinion that the facts stated in your letter brings the Lee Produce Company both within the provisions of the law in relation to selling farm produce on commission and contained in the act of 1916 above referred to, and also within the provisions of sections 48 and 49 of the State tax bill, above quoted from.

You have further advised me that the position is taken by the Lee Produce Company that these sales are not frequent but are isolated cases. The law makes no distinction between a person selling on commission once a year and selling daily, and I do not think the infrequency of the act will excuse a person selling on commission from complying with the law in regard to commission merchants.

You advise me that there is, in the city of Lynchburg, no commission merchant qualified under the act in relation to the sale of farm produce on commission, to handle farm produce which is about to decay because of the failure of the consignee to accept the same, as in the case above set out. This fact, however, does not justify one in acting as a commission merchant without first complying with the act referred to.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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LICENSES—*Engineers—Virginia tax bill, section 89.*—A civil engineer is not exempt from the payment of the license tax provided for by section 89 of the Virginia tax bill merely because he is employed by a city as such and devotes his time exclusively to such employment.

RICHMOND, VA., *October 18, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter of October 15th to the Attorney General calling attention to an opinion of the Attorney General's office that a civil engineer is not exempt from the State license tax because he is city engineer, also appending copies of two orders of the hustings court of the city of Richmond, entered on the 8th day of March, 1917, relieving certain persons from the State license tax because they were salaried employees, and requesting that we examine the law and advise you in regard thereto.

The Attorney General's office adheres to the opinion referred to by you, and given by the Hon. C. B. Garnett, and does not concur in the conclusion reached by the honorable hustings court in the orders above referred to.

I, therefore, recommend that you call upon the attorney for the Commonwealth to file a petition for a re-hearing in this matter with the request that he advise me when the same will come up for hearing in order that I may give him such assistance as I can.

I further recommend that in case the honorable hustings court, upon a re-hearing, remains of the same opinion as contained in said orders, petition for a writ of error be filed with the Supreme Court of Appeals in order that this matter may be finally determined one way or the other.

Yours very truly,

J. D. HANK, JR.,

*Assistant Attorney General.*

MILITARY—*Home guards, organization of.*—Recommendation to the Governor as to steps to be taken by him for the organization of home guards as contemplated by Senate Bill 995.

RICHMOND, VA., April 27, 1917

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

DEAR SIR:

At your request we have considered the matter of the formation of home guards, as contemplated by Senate Bill No. 995, now pending before the Congress of the United States.

We recommend the appointment by your excellency of a commission of five, to be known as the Home Defense Commission or State Committee on Public Safety or by any other designation which may seem proper to you, the said commission to be charged with the duty of formulating and executing a plan for the organization and training of home guards in the several localities where they may be needed.

We suggest that the senior officers of the home guards in the several localities be appointed by you as commander-in-chief upon the recommendation of the commission above referred to and that these officers be authorized to organize and command their respective home guards under such general rules and regulations as the commission may adopt, with the approval of the commander-in-chief.

Inasmuch as the bill referred to has not yet passed the House of Representatives, and its form may yet be changed, and for the further reason that we think that a study of the plan of organization of home guards in other States might prove profitable, we do not at this time offer any further plan in detail, especially since we believe that a commission such as that suggested would be in better position than the undersigned to formulate complete plans of operation. Such a commission would probably represent the different sections of the State and would have more intimate knowledge of local conditions and would also probably have before them in its final form the act of Congress and the information as to what was being done in the formation of home guards in our sister States.

Very truly yours,

JNO. GARLAND POLLARD.

Attorney General.

MILITARY—*Virginia State volunteers—Home guards—Oath of—Sections 300, 310, 168, 169 and 3102, Code of Virginia, 1904.*—Members of the home defense organization known as the Virginia State Volunteers are required to take the same oath that is prescribed for the members of the militia.

*Same.*—Statutes relating to above collected and digested.

*Same.*—Forms of oaths to be taken and subscribed by members of the home defense organization known as the Virginia State Volunteers.

HON. W. W. SALE,  
Adjutant General,  
City.

RICHMOND, VA., July 30, 1917.

DEAR SIR:

Acknowledgment is made of your letter of July 30, which is as follows:

In organizing home defense for this State, to be known as the Virginia State Volunteers, it is necessary that the men, who enlist shall take an oath, and I respectfully request your office to prepare the form of oath under the laws of Virginia which, in your judgment, is necessary to be taken.

I am of the opinion that the members of the home defense organizations to be known as the Virginia State Volunteers should be required to take the same oath that is prescribed for the members of the militia.

It is provided by section 300 of the Code of Virginia, 1904, that members of militia shall be enlisted under oath in addition to the oath prescribed by section 3102 of Virginia, faithfully to serve the State in case of war, invasion, the prevention or suppression of invasion, the prevention or suppression of riots, and in the aiding of civil officers in the maintenance and execution of the laws of the Commonwealth.

It is provided by section 310 of the Code of Virginia, 1904, that every commissioned officer, non-commissioned officer and private, before he enters upon his duties, shall take and subscribe, before any officer authorized to administer oaths, the oath prescribed by section 168 of the Code of Virginia, and that every officer, in addition, shall, unless his disabilities shall have been removed by the General Assembly, take and subscribe the oath prescribed by section 169 of the Code.

If his disabilities have been removed, he is required in lieu of the oath prescribed by section 169 to take and subscribe the oath prescribed by section 170 of the Code. This section provides, in addition to the above, that such oaths shall be taken by each officer and enlisted man as may be prescribed by the commander-in-chief.

I have, therefore, prepared to accompany this communication, forms of additional oaths for the officers of such an organization.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

*Forms of oaths to be taken and subscribed by members of the Home Defense, known as the Virginia Volunteers.*

#### TO BE TAKEN BY OFFICERS AND PRIVATES.

*Oath required by section 168 of the Code.*

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of Virginia, ordained by the convention which assembled in the city of Richmond on the 12th day of June, 1901, and that I will faithfully and impartially discharge and perform all of the duties incumbent upon me as a member of the Home Defense of the Commonwealth of Virginia, known as the Virginia State Volunteers, according to the best of my ability. So help me God.

State of Virginia, }  
\_\_\_\_\_ } to-wit: \_\_\_\_\_  
19\_\_\_\_ Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,

*Oath required by section 300, Code of Virginia, 1904.*

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will faithfully serve the Commonwealth of Virginia in case of war, invasion, and in the prevention or suppression of invasion, the prevention or suppression of riots, and in aid of the civil officers in the maintenance and execution of the laws of the Commonwealth. So help me God.

State of Virginia, }  
\_\_\_\_\_ } to-wit: \_\_\_\_\_  
19\_\_\_\_ Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,

ADDITIONAL OATHS TO BE TAKEN BY OFFICERS.

*For officers whose disabilities have not been removed by the General Assembly.*

I, \_\_\_\_\_, do solemnly swear (or affirm) that I have not, while a citizen of this State, since the 10th day of July, 1902, fought a duel with a deadly weapon, or sent or accepted a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly conveyed such challenge, or aided or assisted in any manner in fighting such duel; and that I will not fight a duel with a deadly weapon, or send or accept a challenge to fight a duel with a deadly weapon, either within or beyond the boundaries of this State, or knowingly convey such challenge, or aid or assist in any manner in fighting such duel during my continuance in office. So help me God.

State of Virginia, }  
\_\_\_\_\_ } to-wit: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_.

*Oaths to be taken by officers whose disabilities have been removed.*

I, \_\_\_\_\_, do solemnly swear (or affirm) that I have not, since the removal of my disabilities by an act of the General Assembly, approved the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, fought in a duel, the issue of which was or might have been the death of either party; nor have I been knowingly the bearer of any challenge or acceptance to fight a duel actually fought, nor have I been otherwise engaged or concerned, directly or indirectly in a duel actually fought since said time, nor will I during my continuance in office be so engaged, directly or indirectly. So help me God.

State of Virginia, }  
\_\_\_\_\_ } to-wit: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_,  
19\_\_\_\_.

The last two oaths are to be taken under the term of section 3110 of the Code of Virginia, 1904, by every officer, the form thereof being prescribed by sections 169 and 170 respectively of the Code of Virginia, 1904.

**MILITARY—Home guards—Carrying of weapons by.**—There is no State law which would prevent the drilling of home guards in a city or town with arms provided such arms are not concealed, and it is proper for the mayor of a city to grant such privilege to the home guards of his city.

**Same—Special police.**—As home guards are organized for the purpose of defending the lives and the property of the citizens of the State and to take the place of the State militia which has been called into regular service by the United States government the mayor of a city having authority to appoint special police officers has authority if he considers it necessary to swear in the home guards of his city as special police.

**Same—Mayor of Suffolk—Authority over police department.**—The mayor of Suffolk has authority to appoint special police officers for his city whenever he deems it necessary.

RICHMOND, VA., August 31, 1917.

HON. M. W. JOYNER,  
Mayor of Suffolk,  
Suffolk, Va.

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of August 31, which I have just received by special delivery. In this letter, you request the following information: First, whether you can grant the home guards of your home town the power to drill with arms. Second, whether the home guard can be sworn in by you as special police.

In regard to drilling with arms, there is no law in the State of Virginia to prevent such drilling, provided, of course, the arms are not concealed, and it would be entirely proper for you to grant such privilege.

In regard to the second question, I desire to call your attention to a portion of section 25 of the charter of Suffolk, contained in the Acts of Assembly, 1871-2, pp. 315 and 319, which provides:

\* \* \* He (the mayor) shall have control of the police of the town and may appoint special officers when he deems it necessary.

I have made a hasty examination—as thorough as possible—in order to give you an immediate reply, and do not find that this section of the charter under which your city is operated, has ever been amended by the legislature, therefore you have authority to appoint special police officers whenever you deem it necessary.

I understand that the home guards are being organized for the purpose of defending the lives and property of your citizens and to take place of the State militia, which has been called into regular service by the United States government. I am, therefore, of the opinion that you might well consider it necessary to swear in the guards as special police and would be within your rights in doing so.

Very truly yours,

J. D. HANK, JR.,  
Assistant Attorney General.

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MILITARY—*Federal draft law—Physicians.*—The constitutionality of the federal draft law is a question for the federal courts and not one on which the Attorney General should express an official opinion.

RICHMOND, VA., August 14, 1917.

DR. GEORGE KEESEE VANDERSLICE,  
Phoebus, Virginia.

DEAR SIR:

Acknowledgment is made of your letter of August 11th addressed to the Attorney General, in which you request his opinion as to the constitutionality of a special selective draft for doctors to fill up the medical corps of the army.

This is a question which comes under the jurisdiction of the federal authorities, and, therefore, it would be improper for this office to officially express an opinion on this subject.

As a matter of courtesy to you, however, I am referring you to 3 Cyc. 839, where in discussing this subject, it is said:

A statute authorizing the raising of a national military force by a draft is not repugnant to the Constitution which gives Congress power "to provide

for calling forth the militia \* \* \* to suppress insurrections," by interfering with the reserved rights of the States over their own militia.

Every citizen of sufficient age and capacity is under obligation to render military service to the country, when required, and is subject to draft for such service.

Regretting my inability to officially advise you, I am,

Yours very truly,

LEON M. BAZILE,

*Law Assistant.*

MILITARY—*Military fund*—V. M. I. Cadets—Section 376, Code of Virginia, 1904, as amended—Chapter 21, Code of Virginia—Section 304, 305, Code of Virginia, 1904—Sections 377, Code of Virginia, 1904, as amended.—The calling out of the V. M. I. cadets on the occasion of the visit of the British Commission to the Governor of Virginia cannot be considered "manifestly in execution of the general purpose" of chapter 21 of the Code of Virginia, 1904, dealing with the State militia, and, therefore, the transportation of the cadets in this instance cannot be paid out of the military fund.

RICHMOND, VA., September 4, 1917.

*His Excellency, H. C. STUART,*  
*Governor of Virginia,*  
*City.*

DEAR SIR:

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

Will you please advise if it would be legal to pay out of the military fund an account for transportation for the Virginia Military Institute cadets?

You further informed me that the transportation referred to in your letter was for the transportation of the Virginia Military Institute cadets to Richmond and return on the occasion of the visit of the British Commission to your excellency.

Section 376 of Virginia Code, volume 4, provides:

For carrying into operation the provisions of this chapter, it shall be the duty of the Auditor of Public Accounts to set aside, annually, to the credit of the Adjutant General, one and one-half per centum of all receipts into the treasury derived from regular sources of income, except the school fund, which sum so set aside shall constitute and be known as the "military fund," which is hereby appropriated to the uses and purposes set forth in this chapter; provided, however, that no other appropriation shall be made for the purpose aforesaid; provided, further, that the said fund shall only be drawn upon as needed from time to time.

The chapter referred to by this section is chapter 21 of the Virginia Code providing for the organization and maintenance of the Virginia volunteers.

Sections 304-5 of this chapter provide for the payment of officers and enlisted men of the Virginia volunteers and the payment of necessary expenses incurred in furnishing supplies, subsistence, quartering and transporting troops of the Virginia volunteers. I can find no provision in this act for the calling out of the Virginia Military Institute cadets nor for the payment of the expenses incurred in their transportation in case they are called out, the chapter contemplating only the expenses incurred by what is known as the State militia.

## REPORT OF THE ATTORNEY GENERAL

The only section save that above-quoted which deals with payments out of the military fund is section 377 of Virginia Code, volume 4, which provides for the military board and states that:

Expenditures not specifically provided for in this chapter but manifestly in execution of its general purpose and for the evident benefit of the volunteer service, may be made by the said board, but only on the concurrence and the order in writing of all the members.

I do not think the calling out of the V. M. I. cadets can be considered "manifestly in execution of the general purpose" of chapter 21 of the Code dealing with the State militia, and I am therefore of the opinion that the transportation of the cadets in the instance above mentioned cannot be paid out of the military fund.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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MILLS—Tolls—Section 1359, Code of Virginia, 1904.—Where wheat is ground for toll the miller is entitled to take one-eighth of the grain ground.

RICHMOND, VA., July 16, 1917.

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

DEAR SIR:

I have the honor to acknowledge the letter of the Secretary to the Governor of July 14, 1917, to the Attorney General, enclosing a letter from J. J. Vernon, of Palmyra, Virginia, inquiring as to the law in regard to the taking of tolls for grinding wheat, and requesting that the Attorney General give you his opinion thereon.

Section 1359 of the Code provides that all clean wheat of a merchantable quality weighing not less than sixty pounds to the bushel, brought to the mill, shall be ground as the party bringing the same shall direct into so much of the best extra, superfine or family flour as the wheat will produce; and there shall not be taken for toll more than one-eighth part of any grain of which the remaining part is ground into extra, or family, or super flour. If, however, the mill cannot, without great inconvenience, grind wheat into the best flour for toll, the owner of said mill may exchange flour for wheat at the following rates:

One barrel of extra flour for five bushels of wheat; one barrel of super-flour for four and one-half bushels of wheat; and one barrel of best family flour for five and one-half bushels of wheat, the quality of the flour to be determined by inspection, if required.

This seems to be the whole law of Virginia on the subject, and from this you will observe that where wheat is ground for toll, the miller may take one-eighth part of the grain ground. The statute, however, provides also an exchange rate as above set out.

Very respectfully yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

**NOTARIES—Who may be appointed—Governor—Powers of—Section 32, Virginia Constitution, section 923, Code of Virginia, 1904, as amended.**—While section 32 of the Virginia Constitution defines the persons who may be appointed notaries public, the residence provision of this section of the Constitution relates to officers of counties, cities, towns or other sub-divisions of the State and not to notaries public who are State officials. The Governor has the authority to appoint a notary for a county or city regardless of the place of his residence. The provision of section 923 of the Code of Virginia, 1904, as amended, that the removal of a notary from the county or corporation in which he resided when appointed unless such removal be to another county or city for which he may have been appointed vacates such office was not intended as a qualification of the power of appointment conferred on the Governor, but operates merely as a limitation upon the term of the notary.

RICHMOND, VA., June 1, 1917.

J. D. HANK, ESQ.,  
Law Building,  
Norfolk, Va.

MY DEAR HANK:

Acknowledgment is made of your letter of May 30th, addressed to the Attorney General, in which you request him to advise you on the following state of facts:

The question has arisen in Norfolk as to whether a resident of Portsmouth city can be granted a commission as notary for Norfolk city, where he transacts all his business, without also securing a commission for Portsmouth city.

The Constitution of Virginia, section 32, refers to notaries, but the provision in the first part of the section as to eligibility in the city or county in which he resides would appear not to apply to notaries; and section 923 of the Code states that the same person may be appointed a notary of two or more counties or cities, and, as a person can only live in one county, we take it that a person may be appointed for a county or city in which he does not reside without first being appointed a notary for the county or city in which he does reside.

Of course, you are aware of the fact that the Attorney General is the legal adviser of the officers and certain departments located at the seat of government, and, therefore, what is said here is unofficial and is written merely as a matter of courtesy to you.

This question, so far as I am able to find, has not been passed on by the courts of this State or by this office. As you say, section 32 of the Constitution defines the persons who may be appointed notaries public, and I agree with you that the residence provision of this section of the Constitution relates to officers of counties, cities, towns or other sub-divisions of the State and not to notaries public who are State officials. Therefore, your question must be answered in the light of the provisions of section 923 of the Code of Va., 1904, as amended (Va. Code, volume 4, pages 252, 253).

This section authorizes the Governor to appoint in and for the separate counties and cities of the State as many notaries as may to him seem proper. It also provides that the Governor may appoint the same person to serve for two or more counties and cities provided that notaries in cities or counties in which cities or parts thereof are located shall have authority to act as such in each of said localities or for one county and city. This section further provides that the notary shall give bond in the circuit court of the county or corporation or hustings court of the city for which he is appointed or before the judge of such court in vacation or before the clerk thereof. The section then provides that the "removal of a notary from the county or corporation in which said notary resides when appointed, unless said removal be to another

county or city for which said notary may have been appointed, shall be construed as a vacation of said office, and the clerk of said county or city shall at once inform the Governor of the fact, as well as of all deaths of notaries that may occur."

In the absence of this latter provision it seems to me clear that the Governor would have the authority to appoint a notary for a county or city regardless of his place of residence. It does not seem to me that the above quoted provision of the act, in reference to the removal of a notary from the county or corporation in which he resides was intended as a qualification of the power of appointment conferred on the Governor, but operates merely as a limitation upon the term of the notary. If this were not true then, the provision permitting the Governor to appoint the same person to serve for two or more counties or cities would be nullified.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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NURSES—*Professional—Certificates issued by State Board of Examiners of Nurses—Section 1766-a, Code of Virginia, 1904, as amended.*—While section 1766-a of the Code of Virginia, 1904, as amended, provides that the certificate of the State Board of Examiners of Nurses shall be issued by the secretary upon an order of the board there is no provision specifying how the certificate shall be signed. Therefore, there is nothing improper in all members of the State Board of Examiners for Nurses signing such certificate as well as the secretary.

RICHMOND, VA., March 14, 1917.

MISS JULIA MELLICHAMP, *Secretary-Treasurer,*  
*State Board of Examiners of Nurses,*  
*Norfolk, Va.,*

DEAR MISS MELLICHAMP:

Acknowledgment is made of your letter of March 6, 1917, in which you request me to advise you on the following question:

May I trouble you with another question for our board, please? For many reasons we would like to change the form of our certificate of registration so that the names of all the board members could appear on it. However, our law reads that certificate of registration must be signed by "the president and the secretary." It does not say by them only and we are wondering if it is permissible for us to change our form so as to include the names of the five board members.

It is provided by section 1766-a of the Code of Va., 1904, as amended, by the Acts of 1916, as follows:

Provision shall be made by the board hereby constituted for holding examinations at least twice in each year. All examinations shall be made directly by said board or a committee of two members designated by the board and due notice of the time and place of holding such examinations as in the case provided for the publication of the rules and regulations of said board. The examination shall be of such character as to determine the fitness of the applicant to practice professional nursing of the sick. If the result of the examination of any applicant shall be satisfactory to a majority of the board, the secretary shall upon an order of the board issue to the applicant a certificate to that effect; whereupon the person named on the certificate shall be declared duly licensed to practice professional nursing in this State.

You will therefore see that while the law provides the certificate shall be issued by the secretary upon an order of the board, there is no provision specifying how this certificate shall be signed. I am, therefore, of the opinion that there is nothing improper in all members of your board signing such certificates, as well as the secretary.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

**OFFICERS, PUBLIC—*State officers—Who are?—Federal draft act.***—The question whether a public officer is a State officer on the one hand, or a county or city officer on the other hand, is not determined by the territorial limits within which he exercises his official functions, nor by the mere office, election or appointment, nor by the source from which he receives his salary, but rather by the nature of the duties he performs. If his duties relate exclusively to local affairs, he is a county or city officer, as the case may be, but where he exercises State functions, he is a State officer, although he may be elected by the voters of a county or city and his territorial jurisdiction is confined thereto.

*Same.*—City engineers, surveyors, officers who have superintendence and control of streets, parks, water works, gas works, hospitals, sewers, cemeteries and city inspectors whose functions relate exclusively to local affairs, are local, and not State officers.

*Same.*—A city judge, sergeant, clerk, Commonwealth's attorney, treasurer, sheriff and the like, while elected or appointed for the city, and while their jurisdiction is confined to the local limits, as their duties and functions in a measure concern the whole State, are officers of the State. So are school trustees, but a school teacher or a professor in a State university is not.

*Same.*—*State officials exempt under the federal draft law.*—While notaries public, justices of the peace, constables, school trustees, visitors to State institutions, members of local boards of review, are State officers exercising occasional State functions, they are principally occupied in private pursuits and it was not the intention of Congress to extend the exemption to this class of officers. The object of exempting State officers from military service was to interfere as little as possible by the federal government with the performance of State functions, and therefore, it was not the intention of Congress to relieve from service men of military age engaging in private occupations, simply because, incidentally and occasionally, they might be called upon to exercise some official function for the State. Therefore, the term "State officers" as used in the selective service regulations refer only to those State officers whose time is taken up in the service of the State and whose services are regular and continuous and not to those officers whose services are occasional.

*Same.*—Sheriffs, treasurers, Commonwealth's attorneys, court clerks, division superintendents of schools, city sergeants, policemen, commissioners of the revenue, judges and members of the General Assembly while in session, are State officers and by virtue thereof, are exempt from military service under the federal draft law.

*Same.*—Professors and instructors in State institutions of learning, principals and teachers in the public schools are not by virtue of their employment by the State exempt from military service, nor are those exempt who are employed under the several heads of the departments of the State.

RICHMOND, VA., December 24, 1917.

HON. W. W. SALE,  
*Adjutant General of Virginia,  
City.*

DEAR SIR:

Acknowledgment is made of your letter of December 20 in which you inform me that you are directed by His Excellency, the Governor of Virginia, to request my opinion as to who are to be considered State officers and therefore exempt from military service under the selective service law of the United States. You inform me that the request for my opinion is in pursuance of a communication received by me from the Provost Marshal General dated December 13, 1917, in which it is stated:

This office (office of Provost Marshal General) has not made and cannot make any ruling or interpretation as to who are State, legislative, executive and judicial officers \* \* \* but application or classification rules must be left to local and district boards within the State under interpretation of State law by courts of the State or other legal authority. Upon receipt of request from Adjutant General of State for such ruling it will be referred to legal department of his State for such ruling and interpretation to be communicated to exemption boards. (Signed) Crowder.

Under the selective service regulations registrants are to be divided in five classes. A description of each of these classes is not necessary to the present inquiry. It is sufficient to say that State officers, legislative, executive or judicial, are placed in class 5 which in effect grants such officers exemption or discharge from draft. A note on page 39 of the selective service regulations is to the same effect as the communication from General Crowder above quoted. Said note reads as follows:

"State officers must be determined by reference to local law."

By this it is meant that we must look to the laws of the respective States for definition of the term "State officers." In reaching a conclusion upon this question, two difficulties arise:

First, in drawing a distinction between State officers on the one hand, and county, city or district officers on the other; and

Second, in drawing a distinction between State officers on one hand and employees of the State on the other.

There are a number of cases in which our court of last resort has considered whether a specific officer was an officer of the city or the State and from these opinions, I draw the conclusion that the question whether a public officer is a State officer on one hand, or a county or city officer on the other, is not determined by the territorial limits within which he exercises his official functions, nor by the manner of his election or appointment, nor by the source from which he receives his salary, but rather by the nature of the duties he performs. If his duties relate exclusively to local affairs, he is a county or city officer, as the case may be, but where he exercises State functions, he is a State officer although he may be elected by the voters of a county or city and his territorial jurisdiction confined thereto. For instance, it has been decided that the chief of police of a city is a State officer and not a city officer. *Smith v. Bryan*, 100 Va. 199. This is because the chief of police represents the sovereignty of the State in the enforcement of its laws. On the other hand, as suggested by Judge Staples in *Burch v. Hardwicke*, 30 Gratt. (71 Va.) 33, city engineers, surveyors, officers having superintendence and control of streets, parks, water works, gas works, hospitals, sewers, cemeteries, city inspectors whose functions relate ex-

clusively to local affairs, are city and not State officers. But there are many officers such as city judge, sergeant, clerk, Commonwealth's attorney, treasurer, sheriff and the like while elected or appointed for the city and while their jurisdiction is confined to the local limits, their duties and functions, in a measure, concern the whole State. They are, therefore, officers of the State. Accordingly, it has been decided that school trustees are State officers.

*Kilpatrick v. Smith*, 77 Va. 347, 357.

*Childrey v. Rady*, 77 Va. 518, 530.

A school teacher is not a State officer.

*Heath v. Johnson*, 36 W. Va., 782, nor is a professor in a State university.

*Hartigan v. Board*, 49 W. Va., 14.

If the principles laid down in these decisions are to be strictly followed in the interpretation of the selective draft law, a very large number of citizens otherwise liable for military service would be exempted, such as notaries public, justices of the peace, constables, school trustees, visitors of State institutions, members of local boards of review, and many others who, though exercising occasional State functions, are occupied principally in private pursuits. It is safe to say that there are literally thousands of such officers in the State, and perhaps hundreds of them are within military age. Especially is this true of notaries public. I cannot bring myself to believe that it was the intention of Congress to extend the exemption to this class of officers. This is clearly a case for the application of the "rule of reason," and the reason for the exemption of State officers from military service was that the federal government in the prosecution of the war desired to interfere as little as possible with the performance of State functions. In my opinion, it was not intended to relieve from service men of military age engaged in private occupations, simply because incidentally and occasionally they might be called upon to exercise some official function for the State.

I am therefore of the opinion that the term "State officers" as used in the selective service regulations refers only to those State officers whose time is taken up in the service of the State and whose services are regular and continuous and not to those officers whose services are occasional. The application of this principle may in some specific cases be difficult, but applying it to certain questions which have already arisen, I am of the opinion that notaries public, justices of the peace, constables, school trustees, visitors of State institutions and members of local boards of review are not, by virtue of their office, exempt from military service. On the other hand, I am of the opinion that the following officers are exempt from military service by virtue of their offices—sheriffs, treasurers, Commonwealth's attorneys, court clerks, division superintendents of schools, city sergeants, commissioners of the revenue, judges and members of the General Assembly while in session.

The distinction between State officers and State employees is considered in the case of *Hartigan v. Board*, *supra*. The court seems to take the view that where the Constitution or statutes prescribe an official oath, a fixed tenure and specific duties, these are strong circumstances to indicate that it was the intention to create an office. In this case it was decided that a professor in a State institution was not an officer, but an employee of the State. It is difficult to prescribe a rule which would apply in all cases, but in general it may be said that only those who occupy positions created in terms by the Constitution or the statutes, and whose duties are therein defined, may be classed as officers. I am of the opinion that professors and instructors in State institutions of learning, principals and teachers in the public schools are not, by virtue

of their employment by the State, exempt from military service, nor are those exempt who are employed under the several heads of the departments of the State.

Respectfully,

JNO. GARLAND POLLARD,

*Attorney General.*

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OFFICERS, PUBLIC—*Deputy clerks of court—Section 817, Code of Virginia, 1904, chapter 300, Acts of 1916.*—Deputy clerks of the courts of the State are not State officers.

*Same—Section 817, Code of Virginia, 1904.*—Deputy clerks while not State officers are public officers.

*Same.*—Query as to whether deputy clerks as public officers come within the exemption from military draft under the federal draft law.

*Same.—Construction of federal draft law.*—The federal draft law being a federal law should properly be construed by the federal authorities.

RICHMOND, VA., July 20, 1917.

HON. HENRY C. STUART,  
*Governor of Virginia,  
Richmond, Va.*

DEAR SIR:

I have the honor to acknowledge your letter of the 19th instant to the Attorney General, propounding the following inquiry:

Will you please advise if a deputy clerk is a State officer in the sense that he is exempt from the military draft?

Permit me to say that this office has been in receipt of a number of inquiries from persons interested, asking if deputy clerks, notaries public and overseers of the poor were officers in the sense that they were exempt from the military draft, and I have heretofore replied that the act of Congress providing for the draft and for the exemptions thereunder was a federal law and should properly be construed by the federal authorities, and for this reason I have not undertaken to pass upon the character of office held by deputy clerks of courts, notaries public and overseers of the poor.

Answering your specific inquiry, from such an examination as I have been able to make, I have not reached a definite conclusion as to whether or not deputy clerks of courts are such officers as were contemplated as being exempt under military draft, or if such draft refers only to the principal office.

Of course, deputy clerks of the courts of the State are not State officers, but the question arises as to whether or not they are such county or city officers as are exempt under the military draft. Generally speaking, a deputy clerk is a public officer for the reason that he takes oath of office and performs public duties and is invested by law with certain powers.

By section 817 of the Code of Virginia, the clerk of any circuit or city court, with the consent of the judge of the court of which he is clerk, may appoint one or more deputies who may discharge any of the official duties of the principal during the principal's continuance in office. Any such deputy is required to take and subscribe the oath provided for county officers.

We have no decision in Virginia that throws very much light on the subject, but in *Armory v. Gloucester Justices*, 2 Va. Cas. 523, it was unanimously held that the offices of deputy clerks of county courts and of justices of the peace of the same county could not perceive any sound distinction in respect of the compatibility of offices between the deputy and principal clerk, and said every man is said to be a public officer who has any duty to perform concerning the public.

I think, therefore, that as before said, generally speaking, this decision is sufficient authority for holding that a deputy clerk is a public officer. Indeed, this has been specifically held in the New Jersey case of *Gibbs v. Morgan*, 39 N. J. Eq. 126. Here it was said that although deputy clerks have no term of office and are paid and employed by the county clerks, yet they are public officers because the law constitutes them officers and gives them certain powers.

In *Miller v. Lewis*, 4 N. Y., 554, 566, decided under a statute conferring more limited power on deputy clerks than conferred by the Virginia statute, Jewett, J., said:

The deputy is a public officer acting under his official oath.

However, in *Jeffries v. Harrington*, 11 Colo. 191, the question arose as to whether a woman could hold the position of deputy clerk of a county court under a constitutional provision that:

No person except a qualified elector shall be elected or appointed to a civil or military office in this State.

The statute of Colorado was similar to that in Virginia, but the court held that the term "office" could not, without clear legislative or constitutional inhibition, close this avenue of employment to women, and approved *Warwick v. State*, 25 Ohio St., 24. In this latter case, the Constitution of Ohio contained almost the identical provision quoted above from the Colorado Constitution. The Ohio court held that the word "office" should be given a restricted interpretation and should apply to the principal office alone, and not to the deputy, and that, therefore, a woman could hold the office of deputy clerk even though she was not a qualified elector.

It might be well to call your attention to the fact that section 32 of the Constitution of Virginia provides

Every person qualified to vote shall be eligible to any office of the State or any county, city or town or other sub-division of the State wherein he resides. \* \* \* Men and women eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity.

In chapter 300 of the Acts of 1916, page 513, the legislature provides that any female over the age of twenty-one years may be appointed deputy clerk by the clerk of any court of this Commonwealth and with the consent of the clerk may qualify, etc.

I do not know that the fact that the legislature of Virginia expressly provides that women can act as deputy clerks, aids us in arriving at a solution of this question, but while the Constitutional provision does not, in terms, prohibit a woman from holding any office in Virginia, yet if, in construing the Constitutional provision above set out, we followed the rule of *expressio unius est exclusio alterius* (that is, the expression of one is the exclusion of every other), the fact that the Constitution expressly provides that every person qualified to vote shall be eligible to office would impliedly

limit the right to hold office to qualified voters and the legislature, in providing that women shall be deputy clerks, gave at least legislative approval to a restricted construction of the term "office."

It follows, from the foregoing, that it is a matter of great doubt as to whether or not deputy clerks as public officers come within the exemption from military draft, and, as before suggested, is a question upon which the federal authorities will eventually have to pass.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

OFFICERS, PUBLIC—*Attorneys for the Commonwealth—Incompatibility of offices—Federal and State service.*—The acceptance of any office or post of profit, trust or emolument or the acceptance by a State officer of any emolument whatever under the United States government *ipso facto* vacates such office unless such officer comes within the qualifications of section 164 of the Code of Virginia, 1904, as amended.

*Same.*—The attorney for the Commonwealth of a county or city would not forfeit his office by entering a training camp for the officers' reserve corps of the United States army, and training for service, provided that he accepted no emolument whatever from the United States government.

*Same.*—The acceptance of a commission in the officers' reserve corps of the United States Army by any State officer *ipso facto* vacates his office unless he is an officer or soldier of the Virginia militia called into service by the United States.

RICHMOND, VA., April 28, 1917.

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

DEAR SIR:

I acknowledge receipt of letter of Hon. John W. Carter, Jr., Commonwealth's attorney of Danville, Virginia, referred to this office by you, in which he desires to be advised if there is any possible way by which State officers situated as he is could get leave of absence from their duties and enter the training camp for the officers' reserve corps at Fort Myer.

As I have before informed you in the case of Hon. John S. Parsons, Commissioner of Game and Inland Fisheries, under section 163 of the Code an acceptance of any office or post of profit, trust or emolument or the acceptance by a State officer of any emolument whatever under the United States government *ipso facto* vacates such office unless such officer comes within the qualifications of section 164 of the Code.

So far as the question propounded by Mr. Carter is concerned, the only qualification which could avail him is that which does not exclude from their State offices or posts militia officers or soldiers on account of the recompense they may receive from the United States when called out into actual duty.

As I understand the plan for the training camp for the officers reserve corps, the citizens who enter those camps receive no emolument from the government and take no oath save that they will take a commission if tendered to them by the government at the end of the training service. If that be true, it would seem that mere training at the camp at Fort Myer for the officers' reserve corps would not be accepting any office, or post of trust or emolument or the acceptance of any emolument whatever under the United States government.

It follows that I am of opinion that training for the officers' reserve corps at Fort Myer would not *ipso facto* vacate any State office. I am further of opinion that accepting a commission in the officers reserve corps by any State officer would *ipso facto* vacate his office unless he is an officer or soldier of the Virginia militia called into service by the United States.

I refrain from expressing any opinion upon the propriety of a Commonwealth's attorney taking a leave of absence so far as the State is concerned for the time necessary in the training camp for the officers' reserve corps, but inasmuch as his services to the State are paid for entirely in fees, the State's service would hardly be crippled a great deal, because the court could appoint a special Commonwealth's attorney to prosecute any cases arising during that time; the more serious question, of course, is one for the counties and cities, by which these officers are paid, to determine for themselves.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

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OFFICERS, PUBLIC—*Commissioner of Fisheries—Commissioner of Game and Inland Fisheries—Employees of Department of Fisheries—Incompatibility of officers—State and federal service—Sections 163 and 164, Code of Virginia, 1904.*—The Commissioner of Game and Inland Fisheries of Virginia is an officer who holds an office or post in the State of Virginia within the meaning of section 163 of the Code of Virginia, 1904. Therefore, the holding of any office or post of profit, trust or emolument, civil or military, under the government of the United States or any employment by such government or the reception from it in any way of any emolument whatever by the Commissioner of Game and Inland Fisheries *ipso facto* vacates his office.

*Same.*—Unless the Commissioner of Game and Inland Fisheries can be commissioned as an officer of the Virginia militia and as such be called in actual duty by the federal government the reception by him of any recompense from the United States government would *ipso facto* vacate his office under the State law.

*Same.*—The captains and crews of the Virginia oyster fleet are simply employees of the Commission of Fisheries and are not officers of the State within the meaning of sections 163 and 164 of the Code of Virginia, 1904. Therefore, they may be sworn into the service of the United States and paid jointly by the United States and the State of Virginia.

RICHMOND, VA., April 19, 1917.

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

DEAR SIR:

You inform me that in view of the war the United States government wishes to take over the Virginia oyster fleet, to be operated under the joint control of your department and the federal government, each sharing in the expense, and that the government wishes to commission you and the captains of the boats and swear the crew into the service.

You desire an opinion as to what effect this would have:

First. Upon you as Commissioner of Game and Inland Fisheries.

Second. Upon the captains of the boats, and,

Third. Upon the crew.

Section 163 of the Code of Virginia provides as follows:

No person shall be capable of holding any office or post mentioned in the preceding section who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, *ipso facto*, vacate any office, or post of profit, trust, or emolument under the government of this Commonwealth, or under any county, city, or town thereof.

Section 164 qualifies the preceding section and provides that it shall not be construed "to exclude from such office or post militia officers or soldiers on account of the recompense they may receive from the United States when called out in actual duty."

The Commissioner of Game and Inland Fisheries in Virginia is unquestionably an office or post in the State of Virginia, as provided by section 163, and it is clear, therefore, that if you hold any office or post of profit, trust or emolument, civil or military under the government of the United States or if you should get into the employment of such government, or receive from it in any way any emolument whatever, you would *ipso facto* vacate the office of Commissioner of Game and Inland Fisheries, unless you come within one of the qualifications provided in section 164.

The only qualification which could by any possibility exempt you from the provisions of section 162 is that portion quoted from section 164 above, which provides that the section shall not be construed to exclude from such office or post militia officers or soldiers on account of the recompense they receive from the United States when called out in actual duty.

This qualification contemplates officers or soldiers of the Virginia militia, and is not intended to apply to officers or soldiers of the United States army or navy, unless they are officers or soldiers of the United States army by virtue of their being officers or soldiers of the Virginia militia.

I know of no provision in the Virginia law since the Acts of 1912, by which any volunteer naval forces could be formed in Virginia, and, therefore, I do not see how you could be commissioned by the Governor as an officer of the Virginia militia and thus come within qualification which would permit you to receive recompense from the United States when called out in actual duty without forfeiting your office as Commissioner of Game and Inland Fisheries.

If, however, you can be commissioned as an officer of the Virginia militia and as such also receive recompense from the United States government, such emolument from the United States government would not *ipso facto* vacate your office under the State law.

Responding to your second and third inquiries as to the captains and crew of the oyster fleet, I beg to say that under the statutes they are simply employees of the Commission of Fisheries and are not officers of the State within the meaning of the sections above cited.

I see no reason, therefore, why they may not be sworn into the service of the United States and be paid jointly by the United States and the State of Virginia.

I may add that section 164 of the Code was amended in the Acts of 1915, page 103, and that this is the last enactment of the legislature qualifying the general provisions of section 162, providing for the disability of persons holding office under the United States to hold State offices.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

OFFICERS, PUBLIC—*State Board of Health—Members of—Incompatibility of offices—State and federal service—Sections 163 and 164 of the Code of Virginia, 1904.*—Section 163 of the Code of Virginia, 1904, prohibits any person holding any office or trust under the government of the Commonwealth from holding a federal office, and, therefore, any office created by the Constitution or the legislature comes within the provisions of section 163 of the Code of Virginia, 1904. While section 164 of the Code of Virginia, 1904, as amended, makes certain exceptions to section 162 and 163 of the Code it does not make an exception in regard to the State Board of Health except that it provides that section 163 shall not be construed to prevent any United States post master from being a member of the State Board of Health.

*Same.*—The office of a member of the State Board of Health is an office of trust, and an officer in a federal base hospital or in a federal medical reserve corps occupies a military office under the United States government and therefore is ineligible to membership on the State Board of Health.

RICHMOND, VA., *September 25, 1917.*

*His Excellency, H. C. STUART,  
Governor of Virginia,  
City.*

DEAR SIR:

Acknowledgment is made of your letter of September 22 in which you request to be advised:

1. If a physician who has been mustered into the federal service as an officer in a base hospital is thereby rendered ineligible for membership on the State Board of Health.

2. If an officer in the Medical Reserve Corps who has been called into federal service is thereby rendered ineligible for membership on the State Board of Health.

Section 163 of Virginia Code, volume 1, provides:

No person shall be capable of holding any office or post mentioned in the preceding section, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government shall, *ipso facto, vacate any office, or post of profit, trust, or emolument under the government of this Commonwealth, or under any county, city, or town thereof.*

The "office or post mentioned in the preceding section" is "any office of honor, profit or trust under the Constitution of Virginia." The question might therefore arise whether or not a member of the State Board of Health is an office "of honor, profit or trust" under the Constitution of Virginia, but from the italicized portion of section 163 above-quoted, it will be seen that it was the intention of the legislature not to allow a person holding any office or trust under the government of the Commonwealth to hold a federal office, and therefore it must be concluded that any office created by the Constitution or the legislature comes within the provisions of section 163.

Section 164 makes certain exceptions to sections 162-3, but does not make an exception in regard to the State Board of Health save and except that it provides that section 163 shall not be construed "to prevent any United States post master

from being a member of the State Board of Health." This exception tends to bear out the view that section 163 was intended to apply to the State Board of Health.

The office of a member of the State Board of Health is undoubtedly an office of trust, and an officer in a federal base hospital or in the federal Medical Reserve Corps is undoubtedly occupying a military office under the United States government, and therefore it must be concluded that neither an officer of a federal base hospital nor of a federal Medical Reserve Corps is eligible to membership on the State Board of Health.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

OFFICERS, PUBLIC—*State and federal offices—Incompatibility of—Section 163, Code of Virginia, 1904.*—Employment in the internal revenue department of the federal government is an office, post, trust or emolument under the federal government, and, a member of the Virginia State Board of Charities holds an office or post or trust under the government of Virginia. Therefore, the acceptance of a position with the Internal Revenue Department of the United States government by a member of the State Board of Charities, *ipso facto*, vacates the latter office.

RICHMOND, VA., *September 26, 1917.*

DR. L. S. FOSTER,

*212 Taylor Building,*

*Norfolk, Va.*

DEAR SIR:

Replying to your request to know whether your present position with the Internal Revenue Department of the United States is incompatible with membership on the State Board of Charities, I beg to call your attention to section 163 of the Virginia Code, Vol. 1, which provides:

No person shall be capable of holding any office or post mentioned in the preceding section who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever, *and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust, or emolument under the government of this Commonwealth, or under any county, city or town thereof.*

There can be no doubt that your position with the Internal Revenue Department is an office, post, trust, or emolument under the federal government, and that your position as a member of the State Board of Charities is an office or post of trust under the government of this Commonwealth.

It will be seen, therefore, that your acceptance of the position with the Internal Revenue Department of the United States government, *ipso facto*, vacated your office as a member of the State Board of Charities.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

OFFICERS, PUBLIC—*Sheriffs—Game wardens*—The offices of sheriff and game warden are not incompatible.

RICHMOND, VA., May 8, 1917.

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

DEAR SIR:

I acknowledge your letter of May 5th to the Attorney General, inquiring whether or not a sheriff of the county can also legally hold the position of county game warden.

I find nothing in the law making these offices incompatible, but you realize, of course, that the sheriff of a county is always *ex-officio* a game warden.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

OFFICERS, PUBLIC—*Attorneys for the Commonwealth*.—The attorney for the Commonwealth for the city of Roanoke is a State officer.

RICHMOND, VA., December 6, 1917.

HON. C. A. WOODRUM,  
*303-316 Terry Building,*  
*Roanoke, Va.*

DEAR SIR:

Yours of December 5th received. I do not think that there can be any doubt about the fact that the Commonwealth's attorney for the city of Roanoke is a State officer. In the case of *Burch v. Hardwicke*, 71 Va. 34, the court decided that the chief of police of a city is an officer of the State and not of the municipality in which he exercises his office. In deciding that case Judge Staples said:

On the other hand, there are many officers, such as city judge, sergeant, clerk, Commonwealth's attorney, treasurer, sheriff, high constable, and the like, some of whom are recognized by the Constitution, while others are not. All these are generally mentioned as city officers, and they are even so designated in the Constitution; but no one has ever contended that either of them is in any manner subject to the control and removal of the mayor. The reason is, that while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties and functions, in a measure, concern the whole State. They are State agencies or instrumentalities operating to some extent through the medium of city charters in the preservation of the public peace and good government. However elected or appointed, however paid, they are as much State officers as constables, justices of the peace and Commonwealth's attorneys, whose jurisdiction is confined to particular counties.

The above case was approved in *Smith v. Bryan*, 100 Va. 199.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

OFFICERS, PUBLIC—*Attorneys for the Commonwealth—Salary of*.—The salary of the attorney for the Commonwealth may be increased by the board of supervisors of his county during his term of office.

*Same—Executive officers.*—The Commonwealth's attorney is not an executive officer at the seat of government within the contemplation of section 83 of the Virginia Constitution.

RICHMOND, VA., April 14, 1917.

THOMAS H. HOWERTON, ESQ.,  
*Commonwealth's Attorney,*  
*Waverly, Va.*

DEAR SIR:

The question you propound as to the right of the board of supervisors of Sussex county to increase the salary of county officers during their term is not one that comes within the range of the official duties of the Attorney General and what is here said cannot be regarded, therefore, in any way as official.

Personally I know of no law inhibiting the increase or decrease of the Commonwealth's attorney's salary by the board of supervisors during the term, and I am very sure that the case of *Bottom v. Moore, Auditor*, 119 Va., page 372, which you cite, is authority for the proposition that such an officer is not one of the executive officers at the seat of government contemplated by section 83 of the Constitution.

Mr. Pollard is out of the city, or he would be glad to give you his own personal opinion, which I am sure, however, will coincide with this.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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OFFICERS, PUBLIC—*Judges—Mileage of—Payment out of treasury—Section 3049, Code of Virginia, 1904.*—A circuit judge is not entitled to receive out of the treasury of the State mileage for a term of court that he did not personally hold but which was held at his request by another judge whose traveling expenses and hotel bills were paid personally by the judge at whose request the other judge held the term of court.

RICHMOND, VA., November 13, 1916.

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

DEAR SIR:

Acknowledgment is made of your communication, enclosing a letter from Hon. Jesse F. West, judge of the third judicial circuit, in which you desire an opinion as to whether or not a judge is entitled to mileage for a term of the court which he did not hold but which was held at his request by another judge, whose traveling expenses and hotel bills were paid personally by the judge at whose request the other judge held the term of court.

I agree with you that Judge West is not entitled to receive out of the treasury of the State mileage for a term of court that he did not hold and that you cannot take official cognizance of any private arrangement made between judges of courts who hold terms of courts each for the other.

It is well to note in this connection that section 3049, authorizing a judge of a court who is unable to attend a term of his court to secure another judge to hold the same, also provides for the designation by the Governor of a judge to hold terms of court other than in his own circuit, in which case the mileage and per diem are to be paid out of the county or city treasury.

Finding no warrant in law for taking money out of the treasury of the State in the instant case, I am reluctantly forced to agree with your conclusion and to return herewith the papers for your files.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

OFFICERS, PUBLIC—*Judges, salaries of—Chapter 183, Acts of 1912—Section 102, Constitution of Virginia.*—The terms of office of Judges Sims and Prentis commenced subsequent to the first day of February, 1913, and, therefore, their salaries should be paid at the rate of \$5,000 per year.

*Same.*—The meaning of section 102 of the Virginia Constitution is that the salary of a judge shall be governed by the law in force at the time of his election or appointment and qualification, and, chapter 183 of the Acts of 1912 is the law in force as to the present salary of judges whose terms commence after the first day of February, 1913. The true meaning of this constitutional provision is that the salary of a judge shall be governed by the law in force at the time of his qualification which is the commencement of his term of office.

RICHMOND, VA., *January 8, 1917.*

HON. C. LEE MOORE,

*Auditor of Public Accounts,  
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your request for an opinion as to whether Judges F. W. Sims and Robert R. Prentis should each receive a salary as judge of the Supreme Court of Appeals of Virginia at the rate of \$4,500 a year or at the rate of \$5,000 a year. Both of these have become members of the court during 1916, the former filling out an unexpired term of Judge Keith, and the latter that of Judge Cardwell.

By chapter 183 of the Acts of 1912, page 452, it is provided, Vol. 4, Code, 850, as follows:

Be it enacted by the General Assembly of Virginia, that the annual salaries of judges of the Supreme Court of Appeals of Virginia, whose terms of office commence on or after the first day of February, nineteen hundred and thirteen, shall be five thousand dollars, except the president of the court, whose annual salary shall be five thousand two hundred dollars. Said salaries shall be paid out of the State treasury in monthly instalments.

Your attention is also directed to section 102 of the Constitution, which is as follows:

All judges shall be commissioned by the Governor. They shall receive such salaries and allowances as may be determined by law within the limitations fixed by the Constitution, the amount of which shall not be increased or diminished during their terms of office. Their terms of office shall commence on the first day of February next following their election, and whenever a vacancy occurs in the office of judge, his successor shall be elected for the unexpired term.

The question naturally presents itself under the provisions of the Constitution and the statute, as follows:

Where a judge is appointed to fill out the unexpired term which term commenced prior to the first day of February, 1913, is the salary of the newly appointed judge to be governed by the law in force at the beginning of his predecessor's term, or the law in force at the time of his appointment?

Analyzing the statute above, it would seem clear that the terms of office of Judges Sims and Prentis commenced subsequent to the first day of February, 1913, and, therefore, their salaries should be paid at the rate of \$5,000 and looking to the statute alone, there would seem to be no difficulty in coming to this conclusion.

The section of the Constitution quoted above provides that the amount of the salaries and allowances of a judge of the Supreme Court of Appeals shall not be increased or diminished during their terms of office and adds "their terms of office shall commence on the first day of February next following their election.

The true construction of the statute above, in the light of this constitutional provision, is not so easy to determine. The purpose of the constitutional provision, as was said in *Buller County v. James*, 116 Ky. 575, 578, is to leave the officials, whose duty it is to fix the salary, free from the importunity and personal influence of the incumbent of the office, and to secure to him for his term, when his salary is once fixed, the amount so agreed to be paid him and thus make him more independent in the discharge of his official duty.

Therefore, it would seem to me that the meaning of the constitutional provision is that the salary of a judge shall be governed by the law in force at the time of his election or appointment and qualification, and there can be no question in this case but that chapter 183, Acts of 1912, is the law in force as to the present salary of judges of the court, whose terms commence after the first day of February, 1913. As was said in the Kentucky case above, the purpose of the constitutional provision was to protect the legislature from the importunity of judges and to protect the judges in office from the caprice of the legislature. Both of these purposes fail as to a judge who is appointed subsequent to the passage of the law increasing the salary of a judge whose term of office should commence after the law increasing the salary went into force and effect, and, as before said, the true meaning would seem to be that the salary of the judge shall be governed by the law in force at the time of his qualification, which is the commencement of his term of office.

I am aware that under similar constitutional provisions some of the decided cases may not be in accordance with this view; but, the legislature in the passage of chapter 183, Acts of 1912, so clearly manifests its intention that the judges, whose terms commence after the enactment of the law, should get the salary of \$5,000, I am constrained to hold that it is your duty to pay Judge Sims and Judge Prentis at that rate.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General of Virginia.*

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OFFICERS, PUBLIC—*Judges—Salary of.*—Judges Sims and Prentis of the Supreme Court of Appeals should be paid at the rate of \$5,000 per year in monthly instalments so long as the appropriation therefor permits this rate to be paid, and for the residue of their salaries they will have to look to the legislature for relief.

RICHMOND, VA., *January 10, 1917.*

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

DEAR SIR:

Supplementing my letter to you of January 8th, with regard to salaries due to Judges Sims and Prentis, and confirming my conversation with you prior to that time, I beg to advise that in my opinion these judges should be paid at the rate of \$5,000 a year in monthly instalments so long as the appropriation therefor permits, this rate to be paid, and for the residue of their salaries they will have to look to the legislature for relief.

The act of the legislature fixing the salaries at \$5,000 provides that they shall be paid in monthly instalments, and, therefore, it seems to me clear that so long as the appropriation available will admit thereof you should pay them one-twelfth of \$5,000 each month.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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OFFICERS, PUBLIC—*Railroad passes—Section 161, Constitution of Virginia.*—  
A public officer who renders editorial service to a railroad can legally receive and use a pass over such railroad for his services.

RICHMOND, VA., *October 18, 1917.*

MR. B. C. MOOMAW, JR.,  
*Director, Division of Markets of the Department of Agriculture,*  
*Richmond, Va.*

DEAR SIR:

You inform me that before you were made Director of the Division of Markets of the Department of Agriculture of the Commonwealth of Virginia, and while you were not in the employment of the State, you were engaged by the Chesapeake and Ohio Railway to render services in connection with the editing of their magazine, the *Agricultural and Industrial Outlook*, a publication having for its main purpose the advertisement of the resources of this State, and that in return for your services you received from said railway an intra-State pass upon the lines of said railway, and now that you have become an officer of the State you desire to know whether you can, without violation of section 161 of the Constitution, continue to receive the pass referred to in return for a continuation of your services in editing said publication.

The section of the Constitution referred to prohibits the granting by railroads to any State officer, for his personal use while in office, "any frank, free pass, free transportation or any rebate or reduction in the rates charged by said company to the general public for like services."

I consider your case governed by the ruling of the Supreme Court of Appeals of Virginia, set out in the opinion of *Commonwealth v. Gleason*, 111 Va., 383, where it was decided that the inhibition of the Constitution did not apply to employees of railroads who received passes in part compensation for their services.

I am, therefore, of the opinion that it is lawful for you to continue your said services to the said railway and may continue to receive a pass in return therefor.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

OFFICERS, PUBLIC—*Sheriffs—Deputies—Appointment of—Section 817, Code of Virginia, 1904.*—A sheriff with the consent of the court or with the consent of the judge of the court in vacation may appoint one or more deputies who may discharge official duties during the sheriff's continuance in office.

*Same.*—A sheriff is not limited as to the number of deputies which may be appointed by him with the consent of the court or judge thereof in vacation. Therefore, a sheriff can organize a body of men to act as a home guard by appointing them as deputies provided the consent of the court or the judge thereof in vacation is first obtained.

RICHMOND, VA., April 17, 1917.

MR. A. B. HALL, *Sheriff,*  
*Hanover, Virginia.*

DEAR SIR:

Responding to your request, through Mr. J. S. Potts, of Doswell, Va., for an opinion as to your right to organize a body of men and empower them as deputy sheriffs to act as a "home guard," the men not to wear uniforms, but the deputy sheriffs to be permitted to carry concealed weapons and to be called out in any emergency, the only provision of the law governing this matter so far as I am advised is section 817, which provides for the appointment of deputy sheriffs.

This section provides that the sheriff, with the consent of the court or with the consent of the judge of the court in vacation may appoint one or more deputies who may discharge any official duties during your continuance in office. This section does not limit the number of deputies which may be appointed by you, with the consent of the court.

It would seem, therefore, that your desire to organize such a body of men can be fulfilled, provided it appeals to the discretion of the judge of the circuit court of Hanover county.

Very truly yours,

LESLIE C. GARNETT,  
*Attorney General.*

PARDONS—*Remission of fines—Refunding fines that have been paid—Sections 738, 743, inclusive, Code of Virginia, 1904—Section 73, Constitution of Virginia—Section 186 of the Constitution of Virginia.*—The Governor only has the power to remit in whole or in part fines and penalties and this power does not apply to fines and penalties which have been paid but only to fines and penalties which are unpaid at the time that the Governor remits the same. Therefore, the Governor has no power to order the restitution of fines which have been paid.

*Same.*—It being provided by section 186 of the Constitution of Virginia that no money shall be paid out of the State treasury except in pursuance of appropriations made by law, the only way that fines paid into the public treasury can be restored to persons paying the same is by appropriation made by the legislature.

RICHMOND, VA., September 12, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of September 7, 1917, enclosing an order of the circuit court of Prince George county, entered August 24, 1917, upon

the petition of Annie Hall and Marion Hall, filed in accordance with the provisions of section 738 of the Code of Virginia, 1904, as amended. It appears from the order that the petitioners were convicted by a justice of the peace in Prince George county for a criminal offense, and fined the sum of \$20.00 each, which fines, together with the costs in each case, were paid by the petitioners. It further appears as a fact certified in the order of the judge, that the petitioners were wholly innocent of the offense charged.

The order of the court, after setting out the facts, provides:

The premises considered, the court is of opinion that prayer of the petitioners should be granted, and, therefore, recommends: That the fines and costs in the sum of \$46.30, together with the costs in this action by the petitioners expended, and attorney's fee in the sum of \$———, be paid by the Auditor of Public Accounts of Virginia to the said Annie Hall and Marion Hall, the petitioners in this cause.

You request me to answer the following questions:

1. Do sections 738-743, inclusive, Code of Virginia, Pollard's edition, apply to cases in which a fine has already been paid?
2. If so, what means are provided for refunding such fines from the State treasury?
3. Is there any provision of law allowing payment by the Commonwealth of an attorney's fee in connection with such proceedings?

It is provided by section 73 of the Constitution of Virginia (1902) that the Governor "shall have power to remit fines and penalties in such cases and under such rules and regulations as may be prescribed by law." By section 738 of the Code of Virginia, 1904, as amended, and subsequent sections, the legislature has provided the method by which the Governor shall exercise the power to remit fines and penalties. It is provided by section 738 of the Code of Virginia, 1904, as amended, as follows:

The Governor shall have power, in his discretion, to remit, in whole or in part, fines and penalties, whether heretofore or hereafter imposed, in all cases of felony or misdemeanor, after conviction, except where judgment shall have been rendered against any person for contempt of court, for non-performance of or disobedience to some order, decree or judgment of said court, or where the fine or penalty has been imposed by the State Corporation Commission, or where the prosecution has been carried on by the House of Delegates; provided, in the opinion of the Governor, the evidence accompanying such application warrants the granting of the relief asked for. But the provisions of sections seven hundred and thirty-nine, seven hundred and forty, seven hundred and forty-one and seven hundred and forty-three of the Code of Virginia shall be complied with as a condition precedent to such action by the Governor; provided, that where the party against whom the fine has been imposed and judgment rendered therefor has departed this life leaving a widow and children surviving, the Governor may remit such fine upon the certificate of the judge of the circuit court of the county, or the city court of the city wherein such fine was imposed and judgment rendered, that to enforce the same against the estate, real or personal, of the said decedent would impose hardship upon his widow and children.

It will be seen upon an examination of this section of the Code, together with section 73 of the Constitution, that the Governor is only given the power to remit in whole or part fines and penalties. This power, I am of the opinion, does not apply to fines and penalties which have been paid, but only to fines and penalties which are unpaid at the time the Governor remits the same. This question was before the

Supreme Court of New Jersey in the case of *Cook v. Freeholders of Middlesex*, 26 N. J. L., 326 (1856), in which the court held that a pardon remitting a fine or the costs of the prosecution which had been paid, did not entitle the party to a restitution of a fine or costs or to indemnity for any part of the penalty which may have been paid or suffered. A pardon, the court held, operates prospectively only by terminating the penalty and giving to the party pardoned a new credit and capacity. On appeal to the Court of Errors and Appeals, the judgment of the Supreme Court was sustained. In *Cook v. Freeholders of Middlesex*, 27 N. J. L., 637 (1858-9), in sustaining the judgment of the Supreme Court, the Court of Errors and Appeals, speaking through Elmer, J., said:

It is fully established by the authorities, and was admitted on the argument, by the plaintiff's counsel, that a pardon and remission of a fine, granted by the King of England or by the Governor and council of this State, previous to the adoption of the present Constitution, in the words used in the instrument now in question, would not have operated to restore a fine actually collected. A charter of pardon granted by the crown, simply remitting a fine, did not entitle the offender to restitution after the fine had passed into the royal exchequer. To effect that object, express words importing a restitution were necessary. It thus appears that, before the meeting of the Constitutional Convention in 1844 the words to remit a fine or forfeiture had a well established meaning, and were never used to signify more than a discharge or forgiveness of a fine of forfeiture not yet collected.

When adopted as a part of the Constitution, they must be considered as meant to be used in their proper legal sense, unless there is something in the instrument which indicates a different intention.

And again, on page 642, it is said:

\* \* \* But no power is given, in terms or by necessary implication, to restore a fine after it has been collected. The fine, once paid, is like any other punishment inflicted, which was not intended to be repaid or recompensed. No such power had ever been conferred on the executive, either while New Jersey was a colony or after she became an independent State.

The same result was reached by the Court of Errors and Appeals of Kentucky in *Rucker v. Bosworth*, 7 J. J. Marsh (30 Ky.), 645, 636 (1832). In so holding, the court, speaking through Nicholas, J., said:

We think *Bosworth* has no right to recover. The fines having been collected and paid over to the informer before the remission, his right thereto became absolute and indefeasible. There was nothing left upon which the remission could take effect. A remission is not in the nature of nor does it operate like the reversal of a judgment. It is more like and operate as a release. After the payment of a debt or demand, a release of it operates nothing. So after the payment of the fines to the prosecutor to whom they belonged, the Governor's power of remission was either gone or of none effect.

It being well established that the remission of a fine does not operate to restore a fine actually collected or to entitle the offender to a restitution after the fine has been paid, I am of the opinion that you have no authority under section 73 of the Constitution or sections 738-743 of the Code of Virginia, inclusive, to order the restitution of the fines in the cases under consideration.

In addition to the reasons heretofore given for this opinion, I desire to direct your attention to section 186 of the Constitution of Virginia (1902), which provides that "no money shall be paid out of the State treasury except in pursuance of appropriations made by law." The fines and costs in the cases here under consideration

having been paid into the treasury, the only way that the same can be restored to the petitioners would be in pursuance of a valid appropriation made by law.

Having answered your first question in the negative, it is unnecessary to reply to your other questions.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

**PARDONS—Commutation of sentence—Power of Governor.**—Technically, the Governor has no authority to commute the sentence of a prisoner from confinement in a penitentiary to commitment to the State reformatory for a similar period of time, but such purpose can be accomplished by granting the minor a conditional pardon provided that the condition imposed be first made possible by an agreement of the Prison Association of Virginia to receive the minor into custody for the period of sentence and the voluntary written surrender of the parents of such infant of any right they may have to the custody of the child to the association for such period of time.

RICHMOND, VA., November 27, 1917.

*His Excellency, H. C. STUART,*

*Governor of Virginia,*

*Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of your request for my opinion as to whether you have authority to commute the sentence of a prisoner from confinement in the penitentiary for five years to commitment to the State reformatory for a like period. You advise me that the prisoner is a minor and that his parents are living.

The charter of the Prison Association of Virginia, the corporation which conducts the reformatory (Acts of Assembly 1891-2, pp. 985-6) provides that the association may, in their discretion, receive into the reformatory such children and youth as may be committed to their charge by the voluntary written surrender of their parents or other persons having the legal right to their custody and control.

I am of opinion that technically you cannot thus commute the sentence above referred to, but that you can accomplish the purpose you have in view by granting the minor a conditional pardon; provided, however, that the condition imposed be first made possible by the agreement of the Prison Association of Virginia to receive the minor into its custody for five years and the voluntary written surrender of the parents of any right they may have to the custody of the child, to said association for said period.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

**PHYSICIANS AND SURGEONS—Admitting same to practice—Chapter 84, Acts 1916.**—Under the law an applicant for admission to practice medicine must furnish satisfactory evidence that he has studied medicine not less than four school years, including four satisfactory courses of at least eight months each in four different calendar years. Therefore, third year students at the medical colleges in Virginia who continue their courses at the conclusion of the eight months term are not under the law as it now exists entitled to examination even though they completed another eight months course which would make up a total of four terms in a medical school.

RICHMOND, VA., *April 17, 1917.*

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

DEAR SIR:

I beg to acknowledge your letter of the 14th instant, enclosing letter from the Surgeon General, U. S. Navy, requesting that the various State boards and faculties of the various medical schools take immediate steps to provide for a continuous course of medical instruction throughout the year in order to advance the date of graduation of the junior classes now undergoing instruction. The surgeon general urges this course because of the necessity of an early continuing supply of well trained young medical men to be provided to augment and enter the regular naval medical establishment and as a matter of national welfare, both military and civil.

I quote from your letter, as follows:

Since our law specifically provides that "each of the four courses of instruction must be in different calendar years," we hesitate to comply with this request, until advised by you if, in the face of the present emergency, such a procedure would be legal, and if not, what course of action you would suggest.

It is true that the provisions of chapter 84 of the Acts of 1916, page 138, provides that an applicant for admission to practice medicine must furnish satisfactory evidence that he has studied medicine not less than four school years, including four satisfactory courses of at least eight months each, in four different calendar years.

I assume that the reason you desire the opinion of this office touching this matter is that the third year students at the medical colleges in Virginia, who would continue their courses at the conclusion of this eight months term would not, under the law as it now exists, be entitled to examination, even though they completed another eight months course, which would make up the total of four terms in the medical school.

Permit me to suggest that it can hardly be possible but that the legislature which meets in January, 1918, would pass an act permitting any students who would take this special course of eight months, part of which would be taken in the calendar year, 1917, and part in the calendar year 1918, to apply for an examination to practice medicine in Virginia.

In other words, if the medical schools of Virginia do continue in session and the three year students therein take an additional eight months course continuously, before such eight months course shall have expired, the legislature will be in session, and I have no doubt would protect these students in the matter of their right to apply for an examination to practice medicine in Virginia upon their graduation.

Under these circumstances it is unnecessary for the State Board of Medical Examiners to do other than assure the medical colleges of Virginia that they will recommend to the legislature the passage of an act permitting the students before mentioned to apply for examination upon the completion of the continuing eight months course, as above set out.

Very truly yours,

LESLIE C. GARNETT,  
*Attorney General.*

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PHYSICIANS AND SURGEONS—*Who are entitled to certificates to practice—Chapter 84, Acts of 1916.*—The State Board of Medical Examiners is authorized upon the receipt of satisfactory evidence that a physician regularly practiced medicine in this State before 1885 to issue a verification certificate.

*Same.*—If a physician can satisfy the judge of the circuit court and the Commonwealth's attorney of the county in which he resides from evidence produced before them that he was a practicing physician prior to January 1, 1885, and gets a certificate from those officials to that effect, the State Board of Medical Examiners is required to give him a certificate allowing him to practice medicine in Virginia.

RICHMOND, VA., April 19, 1917.

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

DEAR SIR:

I beg to acknowledge your letter of April 17, to the Attorney General, enclosing correspondence with regard to the right of Dr. D. C. Mebane to a certificate to practice medicine in Virginia.

Among the enclosures are four affidavits that Dr. Mebane was a practitioner of medicine at Millsville, Carroll county, Va., prior to 1885, but it appears that for some years he has been living in Wilkes-Barre, Pennsylvania.

You desire the opinion of the Attorney General as to whether or not Dr. Mebane is entitled to a verification certificate or whether he must be required to stand an examination for the practice of medicine in Virginia.

The law governing this matter is not entirely clear and there seems to be no statute specifically directing the issuing of licenses to doctors who practice in Virginia prior to 1885. The right, however, to a certificate to practice medicine in Virginia by those physicians who practiced prior to 1885 is impliedly recognized by the provisions of the medical bill, chapter 84 of the Acts of 1916, page 138, where in section 6 thereof is found this language:

It is especially provided that those whose claims to State license rest upon having practiced in the State previous to the year eighteen hundred and eighty-five, shall present to the board satisfactory evidence of having legally practiced medicine in this State before eighteen hundred and eighty-five or if an osteopath, before the year nineteen hundred and three. The board may, at its discretion, arrange for reciprocity with the authorities of other States, territories and countries having requirements equal to those established by this act.

This expression would seem to authorize your board, upon the receipt of satisfactory evidence that the physician regularly practiced medicine in this State before 1885, to issue a verification certificate.

You will also note by the last sentence of the act quoted above that your board at its discretion may arrange for reciprocity with authorities of other States having the requirements equal to those established in Virginia. I am not advised as to whether or not you have any reciprocity arrangement with Pennsylvania.

If Dr. Mebane should come to Virginia and take up his residence here, then, under the provisions of sub-section (e) of section 8 of the said act, which is as follows;

\* \* \* provided, that any person who shall produce before the said examining board a certificate from the judge of the circuit court and the Commonwealth's attorney of the county in which he resides, stating that in their opinion, from evidence produced before them, he was a practicing physician in Virginia prior to the first day of January, eighteen hundred and eighty-five, then said examining board shall give to said person a certificate allowing said person to practice medicine in Virginia,

if he can satisfy the circuit court and the Commonwealth's attorney of the county in which he resides that in their opinion from evidence produced before them he was a practicing physician prior to January 1, 1885, and should get a certificate from those officials to that effect, your board would be required to give him a certificate allowing him to practice medicine in Virginia.

I return herewith correspondence and affidavits for your files.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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PHYSICIANS AND SURGEONS—*Certificates to practice*—*Medical Officers of the Public Service of the United States—Chapter 84, Acts of 1816.*—The credentials presented by commissioned or contract medical officers serving in the United States army, navy or public health and marine hospital service for certificate of qualification from the Virginia Board of Medical Examiners must be "satisfactory," which means that the same must be of such a nature as would satisfy the State Board of Medical Examiners that the applicant is in fact a medical officer of the public service of the United States, and the State Board of Medical Examiners has all power to decide for itself as to what are satisfactory credentials and may adopt any reasonable rule as to the same.

*Same.*—No fee can be charged by the State Board of Medical Examiners for issuing certificates to medical officers of the United States.

*Same.*—The State Board of Medical Examiners is not justified in withholding from medical officers in the United States service their certificates of qualification upon presentation of satisfactory credentials evidencing the fact that they have been commissioned as medical officers in the public service of the United States because they have become medical officers if having passed regular examinations.

RICHMOND, VA., November 6, 1917.

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

DEAR SIR:

Acknowledgment is made of your request for my opinion on the following question: What credentials are required and what fees shall be charged for issuing certificates to practice medicine in this State to medical officers in the public service of the United States?

Section 11 of the act to regulate the practice of medicine and surgery (chapter 84, Acts 1916, volume 4, Code p. 1085) provides:

Nothing in this act shall be construed to affect commissioned or contract medical officers serving in the United States army, navy or public health and marine hospital service, while so commissioned, and in the performance of their duties, but such shall not engage in private practice without license from the board of medical examiners of the State and the board may issue certificates of qualification without examination to medical officers in the public service of the United States on presentation of satisfactory credentials. On the face of these certificates it must appear that they were issued *pro forma* and without examination.

It appears from the above quotation that the credentials presented must be "satisfactory," which I construe to mean that the same must be of such a nature as

would satisfy your honorable body that the applicant is in fact a medical officer in the public service of the United States. There are, of course, a number of ways in which this fact may be proven, but I should think that the most satisfactory method would be to require the applicant to furnish or exhibit to your board or its secretary, the commission showing his appointment as a medical officer in the public service of the United States, or a certified copy of such commission. I think, however, the act vests in your board the power to decide for itself what are "satisfactory credentials" and you may adopt any reasonable rule as to same.

As to the fee charged for issuing certificates, I find that the act, while specifying what fees shall be charged in other cases, fails to provide any fee whatsoever for issuing certificates to medical officers of the United States. The act being silent on this question, no fee can legally be charged. Such cases do not come under the provisions of section 6 providing for the issuing of reciprocity certificates as will be readily seen from the following quotation from that section:

The board may, at its discretion, arrange for reciprocity with the authorities of other States, territories and countries having requirements equal to those established by this act. Certificates may be granted applicants to practice under such reciprocity on payment of a fee of fifty dollars to the secretary of the board.

In response to your further question as to the issuing of certificates to those who have been commissioned in the reserve corps of the navy, but who have not passed the regular examination of the navy and have passed no examination except that of the college of their graduation, will say, I presume that the men referred to by you have not yet become "medical officers in the public service of the United States." If, however, I am mistaken in this, and, under the rules of the navy, they can become medical officers without having passed the regular examination of the navy, then you would not be justified in withholding from them their certificates of qualification upon presentation of satisfactory credentials evidencing the fact that they have been commissioned as medical officers in the public service of the United States.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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PHYSICIANS AND SURGEONS—*Who entitled to certificate to practice medicine—Chapter 84, Acts of 1916.*—It is doubtful if the State Board of Medical Examiners has any discretion to inquire into the moral character of a person who produces before them a certificate from the judge of a circuit court and the Commonwealth's attorney of the county in which he resides stating that in their opinion from evidence produced before them he was a practicing physician in Virginia prior to January 1, 1894.

*Same.*—Unless such applicant produces before the State Board of Medical Examiners a certificate from the judge of the circuit court and the Commonwealth's attorney of the county in which he resides stating that in their opinion from evidence produced before them he was a practicing physician in Virginia prior to January 1, 1895, the board has no authority in the premises.

RICHMOND, VA., *January 25, 1917.*

DR. R. S. MARTIN,

*Stuart, Va.*

DEAR SIR:

Acknowledgment is made of your letter of January 10, 1917, in which you request me to advise you as to the proper action to take in the case of Z. P. Smith, and whether he could force your board to give him a verification certificate if he can establish the fact that he was practicing medicine prior to 1895, said Smith being a non-graduate, and there being some conflict as to his general good reputation.

It is provided by section 8, chapter 84, Acts of 1916, that all applicants for certificates to practice medicine in this State, after the passage of this act, must pass an examination before the Board of Medical Examiners. The act further provides that the board shall admit to examination candidates who submit evidence verified by affidavit, and has satisfied the board that he is now

- (a) twenty-one years of age or more,
- (b) good moral character,
- (c) certain general education,
- (d) not less than four year course in a medical school.

In addition to this there are certain alternative courses which the board may allow as substitutes for provision of (c) and (d). Then follows the proviso then occurring in this section.

\* \* \* Provided that any person who shall produce before said examining board a certificate from the judge of a circuit court and Commonwealth's attorney of the county in which he resides, stating that in their opinion, from evidence produced before them, he was a practicing physician in Virginia prior to the first day of January, 1895. The said examining board shall give to said person a certificate allowing said person to practice medicine in Virginia.

The provisions of this law are not quite clear as to whether or not the board has any discretion to inquire into the moral character of a person who shall produce before them the certificate from the judge of a circuit court and the Commonwealth's attorney of the county in which he resides, stating that in their opinion from evidence produced before them he was a practicing physician in Virginia prior to January 1, 1895, and while this might have been the intention of the law it is difficult to definitely conclude that the board has this power. However, unless the applicant shall produce this evidence to the satisfaction of the judge and the Commonwealth's attorney, the board has no authority in the premises.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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PHYSICIANS AND SURGEONS—*Registration of certificates—Chapter 84 of the Acts of 1916.*—A physician who practiced in Virginia prior to 1885 has only one year from the taking effect of chapter 84 of the Acts of 1916 within which to register his certificate to practice medicine in Virginia.

*Same.*—If a physician whose claim to a State license rests upon the fact that he practiced medicine prior to 1885 can satisfy the board of the fact he has one year within which to register his certificate from the taking effect of chapter 84 of the Acts of 1916.

RICHMOND, VA., *December 19, 1916.*

DR. J. N. BARNEY,  
*Fredericksburg, Virginia.*

DEAR SIR:

Your request to the Attorney General for an opinion upon the following proposition is now upon my desk:

Whether a physician who practices in this State prior to 1885, who moved out of the State before obtaining verification certificate can now move back into the State and practice without an examination?

Under chapter 84 of the Acts of 1916, a physician who practiced in this State prior to 1885 has only one year within which to register his certificate to practice medicine in Virginia. Section 6 of this chapter also provides that those whose claims to State license rest upon having practiced in the State previous to the year eighteen hundred and eighty-five, shall present to the State Board of Medical Examiners satisfactory evidence of having practiced medicine in this State before that time. As above set out if the physician whose claims to State license rests upon the fact that he practiced medicine prior to 1885 can satisfy the board of the fact, he has one year within which to register his certificate. I assume that this is the information you desire.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

PHYSICIANS AND SURGEONS—*Examination of—Chapter 84 of the Acts of 1916—Chapter 237, Acts of 1912.*—The State Board of Medical Examiners has no power to admit to examination the graduate of any school which does not maintain a standard satisfactory to the board, and the fact that the applicant may have graduated prior to April 1, 1914, is immaterial. Since April 1, 1914, the State Board of Medical Examiners has had no power to admit to examination any graduate of any school not maintaining satisfactory courses and standards.

*Same—Admission to practice—Reciprocity.*—Under the terms of the Virginia statute, the State Board of Medical Examiners may enter into reciprocity agreements only with those States that now maintain requirements equal to those established by our act for the admission of physicians to the practice of their profession. Where a State maintains requirements equal to the Virginia standard, the State Board of Medical Examiners may issue a reciprocity certificate to an applicant although at the time of his admission to practice in another State he could not meet the Virginia standard of requirements and at such time the requirements of the other States were not equal to the Virginia statute.

RICHMOND, VA., *December 14, 1917.*

DR. R. S. MARTIN, *President,*  
*State Board of Medicine and Surgery,*  
*Stuart, Va.*

DEAR SIR:

In response to request of your board for my opinion as to whether they may properly admit to examination a graduate of a certain school which does not maintain a standard satisfactory to your board, will say:

It seems that the question submitted arises under the terms of clause (d) of section 8 of the act regulating the practice of medicine and surgery, chapter 84, Acts 1916.

Under said section are prescribed the conditions upon which applicants are admitted to examination and among other things it is required that the applicant must have

studied medicine not less than four school years, including four satisfactory courses of at least eight months each in four different calendar years in a medical school registered as maintaining a standard satisfactory to the State Board of Education. \* \* \* The above clause of sub-section (d) shall not apply until April first, nineteen hundred and fourteen.

By reference to a former act governing the practice of medicine and surgery, being chapter 237, Acts 1912, I find that the sentence last above quoted first appeared in that act. It was evidently continued in the act of 1916 through inadvertence.

I am of the opinion that under the statute above quoted your board has no power to admit to examination the graduate of any school not coming within the description above set out; and the fact that the applicant may have graduated prior to April 1, 1914, is immaterial.

It follows from the above that I am also of the opinion that since the first day of April, 1914, your board has had no power to admit to examination any graduate of any school not maintaining satisfactory courses and standards.

You inform me that you also desire my opinion on the following question: Whether a man graduating in the year 1914 in a school not maintaining satisfactory grades and standards, but who was admitted to practice in the State of West Virginia, can now be admitted without examination to practice in Virginia under the reciprocity provisions of the act governing the practice of medicine and surgery.

Under section 6 of the same act it is provided that your board

may, at its discretion, arrange for reciprocity with the authorities of other States, territories and countries having requirements equal to those established by this act. \* \* \*

The question therefore arises whether the State of West Virginia has provided requirements equal to those established in our statutes. It is evident that at the time of the admission of this applicant to the examination the State of West Virginia did not have requirements equal to those now existing in this State, but I am of the opinion that under the terms of the act you are prohibited from entering into reciprocity agreements only with those States that do not now maintain requirements equal to those established by our act. You will therefore please ascertain from the West Virginia authorities whether they now maintain requirements equal to those set out in our act; and if, after inquiry, you find that the requirements are equal to ours you may issue a reciprocity certificate to the applicant above referred to. If, on the other hand, the requirements maintained in West Virginia are not up to the Virginia standard, you are not permitted under the law to issue him a reciprocity certificate.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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PHYSICIANS AND SURGEONS—*Revocation of certificates to practice—Chapter 84, Acts of 1916.*—The State Board of Medical Examiners is authorized to revoke any certificate or verification certificate granted by it, or any other medical examining

board in this State, where a practitioner of medicine is guilty of any crime or misdemeanor, or fraud or deceit by which he was admitted to practice.

*Same.*—Larceny being a crime, the State Board of Medical Examiners has the right to revoke the license of a physician convicted of such offense.

*Same.*—Upon the revocation of the license of a physician by the State Board of Medical Examiners such physician has a right of action to have such issue tried by the circuit court of the county or the corporation court of the city within whose jurisdiction he may reside.

*Same—Attorney for the Commonwealth—Duties of.*—In such case it is the duty of the attorney for the Commonwealth to appear on behalf of the board and defend its action before the court.

RICHMOND, VA., *March 27, 1917.*

DR. R. S. MARTIN,  
*President, State Medical Board,*  
*Stuart, Va.*

DEAR SIR:

Acknowledgment is made of your communication of March 15, 1917, in which you request the Attorney General to advise what steps your board could take, if any, to revoke the license of a physician who has been convicted of larceny and sentenced to the penitentiary.

By referring to section 7, chapter 84, Acts 1916, you will see that your board is authorized to revoke any certificate or verification certificate granted by it, or any other medical examining board in this State, in any of the following cases:

- (a) A practitioner of medicine \* \* \* who is guilty of any crime or misdemeanor, or who is guilty of fraud or deceit, by which he was admitted to practice. \* \* \*

Larceny being a crime, the right of your board to revoke the license of the physician mentioned in your communication would seem clear. Your attention is directed, however, to the next to the last paragraph of section 7 of chapter 84 of Acts of 1916, which provides that any physician who may have his certificate revoked by your board, shall have a right of action to have such issue tried by the circuit court of the county or the corporation court of the city within whose jurisdiction he may reside, in which case it will be the duty of the Commonwealth's attorney of the county or corporation to appear on behalf of the board, and defend its action before the court.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

PHYSICIANS AND SURGEONS—*Chiropody—Chapter 84 of the Acts of 1916.*—In the absence of any law requiring a license prior to 1916 all practitioners of chiropody prior to that time are entitled in the discretion of the State Board of Medical Examiners to a certificate to practice chiropody.

RICHMOND, VA., *December 19, 1916.*

DR. N. C. MUELLER,  
*Chiropodist,*  
*Richmond, Va.*

DEAR SIR:

Your letter to the Attorney General with regard to the right of applicants practice chiropody in Virginia is upon my desk for reply.

I can find no law under which practitioners of chiropody were required to take out license prior to the Acts of 1916, although your letter says that they were required to pay a State license of \$10.75 and a city license of \$10.00. In the absence of any law requiring a license prior to 1916, it would seem to me that all practitioners of chiropody prior to that time would be entitled, in the discretion of the State Board of Medical Examiners, to a certificate to practice chiropody. You will notice that section 11-b of chapter 84 of the Acts of 1916, at page 147, provides that if the requirements are to the satisfaction of the State Board one applicant shall be issued a certificate to practice chiropody in the State of Virginia. It therefore seems to be a matter of discretion with the State Medical Board as to whom they will license.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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PHYSICIANS AND SURGEONS—*Chiropody—Chapter 84 of Acts of 1916.*—The fact that certain enumerated persons are exempt from the examination required of persons not coming within the meaning of section 11-b of chapter 84 of the Acts of 1916, does not require the State Board of Medical Examiners to issue the certificate provided for if in addition to the other requirements of this section "such other information" is not furnished the board by such persons as may be deemed advisable by the members of the board in the exercise of a sound discretion.

RICHMOND, VA., April 7, 1917.

DR. J. W. PRESTON,

*Secretary, Virginia State Board of Medical Examiners,  
Roanoke, Va.*

DEAR SIR:

Acknowledgment is made of your letter of April 5th, in the matter of the application of Mrs. Mary Shannonhouse for a license to practice chiropody. In your letter you say:

If I understand you correctly, the evidence of all of these parties is complete in due form, showing that they were practicing chiropody previous to the first of January, 1916, but there is yet just one point relative to which I am still in doubt, and that is as to whether we have a right to make any inquiry whatever as to their professional qualifications. To quote the law, "if the requirements are to the satisfaction of the said board," it would appear that we have some such right, but looking upon it as a whole, it would seem that section 11-b is intended to exempt all who were practicing on the first day of January, 1916, from any examination or question no matter whether they were properly qualified professionally or not.

I am of the opinion that under the provisions of section 11-b of chapter 84 of the Acts of 1916, that the fact that such persons as are mentioned in that section are exempt from the examination required of persons not coming within the meaning of that section, does not require the board to issue the certificate provided for if in addition to the other requirements of this section "such other information" is not furnished the board, as may be deemed advisable by the members of the board in the exercise of a sound discretion.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

PHYSICIANS AND SURGEONS—*Chiropractors—Optometry—Chapter 148, Acts of 1916—Chapter 84, Acts of 1916.*—Chapter 148 of the Acts of 1916 relates to the practice of optometry and has no reference to chiropractice.

*Same.*—Chiropractors who commenced to practice chiropractice in this State prior to January 1, 1913, are exempt from the law requiring examinations for the practice of medicine and surgery.

RICHMOND, VA., June 16, 1917.

J. DOUGLAS WATKINS, ESQ.,  
Petersburg, Va.

DEAR SIR:

Responding to your letter of the 13th instant to the Attorney General, asking if chiropractors are exempt under section 16, chapter 148 of the Acts of 1916, I beg to advise that this act is one to regulate the practice of optometry, and has no reference whatsoever to chiropractice, and, therefore, section 16 thereof contains no exemption.

However, I call your attention to the fact that by section 11, chapter 84 of the Acts of 1916, being an act to regulate the practice of medicine and surgery, chiropractors who commenced the practice of chiropractice in this State prior to January 1, 1913, are exempted from the law requiring examinations for the practice of medicine and surgery.

Very truly yours,  
LESLIE C. GARNETT,  
Assistant Attorney General.

PHYSICIANS AND SURGEONS—*Optometry—Chiropractic.*—If chiropractors usually practice the various branches of medicine they are not required to be licensed as optometrists to practice optometry.

RICHMOND, VA., June 25, 1917.

MR. J. DOUGLAS WATKINS,  
146 N. Sycamore St.,  
Petersburg, Va.

DEAR SIR:

Acknowledgment is made of your letter of June 19. I am not entirely familiar with the term "Chiropractic" and do not know what branches of practice of medicine it purports to cover.

If it can be assumed that chiropractors are general practitioners of medicine, I think it would be safe to say that general practitioners are licensed for the same purposes as optometrists and that, therefore, chiropractors licensed by the medical board would be entitled to practice all branches of the medical science.

If, therefore, it can be assumed that chiropractors usually practice the various branches of medicine, I do not see how they could be required to be licensed as optometrists to practice optometry.

Yours very truly,  
LESLIE C. GARNETT,  
Assistant Attorney General.

PHYSICIANS AND SURGEONS—*Optometry—Chapter 148, Acts of 1916—Application for exemption certificates—When filed.*—The State Board of Examiners in optom-

etry are not authorized to issue an exemption certificate to an optometrist who files his application after the expiration of the time limit provided for in chapter 148 of the Acts of 1916, regardless of the cause of his failure to file the same at the proper time.

RICHMOND, VA., *March 14, 1917.*

MR. J. DOUGLAS WATKINS,

*Secretary, Virginia State Board of Examiners in Optometry,  
Petersburg, Va.*

DEAR SIR:

Acknowledgment is made of your letter of February 23rd, in which you request me to advise you on the following state of facts:

Thos. D. Hopkins, Lexington, Va., is known to have practiced optometry for more than one year next prior to June 18, 1915, and on September 8, 1916, made application for membership in The Virginia State Optical Association and now claims he at that time thought he was making application to the Virginia State Board of Examiners in Optometry for exemption certificate, and did not find out his mistake until February 7, 1917.

Enclosed herein copies of communication. Kindly advise on account of this error if the board has a right to grant certificate to this party on application dated after January 1, 1917.

Section 10 of chapter 148, Acts of 1916, reads as follows:

That every person entitled to a certificate of exemption as herein provided, must make application therefor, and present the evidence to entitle him thereto, on or before the first day of January, nineteen hundred and seventeen, or he shall be deemed to have waived his right to such certificate. Before any certificate is issued it shall be numbered and recorded in a book kept by the said Board of Examiners in Optometry, and its number shall be noted upon the certificate.

While this is no doubt a hard case, the rule is well established that all persons are presumed to know the law and that ignorance thereof excuses no man; therefore, I am of the opinion that under the provisions of section 10, chapter 148, Acts of 1916, your board is not authorized to issue the certificate in the case set out in your letter.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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PHYSICIANS AND SURGEONS—*Optometry—Certificates to practice.*—Before granting a certificate of exemption the State Board for the Examination of Optometrists must be satisfied with the good moral character of the applicant and where the evidence of the good moral character of such applicant is not affirmative the board is justified in refusing to grant a certificate.

RICHMOND, VA., *March 13, 1917.*

DR. J. DOUGLAS WATKINS,

*Petersburg, Va.*

DEAR SIR:

Acknowledgment is made of your letter of March 5, 1917, to the Attorney General with regard to the application from a man signing himself as Morris Manuell for an exemption certificate to practice optometry in Virginia.

From the enclosures in your letter it appears that he has variously used the names of S. Rosenblook and S. Salesky, and has practiced optometry in North Carolina without a certificate.

In the light of these facts you desired to be advised whether or not this is sufficient evidence to refuse the certificate on grounds that applicant is not of good moral character. Section 6 contains the following proviso:

Provided, however, that any person who shall submit to the said Board of Examiners in Optometry satisfactory proof that he is of good moral character, that he is and has been engaged in the practice of optometry in a permanent location of business in this State for more than one year next prior to the passage of this act, shall receive from the said Board of Examiners in Optometry a certificate of exemption from such examination, which certificate shall be numbered and registered with said board and entitle him to practice optometry under this act.

From an analysis of this proviso it would appear that the Board of Examiners shall be satisfied with the good moral character of the applicant, and certainly if the enclosures which you submit to this office are the only evidence of his good moral character, the board should be justified in refusing to grant a certificate. However, this is a matter of discretion invested in the said Board of Examiners in Optometry, and my opinion is in no way binding upon their discretion. I herewith return the enclosures.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

PHYSICIANS AND SURGEONS—*Dentists—Appeals from decisions of the State Board of Dental Examiners revoking a license—Chapter 311, Acts of 1914—Words and phrases—"To review."*—Section 9 of chapter 311 of the Acts of 1914 providing for appeal from decisions of the State Board of Dental Examiners requires the board of review to review any and all actions of the Board of Examiners in revoking or refusing to revoke such license. Therefore this statute does not give the board of review the right to hear the matter *de novo*, but limits its consideration to facts presented at the original hearing.

*Same.*—Upon appeals heard by the board of review in such cases the board of review can hear no new evidence but must confine itself to the evidence introduced or offered before the examiners.

*Same.*—The method adopted by the board of review for ascertaining what evidence was adduced at the hearing before the Dental Examiners is entirely within the discretion of the board of review.

RICHMOND, VA., September 25, 1917.

His Excellency, H. C. STUART,  
*Governor of Virginia,*  
*City.*

DEAR SIR.

Acknowledgment is made of your letter of August 17, asking whether or not, upon an appeal from the decision of the State Board of Dental Examiners in revoking a license, such appeal should be heard only from the record certified by the board of review, or if the board of review may go into the hearing of the case *de novo* and permit the petitioner and the State Board of Dental Examiners to summon witnesses to hear their evidence and to hear argument by counsel.

Section 9 of chapter 311 of the Acts of Assembly, 1914 (Virginia Code, volume 4, p. 975) provides as follows:

The Governor, the Superintendent of Public Instruction and the Secretary of State shall be, and they are hereby constituted, a board of review, with power and authority to review any and all actions of the Board of Examiners in revoking or refusing to revoke any such license; and the determination of the said board of review upon any and all matters submitted to it shall be final.

Any person who may feel himself aggrieved at the revocation of his license may have the action of the State board in revoking the same reviewed by the board of review in the following manner:

The person seeking such review shall file with the secretary of the Board of Examiners his affidavit, verified in the manner required by law, setting forth the fact of the revocation of his license, and that there has been a miscarriage of justice, or error committed by the State board, or that the decision of the State board was contrary to law, or was not supported by the evidence adduced at the hearing.

I am of the opinion that the "authority to review" here given, is governed by the same rule of construction laid down in *Alderson v. Commissioners*, 32 W. Va., 454, 9 S. E., 863. The court, in discussing the rights under the writ of *certiorari* used as an appellate proceeding to bring to the circuit court for review an order of inferior tribunal, and said:

\* \* \* It was not the purpose of the act to give a trial *de novo* in the circuit court. The act does not contain words to plainly convey that meaning. It says the circuit court shall "review" the judgment, not retry the case; the word "review" seeming to mean that the circuit court should go over again just what the lower court had considered. It does not say that new evidence may be heard. \* \* \*

It will be noted that the section under consideration authorizes the board of review "to review any and all actions of the Board of Examiners in revoking or refusing to revoke any such license," that it provides that any person who is aggrieved by the revocation of his license "may have the action of the State board in revoking the same reviewed." From the language here used, I am of the opinion that it was not the purpose of the General Assembly to give the board of review the right to hear the matter *de novo*, but to limit its consideration to facts presented at the original hearing. It was not the purpose to give the person aggrieved two trials, one before the examiners and another before the board of review, but simply to have the action of the examiners reviewed, that is to say, another view taken of the same matters by another tribunal. Any other construction of the statute would not only be out of keeping with the language therein used, but would encourage the parties not to present their cases fully before the body primarily charged with passing on such matters.

It follows, therefore, that I am of the opinion that the board of review *must*, upon appeal, hear no new evidence, but must confine itself to the evidence introduced or offered before the examiners.

As to the method which should be adopted by the board of review for ascertaining what evidence was adduced at the hearing before the Dental Examiners, I am of the opinion that this is a matter entirely within the discretion of the board of review. The most convenient course would be to have the examiners to certify the evidence in writing, but the board of review may, if it sees fit, hear the witnesses in person, confining their testimony, however, to that presented to the examiners. The board of review may, in its discretion, hear argument of counsel.

Yours very truly,

JNO. GARLAND POLLARD,  
Attorney General.

PHYSICIANS AND SURGEONS—*Reports of—Vital statistics—Chapter 181, Acts of 1912.*—It is the duty of the physician to make out and deliver the medical certificate of the cause of death under the provisions of chapter 181 of the Acts of 1912, and he cannot justify or excuse his failure to make out the certificate upon the ground that he has not been paid a fee therefor.

*Same.*—If a physician last in medical attendance upon the deceased at the time of his death refuses to fill in a medical certificate of the cause of death without the payment to him of a fee by the family he is subject to prosecution for violation of chapter 181 of the Acts of 1912.

RICHMOND, VA., August 31, 1917.

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

DEAR SIR:

In the absence of the Attorney General, I am replying to your letter of August 27, in which you desire to know whether a physician can be prosecuted for refusing to fill in a medical certificate of the cause of death without payment to him of a fee by the family, and if so, under which section of the law such a case would be handled.

Section 7 (20) of Ch. 181 of the Acts of Assembly, 1912 (Pollard's Code, 1916, volume 4 pp. 840, 843) provides:

The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which the death occurred. And he shall further state the cause of death, so as to show the course of the disease or sequence of causes resulting in the death, giving first the name of the disease causing death (primary cause), and the contributory (secondary) cause, if any, and the duration of each. Indefinite and unsatisfactory terms, indicating only symptoms of disease or conditions resulting from disease, will not be held sufficient for issuing a burial or removal permit; and any certificate containing such terms as defined by the State registrar shall be returned to the physician for correction and more definite statement. Causes of death, which may be the result of either disease or violence, shall be carefully defined; and, if from violence, the means of injury shall be stated, and whether (probably) accidental, suicidal, homicidal.

\* \* \*

Section 21 of the same act (Pollard's Code, 1916, p. 849), provides:

That any physician who was in medical attendance upon any deceased person at the time of death who shall wilfully neglect or refuse to make out and deliver to the undertaker, sexton, or other person in charge of the interment removal or other disposition of the body, upon request, the medical certificate of the cause of death, hereinbefore provided for, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five dollars, nor more than fifty dollars.

It will thus be seen that the law makes it mandatory upon the physician to make out and deliver the medical certificate of the cause of death, and makes no provision for payment to him of a fee therefor, and I am of the opinion that he cannot justify or excuse his failure to make out the certificate upon the ground that he has not been paid a fee therefor. If, therefore, the physician was last in medical attendance upon the deceased at the time of his death, he can be prosecuted for his refusal to fill in a medical certificate of the cause of death without the payment to him of a fee by the family.

In answer to your second question, I am of the opinion that prosecution in such a case should be made under that portion of section 21 of the act as is quoted above.

Yours very truly,

J. D. HANK, JR.,

*Assistant Attorney General.*

PHYSICIANS AND SURGEONS—*Birth certificates—Vital Statistics—Chapter 181, Acts of 1912.*—It is the duty of the attending physician to report all births and in the case of a child dead at birth he is required to file a death certificate as well as a birth certificate.

*Same.*—A physician who files fraudulent certificates of births and deaths can be proceeded against under section 21 of chapter 181 of the Acts of 1912.

RICHMOND, VA., *December 28, 1916.*

DR. W. A. PLECKER,

*Registrar of Vital Statistics,*

*Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of your letter, which is in the following terms:

The Commonwealth's attorney of Augusta county, Hon. Hugh H. Kerr, has a case now against Dr. S. A. Austin, of Waynesboro, for the induction of criminal abortion. Dr. Austin last year reported a hundred and seventeen births, which is the largest number of any physician in the State, with one exception. Mr. Kerr and our local registrar at Waynesboro, Mr. J. A. Patterson, believe that some of these certificates were fraudulent, and that they were the report of immature births, two, at least, being at four months, when it was impossible for them to live or show evidences of life.

We desire your opinion as to whether our vital statistics law can reach him for giving a fraudulent report of births. It seems to be considerably stronger in section twenty-one, on the fraudulent report of the causes of death.

Section 6 of the law for the registration of births and deaths in Virginia, reads as follows:

6. That still-born children and those dead at birth shall be registered as births and also as deaths, and a certificate of both the birth and death shall be filed with the local registrar, in the usual form and manner, the certificate of birth to contain, in place of the name of the child, the word "still-birth". The medical certificate of the cause of death shall be signed by the attending physician, if any, and shall state the cause of death as "still-born"; with the cause of the still-birth, if known, whether a premature birth, and, if born prematurely, the period of uterine gestation, in months, if known; and a burial or removal permit in the usual form shall be required. Midwives shall not sign certificates of death for still-born children; but such cases, and still-births occurring without attendance of either physician or midwife, shall be treated as deaths without medical attendance, as provided for in section eight of this act.

It will, therefore, be seen that this section imposes a duty on the attending physician to report all births and in the case of those children dead at their birth he is required to file a death certificate as well as a birth certificate.

It is provided by the first two paragraphs of section 21 as follows:

That any physician who was in medical attendance upon any deceased person at the time of death who shall wilfully neglect or refuse to make out

and deliver to the undertaker, sexton, or other person in charge of the interment, removal, or other disposition of the body, upon request, the medical certificate of the cause of death, hereinbefore provided for, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than fifty dollars. And if any physician shall knowingly make a false certification of the cause of death, in any case, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than two hundred dollars.

Any physician or midwife in attendance upon a case of confinement, or any other person charged with responsibility for reporting births, in the order named in section thirteen of this act, who shall wilfully neglect or refuse to file a proper certificate of birth with the local registrar, within the time required by this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one dollar nor more than ten dollars.

It would, therefore, seem that if Dr. Austin filed fraudulent certificates of births and deaths that you could proceed against him under section 21 of the act.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

PHYSICIANS AND SURGEONS—*Births and deaths—Certificates of—Registration of births and deaths—Forms.*

HON. \_\_\_\_\_  
*Commonwealth's Attorney,*  
\_\_\_\_\_, *Virginia.*

DEAR SIR:

It is provided in section 21 of chapter 181, Acts of 1912, as amended (volume 4, Code, page 849), as follows:

And any physician or midwife in attendance upon a case of confinement, or any other person charged with responsibility for reporting births, in the order named in section thirteen of this act, who shall wilfully neglect or refuse to file a proper certificate of birth with the local registrar, within the time required by this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one dollar nor more than ten dollars.

The local registrar of births in your county has reported that Dr. \_\_\_\_\_ has violated the above quoted provision in the case of the following births:

(Here insert names.)

I have written to the above named physician calling his attention to the law on the subject, and he has failed to comply with the law, although he has been given abundant opportunity to do so.

I am, therefore, in pursuance of section 22 of said act reporting to you the above mentioned violations of the law.

You will see by consulting the section last referred to that it provides as follows:

\* \* \* When he (the State registrar) shall deem it necessary, he shall report cases of violation of any of the provisions of this act to the Commonwealth's attorney of the county, with a statement of the facts and circum-

stances; and when any such case is reported to him by the State registrar, the Commonwealth's attorney shall forthwith initiate and promptly follow up the necessary court proceedings against the person responsible for the alleged violation of law.

The facts and circumstances surrounding each of the above cases is as follows:  
(Here insert the facts.)

You may summons \_\_\_\_\_, the local registrar as a witness, together with any other witnesses, and \_\_\_\_\_ the parents of said infant.

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PRINTING, PUBLIC—*Sections 275 and 276, Code of Virginia, 1904*—*The report of Commission on Workmen's Compensation law.*—The report of the Commission on Workmen's Compensation, appointed by the Governor under joint resolution of the General Assembly, 1916, is a public record as is the bill prepared by it, therefore the Governor has authority to direct that the printing thereof be done as a necessary public record of his office, so that the same may be at the proper time transmitted to the General Assembly with such recommendations as the Governor sees fit to make. Under section 276 of the Code of Virginia, 1904, upon the presentation to the Governor by the Superintendent of Public Printing of the account for this printing, the Governor is authorized to certify the same to the Auditor of Public Accounts to be paid by him by warrant on the public treasury out of the appropriation for public printing.

RICHMOND, VA., May 11, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of May 9th to the Attorney General informing him that the Commission on Workmen's Compensation, appointed by you under the joint resolution of the General Assembly of 1916, has drawn up a tentative bill which it is desirable shall be printed and that since no appropriation was made for the work of this commission the Superintendent of Public Printing does not think he has authority to pay for the printing of this bill, and requesting the opinion of the Attorney General thereon.

The legislature appropriated a lump sum for public printing. Under section 275 of the Code it is the duty of the public printer to supply the Governor with such printing as may be required by him in his department.

The report of this commission is a public record, as is the bill prepared by it. I am, therefore, of opinion that you can direct that this printing be done as a necessary public record of your office, so that the same may be at the proper time transmitted to the General Assembly with such recommendation as you may see fit to make, and under section 76 of the Code, upon the presentation by the Superintendent of Public Printing to you of the account for this printing you will be authorized to certify the same to the Auditor of Public Accounts, to be paid by him by warrant on the public treasury, out of the appropriation for public printing.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

PUBLIC INSTITUTIONS—*Sale of products of.*—A public institution supported by the State has the right to sell its products in the open market.

RICHMOND, VA., April 19, 1917.

A. W. DRINKARD, JR., PH.D.,  
*Director, Virginia Agricultural Experiment Station,*  
*Blacksburg, Va.*

DEAR SIR:

Acknowledgment is made of your letter to the Attorney General requesting his opinion as to whether or not it is legal for an institution supported by the State to sell farm products in the open market.

The doctrine is entirely familiar that the king has all of the rights granted to his subjects, and, therefore, the sovereignty can take advantage of all of its laws.

There can be no question, it would seem to me, but that an institution supported by the State has the unqualified right to sell its products in the open market.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

RECORDS, PUBLIC—*Judgment dockets*—Section 3559, Code of Virginia, 1904—Section 3182—Section 3560, Code of Virginia, 1904, as amended—*Statutes, construction of.*—Under the Virginia statutes those courts required by law to keep a judgment docket must, after January 1, 1917, combine with such docket an execution book. The two books are to be kept in one volume while those courts not required by law to keep a judgment docket are to keep a volume known as the execution book.

*Same.*—Repeals by implication are not favored and therefore statutes not necessarily inconsistent must be considered together.

RICHMOND, VA., February 7, 1917.

F. W. RICHARDSON, ESQ.,  
*Clerk, Circuit Court, Fairfax County,*  
*Fairfax, Va.*

DEAR SIR:

Acknowledgment is made of your letter of January 6, 1917, in the following terms:

Does section 3560, as amended, Acts 1916, page 122, repeal section 3182 of the Code, and is clerk required to re-docket judgments obtained before January 1, 1917, in new judgment docket book, and are executions issued on judgments obtained before that time required to be kept in new judgment docket book? And is clerk required under the new law to keep a general index of all judgments in addition to the index in the new form of judgment docket.

Under Virginia Code, 1904, section 3559, a judgment docket must be kept by:

1. The clerk of the chancery court of the city of Richmond, and
2. The clerk of every circuit, corporation and hustings court (except the hustings court of the city of Richmond and except circuit courts of cities).

The section next following, to-wit: section 3560, prescribing how judgments must be docketed, was amended by Acts of 1916, page 122, Code, volume 4, page

509. Under this amendment it was provided in effect that the judgment docket should have entered therein all matters relating to executions which had been formerly kept in separate execution books. This amendment by its terms is to become effective January 1, 1917, after which date it is provided that "no other record of executions shall be kept." The General Assembly of 1916 later in its session also passed an amendment to section 3182 prescribing what record of executions should be made (Acts of 1916, page 765, Code, volume 4, p. 461).

In this latter amendment no reference is specifically made to the earlier amendment to section 3560 nor to the fact that it was contemplated that after January 1, 1917, all information relating to judgments and executions should be kept together in one book by said clerks. This amendment provided that an execution book should be kept by:

1. Clerk of the hustings court of the city of Richmond, and,
2. The clerk of the circuit court or other court of every city or corporation (except the clerk of the chancery court of the city of Richmond and the clerk of every corporation court of every city or corporation.)

The same amendment provided in effect that such entries as theretofore had been made in the execution book should be entered in the judgment docket by:

1. The clerk of the chancery court of the city of Richmond, and
2. The clerk of every corporation or hustings court of every city or corporation (except the hustings court of the city of Richmond and the clerk of every circuit court of every county.)

The question has arisen as to whether this later amendment to section 3182 is in conflict with the earlier amendment to section 3560, passed at the same session, and whether the General Assembly intended by the later amendment to repeal the provision of the earlier one providing that the two books should be combined in one.

Reading sections 3559, 3560 (as amended) and section 3182 (as amended) together, we find that the following clerks are required to keep a *judgement docket and lien book* together in one volume after January 1, 1917;

1. Clerk of the chancery court of the city of Richmond, and
2. Clerk of every circuit, corporation and hustings court (except the hustings court of the city of Richmond and except circuit courts of cities.)

and we also find that the following clerks are required to keep an execution book only:

1. The clerk of the hustings court of the city of Richmond, and
2. The clerk of the circuit or other court of every city or corporation (except the clerk of the chancery court of the city of Richmond and the clerk of every corporation court of every city or corporation.)

It will be observed that the exception last above is confusing in that the statute first requires the clerk of the circuit or other court of every city or corporation to keep an execution book, and, then, excepts the clerks of every corporation court of every city or corporation. As a matter of fact in some cities there are courts other than the circuit and corporation courts, as for instance, the law and equity court of the city of Richmond. It was evidently the intention to require of such city courts, other than the corporation courts, to keep an execution book but not a judgment docket. In other words those courts required by law to keep a *judgment docket*

must, after January 1, 1917, combine with said docket the execution book, the two books to be kept in one volume, while those courts not required by law to keep a judgment docket are to keep a volume known as the *execution book*.

It should further be noted that the amendment to section 3182 requiring certain clerks to make entries concerning executions in the *judgment docket* makes an exception in favor of the clerk of every circuit court of every county and while it is true that such clerks do not, by virtue of the amendment to said section have to keep their *judgment docket* and *execution book* in one volume, yet such circuit clerks are required so to do by the amendment to section 3560, as above referred to. It is true that the amendment excepting circuit courts of counties is later than the amendment including them, yet the two amendments are not necessarily inconsistent and must be considered together. Repeals by implication are not favored according to a well established rule.

As to your second inquiry, I am of the opinion that the general law as to indexing judgments remains unchanged by section 3560 as amended.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

REPORTS OF OFFICERS—*Printing of—Report of Prohibition Commissioner—Chapter 146, Acts of 1916—Section 280, Code of Virginia, 1904, as amended.*—The Commissioner of Prohibition is required to make an annual report to the Governor of Virginia who is required to deliver the same to the Superintendent of Public Printing whose duty it is to have the same printed.

*Same.*—There being no specific provision for the printing of the report of the Commissioner of Prohibition found in chapter 146 of the Acts of 1916 the cost of printing this report cannot be paid out of the appropriation for carrying this act into effect and the same must be paid out of the general appropriation for printing.

RICHMOND, VA., November 30, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter asking my opinion as to whether the annual report of the Commissioner of Prohibition should be printed by the Superintendent of Public Printing and paid for out of the appropriation for the publication of the annual reports of the departments of the State.

Section 32 of the prohibition act (chapter 146, Acts 1916, volume 4 Code, p. 1116) requires the said commissioner to make his annual report to you, while section 280 of the Code, as amended, volume 4 of Code, requires you forthwith to deliver the report to the Superintendent of Public Printing, whose duty it shall be to have the same printed.

The question then arises as to whether the cost of said printing shall be paid out of the general appropriation for printing as the costs of other annual official reports are paid; or, shall the cost of same be paid out of the appropriation made for carrying into effect the prohibition act above referred to.

Section 75 of the said act provides \$25,000.00 annually "for the purpose of carrying this act into effect," and, while one of the provisions of the act is that an

annual report shall be made to you as Governor, the act does not in terms require that the same be printed, hence the *printing* of the report cannot be said to be necessary for the purpose of carrying the prohibition act "into effect."

Section 280, above referred to, however, does require all of the annual reports to be printed and it is the uniform custom to pay the costs of printing all such reports out of the general appropriation for printing, except where the printing of such reports is otherwise specifically provided for.

There being no specific provision for the printing of the report in the prohibition act itself, I am of the opinion that the cost of printing this report cannot be paid out of the appropriation for carrying that act into effect and that the same must be paid out of the general appropriation for printing.

In this connection, however, I call your attention to the further provision of section 280 of the Code to the effect that if the officer making the report desires to have printed more than the 500 copies provided for in said section, that all copies in excess of 500, shall be paid for by the department ordering the same.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

REPORTS OF OFFICERS—*Printing of—Section 280, Code of Virginia, 1904, as amended—Chapter 152, Acts of 1916.*—The Commissioner of Game and Inland Fisheries is required to report annually to the Governor.

*Same.*—Section 280 of the Code of Virginia, 1904, as amended, is a general statute dealing with the printing of all annual reports and must be taken to apply to the report of the Department of Game and Inland Fisheries except in those particulars in which said section is in conflict with the special provisions dealing with the report of the Department of Game and Inland Fisheries as embodied in chapter 152 of the Acts of 1916, in which case of conflict the latter act prevails. The one conflict appearing between the two laws with reference to the printing of the report of the Commissioner of Game and Inland Fisheries is that the cost of printing the annual report of such commissioner must not be paid out of the general appropriation for printing but out of the game protection fund. In other particulars the report of this department must be treated in the same manner as the reports of other departments.

RICHMOND, VA., *October 9, 1917.*

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

DEAR SIR:

Yours of October 2 received. You inform me that you are in receipt of the first annual report of the Department of Game and Inland Fisheries, and as I understand it, you desire me to give you my opinion as to whether said report is to be printed by you in accordance with section 280 of the Code, dealing with the printing of the annual reports of the several State departments.

Section 280 of the Code, above referred to, provides that

It shall be the duty of the department chiefs \* \* \* to furnish their annual reports to the officers to whom they are required to be made \* \* \* who shall forthwith deliver them to the Superintendent of Public Printing whose duty it shall be to have them printed \* \* \*

The section then provides that

Five hundred copies of each report shall be printed, three hundred copies of which shall be bound in one volume in ordinary half binding. \* \* \* The remaining two hundred copies of said reports shall be bound separately in ordinary pamphlet binding with paper covers. \* \* \*

Now, turning to chapter 152 of the Acts of 1916, volume 4 of the Code, p. 1135, we find in section 9 a provision that the Commissioner of the Department of Game and Inland Fisheries is required to report annually to the Governor. The same section provides that the report shall be published in pamphlet form.

Section 11 of the same act provides that the blanks and other printed matter necessary to carry out the provision of the game laws "shall be paid for and in like manner and upon the terms as other public printing." This expense shall be chargeable to the first money covered into the game protection fund.

Section 31 of the same act provides that

The expenses incurred for any purpose or in consequence of this chapter shall be limited to the amount of money in the game protection fund and in no event shall the State pay any such salaries or expenses. \* \* \*

I am of the opinion that section 280 of the Code above quoted is the general statute dealing with the printing of all annual reports and must be taken to apply to the report of the Department of Game and Inland Fisheries, except in those particulars in which said section is in conflict with the special provisions dealing with the report of said department as embodied in chapter 152 of the Acts of 1916, above referred to, in which case of conflict the latter act prevails. For the purpose of your inquiry the only conflict appearing is that the annual report of the Department of Game and Inland Fisheries must not be paid out of the General appropriation for printing but out of the game protection fund. In other particulars the report of this department must be treated in the same manner as the reports of other departments.

Yours very truly,

JNO. GARLAND POLLARD,  
*Attorney General.*

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ROADS AND HIGHWAYS—*Condemnation—Chapter 276, Acts of 1916.*—Public roads cannot be opened through the lands of individuals until the steps have been taken provided for by the general road law, as amended by chapter 276 of the Acts of 1916.

*Same.*—Under the provisions of the general road law the board of supervisors of a county have the right to direct the county or district superintendent of roads to examine any proposed route, and with this power to examine, if necessary, the power to survey the proposed route is implied.

*Same.*—If in the surveying of such proposed route there is any injury done to private property or any taking of private property without due process of law the county will be responsible in damages.

RICHMOND, VA., January 25, 1916.

HON. GEO. P. COLEMAN, ESQ.,  
*State Highway Commissioner,  
Richmond, Virginia.*

DEAR SIR:

I beg to acknowledge your reference to the Attorney General of the letter of Hon. H. Dillard, Commonwealth's attorney, Chatham, Virginia, with your request

that you be advised whether or not for the purpose of altering or establishing a public road a survey can be made through lands of any person without permission of the land owner, until viewers have been regularly appointed by the board of supervisors to go upon the lands and ascertain whether it is necessary that such lands be taken for public road purposes.

I do not think that public roads can be opened through the lands of any person until the steps have been taken provided by the general road law, as amended by the Acts of 1916, page 495. Under this law the board by supervisors, superintendents of roads, road sub-district boards, road sub-district supervisor and the State Highway Commissioner have been given the control, supervision, management and jurisdiction, as provided by this law, over all county roads, for the purpose of construction, repairing, establishing, altering and maintaining such roads. By the second section of said general road law it is provided that whenever the county superintendent of roads, or the board of supervisors, shall think it necessary to establish or alter a road, or where any person applies to said board therefor, it may appoint five viewers, or it may direct the county superintendent or road sub-district supervisors to examine such roads or routes, and report upon the expediency of establishing a new road, or of altering the location of any existing road.

Under the broad provisions of this general law it seems to me that the board of supervisors have the right to direct the county or district superintendent of roads to examine any proposed route, and with this power to examine, if necessary, it would seem to me the power to survey the proposed route is implied. Indeed, I do not see how the county or district superintendent could report to the board of supervisors upon the expediency of establishing a new road, in all cases, unless the route of said proposed road should have been surveyed, and the act directs the county or district superintendent at the behest of the board of supervisors to make report to said board of the expediency of establishing a new road.

By chapter 483 of the Acts of Assembly of 1916, page 811, the board of supervisors and the State Highway Commission are given the power of eminent domain for the purpose of establishing highways, and inasmuch as by special statute chartered companies have the power of eminent domain and have the right to go upon the lands of any person and survey any proposed route it would seem to be a very narrow construction of the law which would prohibit the State Highway Commissioner or the board of supervisors from directing a survey of the proposed route to be made by the county or district superintendent of roads authorized to report to the board of supervisors the expediency of establishing a new road.

I must, therefore, conclude that under the direction of the board of supervisors a survey of proposed routes may be made before the final steps are taken to open and establish the road as provided by the general road law.

You will understand, of course, that if in the surveying there is any injury done to private property or any taking of private property without due process of law, the county will be responsible in damages.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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ROADS AND HIGHWAYS—*Injury to—Non-residents.*—No one, whether a citizen of Virginia or not, lawfully using highways of the State can be held answerable in damages for any incidental injury to a State highway.

*Same.*—A contractor engaged in the construction of a road who uses any portion of the highway for the purpose of carrying out his contract cannot be held answerable in damages for incidental damage to the highway in the absence of contract stipulations placing other duties upon him.

RICHMOND, VA., *June 9, 1917.*

HON. C. B. SCOTT,  
*Assistant Highway Commissioner,  
Richmond, Va.*

DEAR SIR:

I beg to acknowledge your letter of the 2nd instant, with regard to the liability of a contractor for repair of damage to a public highway caused by the use of that highway in the execution of his contract.

You inquire if the status of the contractor would be affected by his not being a citizen of the State of Virginia. I am of the opinion that no one, whether a citizen of Virginia or not, lawfully using highways of the State can as a general proposition be held answerable in damages for any incidental injury to a State highway.

You also desire to know if the liability of the contractor would be affected by reason of the fact that the section of the road damaged is a portion of the road under contract, but upon which he has not commenced the work of improvement, and also if he would be liable for damage to an intersecting highway which is not a portion of the road under contract.

I am of opinion that a contractor who lawfully uses any portion of the highway for the purpose of carrying out his contract, cannot be held answerable in damages for incidental damages to the highway. However, if the contractor has engaged to build a road running from A through D to B should in fixing the latter part of the road, to-wit, from D to B, injured the first part, to-wit, from A to D, this incidental injury would not absolve him from his contract to complete the road from A to B without further remuneration than that called for in the contract.

If, on the contrary, he were to fix the road from A to D first and before the completion of the road from D to B he would injure the newly-built road from A to D, it would seem to me that there being an express contract to complete the highway between A and B it would be the contractor's duty to leave the entire highway in proper condition. This does not arise out of any limitation of his right to use the highway but is the duty imposed upon him by his contract.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

ROADS AND HIGHWAYS—*Material for—Passing of title.*—The title to material delivered upon a county highway does not vest in the county merely upon delivery, and the county obtains no lien thereon by virtue of delivery only, in the absence of contract stipulations to that effect.

*Same.*—Form of additions to contract for materials for public highways suggested.

RICHMOND, VA., *December 6, 1916.*

HON. C. B. SCOTT,  
*Assistant Highway Commissioner,  
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of December 4, 1915, enclosing general contract form used by the State Highway Commission, and requesting an opinion

as to whether or not the material delivered upon the work, in accordance with the terms of this contract, becomes the property of the county in which the work is located and if the county is justified in making payments for the value of the material thus delivered, I beg to call your attention to my letter of May 10, 1916, answering a similar inquiry from you with regard to the bridge contracts usually made on work done under the supervision of the State Highway Commission.

There seems to be practically no difference between these contracts, and, therefore, I must reiterate my opinion expressed in that letter that the title to material delivered upon a county highway does not vest in the county merely upon delivery, and that the county obtains no lien thereon by virtue of delivery only.

Responding to your suggestion that we suggest a clause to be embodied in the contract which will make the material delivered thereunder the property of the county and which will justify the county in making payment for the value of the material delivered, I beg to advise that it would seem to me very questionable policy whether or not the county wanted to assume the title to material delivered under a contract of this character, for if such material were lost by flood, fire or theft, under such conditions, the loss would fall upon the county. It would, therefore, seem to me far more desirable to provide in the contract that after any payment under that contract the county should have a lien upon all material delivered at or near or upon the road for the completion of this contract.

With this idea in mind, I would suggest that you insert in the form of contract on the bottom line, page 5, after the word claim, the following:

It is expressly agreed that after any payment shall be made by the party of the second part upon this contract, either to the party of the first part or to any sub-contractor, laborer, or other person for work, labor or material done upon or supplied upon the work herein contracted for, the said party of the second part shall have a lien upon all the material delivered by the party of the first part or by anyone else for him at, near, or upon the county roads, for the completion of this contract.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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ROADS AND HIGHWAYS—*Eminent Domain—Chapter 483, Acts of 1916—Section 1105-f cl. 25, Code of Virginia, 1904.*—Boards of supervisors and the State Highway Commission have the power to condemn buildings necessary for public purposes.

RICHMOND, VA., *December 21, 1916.*

HON. C. B. SCOTT,

*Assistant Highway Commissioner,*

*Richmond, Va.*

DEAR SIR:

Acknowledging your letter in the following terms:

We will be greatly obliged if you will give us your opinion as to the right of the boards of supervisors of the counties of this State when proceeding with the condemnation of right of way for public highways in accordance with the act of the General Assembly, chapter 483, amended and approved March 22, 1916, to obtain land within sixty feet of a dwelling or a dwelling itself, if, in the opinion of the boards of supervisors, such is needed for the proper location and construction of public highways.

I beg to advise that this question is settled by the case of *Burger v. State Female Normal School*, 114 Va., 491, which upholds the right of the institutions of the State to condemn buildings necessary for public purposes. Since the decision in this case clause 25 of section 1105-f of the Code has been amended so as to include the State Highway Commission and the boards of supervisors among those agencies of the State to condemn land or buildings for certain uses. The power thus expressly conferred by this clause is not limited by clause 3 of said section which the Supreme Court of Appeals holds applies only to ordinary corporations chartered by the State, and not to those mentioned in clause 25, which are denominated State institutions.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

ROADS AND HIGHWAYS—*Injury to—Liability for.*—Incidental damage caused by the lawful use of a road does not subject one to an action for damages.

*Same.*—Where a road under construction is injured by the use thereof by the contractor his liability for such injury, if any, will depend on the terms of his contract.

RICHMOND, VA., June 1, 1917.

HON. C. B. SCOTT,

*Assistant Highway Commissioner,  
Richmond, Va.*

DEAR SIR:

I beg to acknowledge your letter of the 26th instant to the Attorney General, asking that your department be advised whether a contractor engaged in road construction in this State who damages a public highway in hauling road material is responsible for repairing such damage when the means of hauling used come within the requirements of the law governing the use of such highway and if the status of the contractor would be affected by the fact that the section of road damaged is a portion of the road under contract.

Answering the first part of your question, it would seem entirely clear that incidental damage caused by the lawful use of the road by one citizen would not subject such citizen to special damages.

Answering the second part of your question, unless the section of the road damaged has not been completed under the contract, and, therefore, the contractual relationship enters into a consideration of the question, I cannot see that the case would come under any different rule than the one above mentioned.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

ROADS AND HIGHWAYS—*Contracts by State Highway Commission.*—The failure to complete work contracted for by a contractor is sufficient ground for the State Highway Commission to refuse to consider the proposals of such contractor for future work.

RICHMOND, VA., *January 29, 1917.*

HON. C. B. SCOTT,  
*Assistant Highway Commissioner,  
Richmond, Va.*

DEAR SIR:

I beg to acknowledge your letter of the 26th instant, to the Attorney General, stating that Mr. E. N. McComb, who entered into a contract with the board of supervisors of Montgomery county for the construction of the sub-structures of the two bridges in that county failed to complete the work in accordance with the plan, and that it was necessary for the Roanoke Iron and Bridge Works who erected the structure, to complete the sub-structure at a cost of \$39.76.

You state that while Mr. McComb recognized the justice of this bill he refuses to pay it on account of some alleged claim against the Roanoke Iron and Bridge Works arising out of another transaction.

You desire to be advised if the State Highway Commission is authorized by law to refuse to consider proposals by Mr. McComb for work to be done by the department, on the ground that he is not a responsible contractor.

I beg to advise you that so far as the payment of the sum of \$39.76 by McComb to the Roanoke Iron and Bridge Works is concerned, from the statement in your letter this seems to be a matter between the parties, in which the State has no interest, but the failure to complete work contracted for by a contractor is certainly to be considered as sufficient ground for the department to refuse to consider the proposals of such a contractor for future work.

In my judgment, this is a matter for the exercise of the discretion of the State Highway Commission in the proper execution of the work of the department.

I return the contract submitted.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

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ROADS AND HIGHWAYS—*Proceeds of bond issues—Chapter 255, Acts of 1912.*—Local road authorities are authorized to draw warrants on funds derived from bond issues on the approval of the estimates by the Commissioner of Highways or the engineer appointed by him, and such engineer or commissioner is not required to personally sign the warrants.

HON. G. P. COLEMAN,  
*Highway Commissioner,  
Richmond, Va.*

RICHMOND, VA., *June 12, 1917.*

DEAR SIR:

Acknowledging your letter of the 8th instant to the Attorney General, I beg to advise that under the provisions of chapter 225 of the Acts of 1912, page 512, section 9, the local road authorities are authorized to draw warrants on the funds derived from bond issues on the approval of the estimates by the Commissioner of Highways or the engineer appointed by him, and it is not contemplated for such engineer or commissioner to personally sign the warrants.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

*SCHOOLS—Superintendent of—Failure to qualify—effect of—Section 1437, Code of Virginia, 1904.*—Where a superintendent of schools is appointed to succeed himself and fails to qualify within the time prescribed by law by virtue of his previous appointment and qualification he holds the office of division superintendent until his successor is appointed and has qualified.

RICHMOND, VA., July 23, 1917.

HON. R. C. REPASS,

*Clerk, Circuit Court,*

*Bland, Va.*

DEAR SIR:

Your letter of July 19 to the Attorney General is before me for consideration.

I note that Mr. Frank L. Dunn has been division superintendent of schools for Bland county for two terms and in March, 1917, was re-elected for the term of four years beginning July 1, 1917, and that he failed to take the oath of office before July 1, as required by section 1437 of the Code.

By virtue of Mr. Dunn's previous appointment and qualification, he holds the office of division superintendent until his successor is appointed and has qualified, and I see no reason why he may not now take the oath of office and qualify as superintendent for the new term.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

*SCHOOLS—Superintendent of schools—Salary of—Increase of during term of office.*—The salary of a superintendent of schools cannot be increased by the local school board during his term of office

RICHMOND, VA., March 4, 1914.

MR. J. H. LINDSAY,

*Charlottesville, Va.*

DEAR LINDSAY:

You must pardon my long delay in answering your letter of February 7th, but the press of public business has been so great that it has been overlooked.

You ask me as to the Constitutional right of your local school board to raise the salary of the superintendent of schools during his term of office.

Section 1438 of the Code (as amended by Acts of 1910, page 130), volume 3, page 211, provides, so far as it is applicable to this question, as follows:

The board of supervisors of any county or the council of any city may, out of any funds in the treasury of such county or city, or the county or city school board may, out of the local school fund, supplement the salary of the superintendent of schools for the division in which said county or city may be located; provided, that the salary of any such division superintendent shall not be increased or diminished by any such said city council or county board of supervisors during his term of office.

It will be noted, from the above section, that the *city council and county board of supervisors* are expressly prohibited from increasing the salary of the division superintendent during his term of office, but the school board is not expressly prohibited, and the question, therefore, is whether the omission of the school board from the proviso can be construed to authorize the school board to raise the salary of a di-

vision superintendent during his term of office. In order properly to answer this question, we must consider section 63 of the Constitution, which reads, so far as it is applicable to the question in hand, as follows:

The General Assembly shall not enact any local, special or private law in the following cases. \* \* \* 11. 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.

From this section, therefore, it is apparent that the General Assembly itself would be prohibited from passing a law authorizing the school board of your county to increase the salary of the division superintendent; and it follows that if a special act of the General Assembly for that purpose would be illegal, *a fortiori*, a special act by the school board would be illegal, unless there be some general law passed by the legislature in conformity with section 64 authorizing such increase. Section 64 provides as follows:

In all the cases enumerated in the last section \* \* \* the General Assembly shall enact general laws.

Now, the General Assembly has enacted a general law in the shape of section 1438, quoted above, which authorizes the school board to supplement the salary of the superintendent of schools and expressly provides that the city council and county board of supervisors shall not during the term of office increase the salary, but there is no express provision in the law authorizing any boards to increase the salary during the term of office of the superintendent of schools; and, therefore, I would conclude that as there is no general law authorizing the school boards to increase the salary of the superintendent of schools during his term of office, and as the legislature is inhibited from authorizing a special act for that purpose, it would be illegal for the school board to do that which it is not specifically authorized to do by general law.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

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SCHOOLS—*Division Superintendent of Schools—Salary of—Section 1438, Code of Virginia, 1904, as amended—Section 1013-C of the Code of Virginia, 1904.*—The salary of division superintendents of schools payable out of the State treasury is regulated in amount by the population of their respective school divisions. Such population may be ascertained either from the last United States census or from a census taken in accordance with section 1013-C of the Code of Virginia, 1904.

RICHMOND, VA., April 4, 1917.

A. B. BRISTOW, ESQ.,  
*Division Superintendent of Schools,*  
*Hopewell, Va.*

DEAR SIR:

Acknowledgment is made of your letter of April 2nd, to the Attorney General, with reference to the power of the board of education to fix your salary based upon the increased population in Prince George county, due to the developements in and around Hopewell.

Section 18 of the Virginia school laws, being section 1438 of the Code, as amended, Va. Code, volume 3, 1910, page 212, provides that the salary of division superintendents of schools payable out of the State treasury shall be regulated in amount by the population of their respective school divisions. However, this statute does not prescribe in what manner the population in each division shall be ascertained. By reference to the report of Attorney General Anderson for the year 1907, page 41, I find that he has given an opinion upon the proposition as to what census shall govern the population of a school division. In that opinion he holds as follows:

The only legal ascertainment of the population of the State, or of any sub-division thereof, authorized by law, is the last United States census, except that by section 1013-c of the Code, a census may be taken of the population in any city in the manner therein prescribed.

This was an opinion delivered to the Superintendent of Public Instruction with regard to the basis on which the salary of the school superintendent of the city of Norfolk and of the school superintendent of the county of Norfolk should be based. Attorney General Anderson holds that if the city of Norfolk had a census taken of its population since the United States census, then such additional population should be taken into account in fixing the salary of the superintendent of schools in the city of Norfolk. Reasoning from this opinion, it would seem clear that if the city of Hopewell has an enumerated census taken since the United States census was published, then such additional population should be taken into account in fixing your salary, and I feel sure the board of education will in its discretion so hold.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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SCHOOLS—School trustees—Eligibility of—Section 1538, Code of Virginia, 1904, as amended.—Section 1538 of the Code of Virginia, 1904, as amended, applies only to persons holding office. Therefore, there can be no objection to one whose term of office has expired through lapse of time or by resignation being elected a school trustee if otherwise qualified. Neither section 1459 nor section 1538 of the Code of Virginia, 1904, as amended, require an interval of time to elapse before a member of a city or town council whose term has expired can be elected a school trustee.

RICHMOND, VA., September 21, 1917.

F. B. SIMPSON, ESQ.,

*Smithfield, Va.*

DEAR SIR:

Acknowledgment is made of your letter September 17, 1917, to the Attorney General, in which you request him to inform you (1) if a man can serve on the town council that owns stock in a corporation that makes or has a contract with the town, and (2) whether a man who has been a member of a town council but whose term has expired or has resigned, can be elected as a school trustee at once, or how long an interval must elapse before he will be eligible to fill the latter office.

Your first question is one that does not come within the jurisdiction of the Attorney General, who is by law made legal advisor of the executive officers and certain boards located at the seat of government, but is a question to be decided by the attorney of your town, and it would therefore be improper for this office to express an opinion thereon.

Your second question is governed by the provisions of section 1538 of the Code of Virginia, 1904, as amended, by which section it is provided:

No federal or State officer, except a notary public, no city officer, no member of council or any officer thereof, shall, during his term of office be chosen or allowed to act as a school trustee. \* \* \*

The law applying to only persons holding office, there can be no objection to one whose term of office has expired through lapse of time, or by resignation, being elected a school trustee if otherwise qualified. Neither section 1459 nor 1538 of the Code of Virginia, 1904, as amended, require an interval of time to elapse before a member of a council whose term has expired can be elected a school trustee.

Yours very truly,

LEON M. BAZILE,  
*Law Assistant.*

*SCHOOLS—Officers—Public—Incompatibility of officers.*—Membership on the State Board of Pharmacy is not incompatible with the position of member of the Norfolk city school board.

RICHMOND, VA., July 23, 1917.

MR. T. RAMSAY TAYLOR,  
*Norfolk, Va.*

DEAR SIR:

Acknowledgment is made of your letter of July 14 to the Attorney General, inquiring if membership on the board of pharmacy is incompatible with the position of member of the Norfolk school board.

I beg to advise that there is no conflict in these two positions and no objection can be raised to your membership on each of these boards.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

*SCHOOLS—School boards—Clerk of—Compensation of—Section 1465 of the Code of Virginia, 1904.*—Under section 1465 of the Code of Virginia, 1904, the only remuneration provided for the services of the clerk of the school board is an amount not exceeding \$3.00 for each teacher. Therefore the allowance of \$20.00 additional is not warranted by the law.

RICHMOND, VA., June 13, 1917.

DR. B. A. POPE,  
*Newsoms, Va.*

DEAR SIR:

Your letter to the Attorney General, inquiring if a district school board has the right to pay the clerk of the board \$3.00 for each teacher in the district and \$20.00 additional, is before me for attention.

This is a matter that primarily comes under the jurisdiction of the Superintendent of Public Instruction. I am, therefore, writing that official, propounding to him the question contained in your letter, with a copy of this reply, and I am sure that if the Superintendent of Public Instruction does not coincide with the unofficial view expressed herein, he will advise you.

Under section 1465 of the Code, the only remuneration provided for the services of the clerk to the school board is an amount not exceeding \$3.00 for each teacher. It would, therefore, seem that the \$20.00 additional is not warranted in the law, but, as I have said, this opinion is unofficial, and Mr. Stearnes may take a different view of it.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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SCHOOLS—Public health—Rules and regulations—Section 149, Code of Virginia, 1904, as amended.—The State Board of Health is authorized to promulgate and enforce rules and regulations for the betterment and protection of public health in the State of Virginia, violation of which is made a misdemeanor.

*Same.*—District school boards being required by law to provide necessary school houses and all other means and appliances needful for the successful operation of the schools have authority to provide adequate sewerage system for any school and it is its duty to do so.

*Same.*—A district school board can lawfully enter into an arrangement with the citizens of a community for the disposition of sewerage which would be mutually beneficial to the schools as well as the residents of the community.

RICHMOND, VA., June 29, 1917.

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

Dear Sir:

I beg to acknowledge your letter to the Attorney General, enclosing a letter from Dr. Ennion G. Williams, State Health Commissioner, together with a copy of report to the State Health Commission, made by the sanitary engineer, of the condition at the George Wythe school, situated in Elizabeth City county, about midway between Hampton and Newport News.

I note that this school has an enrollment of about 400 pupils and is to be enlarged to accommodate 600 or more pupils. The sanitary engineer reports that it is impossible to provide adequate sewerage system by the dry closet method and recommends the installation of sanitary plumbing fixtures in the basement of the school with adequate sewerage disposal by means of septic tanks. He also suggests that the sewerage work could be done in connection with a system for residences in the vicinity, provided the residents would agree to join in the work.

You desire to be advised as to whether the district school board has authority to lay a sewer and build and operate a sewerage disposal plant.

The State Board of Health is authorized to promulgate and enforce rules and regulations for the betterment and protection of public health in the State of Virginia, and violation of these rules is by law made a misdemeanor by the Acts of 1910, page 269. The district school boards are required by law to provide necessary school houses and all other means and appliances needful for the successful operation of the school. (Code, section 1490.)

It is clear, therefore, I think, that the district school board has authority to provide an adequate sewerage system for any school and, indeed, that it is its manifest duty so to do. Of course, there could be no objection to the board's entering

## REPORT OF THE ATTORNEY GENERAL

into an arrangement with the citizens of the community which would be mutually beneficial to the schools as well as the residents. I return for your files Dr. William's letter and copy of the engineer's report.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

SCHOOLS—*Treasurer—Commissions of—Sections 1506 and 1515 of the Code of Virginia, 1904, as amended—Section 1449, as amended.*—Donations to the county school fund embrace a part of the county school funds and donations to the district school fund embrace part of the district school funds. Therefore, the compensation of a county treasurer receiving and disbursing this fund is governed by section 1449 of the Code of Virginia, 1904, as amended.

*Same.*—Section 1515 of the Code of Virginia, 1904, has no application to such fund and the compensation of the treasurer must be governed by the provisions of section 1449 of the Code of Virginia, 1904, as amended.

RICHMOND, VA., May 4, 1917.

HON. R. C. STEARNES,  
*Superintendent of Public Instruction,  
Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter referring to this office for reply the letter of R. Lee Chambliss, Esq., division superintendent of schools of Brunswick county. The facts on which you desire an opinion are set out in Mr. Chambliss' letter, which is as follows:

Please give me your opinion as to what commission a treasurer has the right to receive for disbursing money that has been raised by private contributions or by loans from banks and individuals for school purposes and turned over to him.

I am of the impression that he can receive not over 1%, but when the State Accountant made out the settlement with our treasurer he allowed him the same commission on such funds as he did on the regular taxes.

Therefore, please inform me, giving references to the section of the law on which your opinion is based.

It is provided by section 1506 of the Code of 1904, as amended, sub-sections 2 and 3, in reference to county and district school funds, that the funds applicable annually to the establishment, support and maintenance of public free schools shall consist of

County funds, embracing such tax as shall be levied by the board of supervisors in pursuance of this section, and donations, or the income arising therefrom, or any other funds that may be set apart for district school purposes.

\* \* \* District funds, embracing such tax as shall be levied by the board of supervisors of the county for the purposes of the school district in pursuance of this section; such dog tax as shall be applied to school purposes by the board of supervisors, and donations, or the income arising therefrom, or any other funds that may be set apart for district school purposes.

It will, therefore, be seen that donations to the county fund embrace a part of the county school funds and that likewise donations to the district fund embrace a part of the district school funds.

I am of the opinion that the compensation of the county treasurer receiving and disbursing this fund is governed by the provisions of section 1449 of the Code of Virginia, as amended, which section reads as follows:

The county treasurer shall, in all cases, collect and disburse or invest the funds placed under the control of a county or district school board and all moneys coming into the hands of said boards in accordance with the direction of the board controlling the fund, and, unless otherwise specially provided, shall receive such compensation as the county school board may determine; provided, that the same shall not be more than one per centum upon the amount received. For the proper application of all such funds he and his sureties upon his official bond shall be liable.

Your attention is also called to section 1515 of the Code of Virginia, 1904. I am of the opinion, however, that this section has no application to the fund here in question, and, as I have said, the compensation of the treasurer must be governed by the provisions of section 1449 of the Code as amended.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

SCHOOLS—*County Treasurer—Compensation of.*—A school board can be compelled to allow the county treasurer some commission not exceeding 1% for handling the State school tax, since the provision of section 1515 of the Code of Virginia is mandatory that his compensation shall be a commission. The discretion of the board, however, as to what shall be the rate of commission is not controllable and if the board provides any rate of commission to the treasurer he cannot refuse to handle the fund.

RICHMOND, VA., July 11, 1917.

HON. R. C. STEARNES,  
*Superintendent of Public Instruction,*  
*Richmond, Va.*

DEAR SIR:

I have your letter of July 10 requesting me to answer the following query, propounded by Wm. D. Tompkins:

Can the county school board refuse to allow the county treasurer any commissions under section 1515 for handling the State school tax, and if they should fail to allow commissions, can he refuse to handle the fund.

The provision of section 1515 of the Code of Virginia, pertaining to this inquiry, is as follows:

His compensation for disbursing moneys apportioned to the county from the State funds for public free school purposes shall be a commission of not exceeding one per centum on the amount thereof, to be fixed by the county school board.

Under this provision, I am of the opinion that the school board can be compelled to allow the county treasurer some commission, not exceeding 1%, since the provision seems to be mandatory that his compensation shall be a commission. However, the discretion of the board as to what shall be the rate of commission is not controllable, and if the board provides any rate of commission to the treasurer, he cannot refuse to handle the fund.

## REPORT OF THE ATTORNEY GENERAL

I do not see how the question of his refusal to handle the fund could very well arise since the funds are turned over to him and he would probably refuse to disburse that portion of the fund to which he might be advised he was entitled to as commissions, which would put the burden upon the school board either to recover the balance due or to proceed against the treasurer as they might be so advised.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

*SCHOOLS—Tuition fees—Disposition of—Section 1449, Code of Virginia, 1904.*—Fees collected for the tuition of pupils of a city must be turned over to the city treasurer to be disbursed by him in the usual way.

*Same—Residence.*—Legal residence is largely a question of intention, and where a parent is duly registered as a voter this is evidence of a *bona fide* claim to legal residence in such place and the children of such voter are entitled to free tuition in the public schools of the city where their parent is registered.

*Same—School sites—Property of.*—Lands purchased and paid for by a city council out of other funds than those belonging to the public schools are the property of the city and may be disposed of as the city council and the laws in that regard provide.

RICHMOND, VA., May 4, 1917.

HON. R. C. STEARNES,

*Superintendent of Public Instruction,  
Richmond, Va.*

DEAR SIR:

I beg to acknowledge receipt of your letter of the 3rd instant, enclosing communication from Mr. F. M. Martin, superintendent of the public schools of the city of Petersburg, which letter is herewith returned.

You request that the Attorney General advise you as to the inquiries in Superintendent Martin's letter, which are as follows:

1st. Is it necessary that all the funds accruing from the collection of tuition be turned over to the city treasurer to be disbursed in the usual way, or is it proper for the school board to devote all or any part of such funds to such purposes as they deem to be wise, without turning the funds into the treasurer's hands?

Under section 1449 of the Code of Virginia, it is provided that the county treasurer shall in all cases collect and invest the funds placed under the control of the county or district school board and all moneys coming into the hands of the said board, for which he shall receive not more than one per centum upon the amount received.

Under this provision of the Code, I am of opinion that the collection of tuition should be turned over to the city treasurer to be disbursed by him in the usual way.

The second inquiry is as follows:

2nd. The school board of the city of Petersburg collects tuition from all non-resident pupils. At present the ruling of the school board is that if a parent is duly registered as a voter in the city of Petersburg, although his *bona fide* residence is without the city limits, his children are entitled to free tuition. This ruling gives rise to many perplexing forms of manifest injustice. It is the desire of the school board to charge tuition to all non-resident pupils regardless of the registration of the parents, but we understand that this is not possible under the law. Are we correct in this interpretation?

The question of legal residence is largely a question of intention and where a parent is duly registered as a voter in the city of Petersburg this evidences a *bona fide* claim of legal residence in the city of Petersburg, and I am of opinion that the children of all voters in the city are entitled to free tuition.

There has been no decision in the Supreme Court of Appeals so far as I am advised holding that a man's residence was the place in which he slept; indeed, the question of residence in Virginia is not firmly settled, and certainly a voter in a city must have a legal residence there at least, and the legal residence of the parent should be sufficient, I think, to give free tuition to the child.

The third inquiry propounded by Superintendent Martin sets out the following facts:

The school board of the city of Petersburg purchased two sites for the location of negro schools, which were to be paid for by a bond issue, but inasmuch as the money was not at that time available, individual members of the school board raised the necessary money by note and paid for said sites. Subsequently the city council refused to appropriate the funds from the bond issue until sites suitable to the council had been selected. The school board then selected other sites in conformity with the wishes of the council, which sites were paid for out of the bond issue. The question arises as to whom do the first sites belong, having been deeded to the city council, and payment therefor having been made by the council.

It seems to me clear that inasmuch as these sites were purchased and paid for by the city council out of other funds than those belonging to the school, the property is the property of the city and may be disposed of as the city council and the laws in that regard provide.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

SCHOOLS—*Agricultural high schools—Chapter 520, Acts of 1916, pages 908 and 936—Appropriation for agricultural high schools.*—From the language employed in the general appropriation bill appropriating certain money for agricultural high schools, such funds must be expended under the supervision of the agricultural extension department of the agricultural and mechanical college and polytechnic institute. The supervision granted this department is not limited in any way and the powers vested in the department are very broad, and the only limitation placed upon the expenditure of the fund is that it shall be used "for equipment, maintenance, betterments and additional dormitory space, and for extension work in agriculture, gardening, canning and domestic science." So long as this fund is administered fairly and equitably for these purposes the department acts strictly within the law.

RICHMOND, VA., December 29, 1917.

DR. J. A. C. CHANDLER, *Chairman,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of yours of December 12th in which you ask my opinion as to whether the Agricultural and Mechanical College and Polytechnic Institute has authority under the law to aid out of the appropriation made for agricul-

tural high schools, any agricultural high school designated as such by the State Board of Education. The appropriation referred to may be found in Acts 1916, pp. 908 and 936, and reads as follows:

For equipment, maintenance, betterments and additional dormitory space, and for extension work in agriculture, gardening, canning and domestic science, as may be needed, to be expended under the supervision of the agricultural extension department of the Agricultural and Mechanical College and Polytechnic Institute, the sum of twenty-five thousand dollars.

From the above language it will appear that the sum must be expended under the supervision of the agricultural extension department of the Agricultural and Mechanical College and Polytechnic Institute. The General Assembly did not undertake to limit or circumscribe in any way the supervision granted the said department over said fund, especially did it not limit the benefits of said fund to any particular agricultural high schools. The powers vested in the department are very broad and the only limitation placed upon the expenditure of the fund is that it shall be used "for equipment, maintenance, betterments and additional dormitory space, and for extension work in agriculture, gardening, canning and domestic science," and so long as said department administers said fund fairly and equitably for the purposes above indicated it is strictly within the law.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

SCHOOLS—*Public high schools—Chapter 520 (general appropriation bill, p. 899), Acts of 1916, Chapter 211, Acts of 1906.*—From the language of the general appropriation bill, chapter 520 of the Acts of 1916, relating to high schools, such appropriation is to be expended under the terms of chapter 211 of the Acts of 1906—creating public high schools.

*Same.*—Query as to whether chapter 211 of the Acts of 1906 applies to city high schools.

RICHMOND, VA., *December 19, 1917.*

DR. J. A. C. CHANDLER,

*Richmond, Virginia.*

DEAR DOCTOR:

At the last meeting of the State Board of Education, on your motion, the following resolution was passed:

On motion of Dr. Chandler the secretary was instructed to request the Attorney General's interpretation of the State high school law affecting the distribution of the State high school fund, particularly as to whether or not any high school in the State which meets the conditions might not participate in said fund regardless of whether it be located in city or county.

I find that the last appropriation bill (Acts 1916, p. 899) provides:

- \* For high schools, to be expended as per act creating public high schools
- \* \* \* one hundred thousand dollars.

So far as I am informed the only question upon which you desire my opinion is as to whether city high schools may participate in the fund.

You will observe from the language above quoted that the appropriation is "to be expended as per act creating public high schools." The act referred to is found in the 1915 edition of the school laws, and in Acts 1906, p. 350, volume 3 of Code, p. 663, and is entitled "an act to establish and maintain a system of public high schools and to appropriate money therefor."

It looks to me from an examination of the act as if it were not intended to apply to city schools; but before finally passing on the matter, I want to have the benefit of any though or investigation which you have made.

In the first place, the act seems to be for the purpose of encouraging the establishment of high schools, and I presume in 1906 all the cities had already established such schools. The act also uses the following expressions which would indicate that the draftsman had only county schools in mind:

Two or more districts in the same or adjoining counties may unite in establishing and maintaining a joint high school under the provisions of this act. \* \* \*

The treasurer of each county in which such high school is located shall keep such funds, etc. \* \* \*

The act further refers to the report of the *county* treasurer and to the *county* school board.

I would thank you when you next go to the Department of Public Instruction to call by to see me on the subject; or, if more convenient, to write me the considerations which led you to offer the motion.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

*SCHOOLS—District school bonds—Interest on—Where payable—Loans from the literary fund—Section 1433, Code of Virginia, 1904, as amended*—The interest on a district school bond issued for a loan from the literary fund should be payable at the office of the Second Auditor.

*Same—Section 1433, Code of Virginia, 1904, as amended—Chapter 252, Acts of 1906, as amended.*—The general law governing the investment of the capital and unappropriated income of the literary fund is found in section 1433 of the Code of Virginia, 1904, as amended, clause 11, and chapter 252 of the Acts of 1906, as amended, creates an exception to the provision of the general law as contained in section 1433 of the Code of Virginia, 1904, as amended, clause 11.

*Same—Loans of literary fund.*—A deed of trust is no longer required as security for a loan of the literary fund made under the provisions of section 1433, clause 11, of the Code of Virginia, 1904, as amended. As the law creates a lien in favor of the literary fund against all the funds and income of the school district as well as the property upon which such loan is made.

*Same.*—While school bonds issued for a loan of the literary fund need not be secured by a deed of trust such bonds should state on their face that upon its purchase with a portion of the literary fund a lien in favor of said fund is created by section 1433 of the Code of Virginia, 1904, as amended, against all the funds and income of the school district as well as upon the property upon which said loan is made.

*Same—Chapter 34, Acts of 1906.*—A bond issued under the provisions of chapter 34 of the Acts of 1906 should show on its face that it is one of a series of bonds issued by the school board and that the total bonds issued does not exceed \$8,000.00.

RICHMOND, VA., August 3, 1917.

HON. ROSEWELL PAGE,  
Second Auditor,  
Richmond, Va.

DEAR SIR:

Acknowledgment is made of your letter of August 3, 1917, in reference to the temporary loan by the State Board of Education to the school board of Christiansburg district, Montgomery county, and the bond returned to you by the board of education. You say in your letter:

1st. That this bond contains the provision that it must be presented at the bank when the interest is to be paid, which would give this office a great deal of trouble and would seem to be rather unbusinesslike for the State.

That in the "duties and powers" given the board of education for the loan of the literary fund, found in the third volume of the Code, section 1433, clause 11, there is a limitation that such loans have to be secured by deed of trust. And that under the Williams' act as amended by the Acts of 1916, page 378, special provision is made as to the borrowing of money belonging to the literary fund, *et cetera, et cetera*.

I fully agree with you that the interest should be paid at your office and not at some bank.

In response to the second portion of your letter, I am of the opinion that the general law governing the investment of the capital and unappropriated income of the literary fund, is governed by section 1433 of the Code of Virginia, 1904, as amended, clause 11, and that chapter 252 of the Acts of 1906, as amended by chapter 187 of the Acts of 1916 (Virginia Code, volume 4, page 679), creates an exception to the provisions of general law as contained in section 1433 of the Code of Virginia, 1904, as amended, clause 11. The bond in question not having been issued in accordance with the provisions of chapter 252 of the Acts of 1906, as amended, the loan can be made only under the provisions of section 1433 of the Code of Virginia, 1904, as amended, clause 11. While it is true that the provisions of this law, prior to its last amendment, required investments in bonds made by the district school boards of the different school districts in this State to be secured by a deed of trust on the school property in such districts in which said bonds were invested (Va. Code, volume 3, page 209), this section was amended by the Acts of Assembly, 1916, page 836 (Virginia Code, volume 4, page 327), so as to read as follows:

Eleventh. To invest the capital and unappropriated income of the literary fund in bonds of this State, or of the United States, or in bonds of railroad companies, secured by first mortgages, whose market value for six months preceding the investment has not been less than ninety cents on the dollar, or in bonds made by one or more of the district school boards, of the different school districts in 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. The said board may call in any such investment, or any heretofore made, and re-invest the same, as aforesaid, whenever deemed proper for the preservation, security or improvement of the said fund. Whenever, in accordance with this section, the board shall invest as aforesaid in bonds of this State, no premium shall be required or paid on such investment. All securities for money belonging to the literary fund shall be deposited with the Second Auditor for safekeeping, who shall return with his annual report a list thereof with a statement of their value.

You will therefore see, in case of such loans, a deed of trust is no longer required but the law creates a lien in favor of the literary fund against all the funds and income of the district, as well as upon the property upon which said loan is made.

I therefore conclude that it is unnecessary for this bond to be secured by a deed of trust, but I think that the bond should state on its face that upon its purchase with a portion of the literary fund, a lien in favor of said fund is created by section 1433 of the Code of Virginia, 1904, as amended, against all the funds and income of the school district, as well as upon the property upon which said loan is made.

As the Superintendent of Public Instruction was advised by this office in the letter of the assistant attorney general, dated July 30, 1917, I would suggest that the bond should show on its face that it was one of a series of bonds issued by the school board, and that the total bonds issued did not exceed \$8,000.00 as provided for in chapter 34 of the Acts of 1906, as there is nothing upon the face of the bond to show that bonds numbers 2, 3 and 4, are not issued, and that the sum total of the bonds issued does not exceed the amount allowed by the statute.

Very truly yours,

LEON M. BAZILE,  
*Law Assistant.*

*SCHOOLS—Teachers, pensions of—Chapter 313, Acts of 1908, as amended.—Chapter 329, Acts of 1912.*—There is no provision of law which makes the acceptance of a position as school librarian operate as a forfeiture of the pension being received by one in class "B" on the retired teacher's list, which list is made up of those entitled to pensions because of the length of their service as teachers.

*Same.*—Query as to whether the acceptance of such position by a teacher in class "A" would forfeit his pension.

RICHMOND, VA., *October 17, 1917.*

J. N. HILLMAN, ESQ., *Secretary,*  
*State Board of Education,*  
*Richmond, Va.*

DEAR SIR:

Yours of October 15, enclosing letter from Division Superintendent F. M. Martin, Petersburg, Virginia, under date of October 8, received.

The question propounded is whether a former teacher in the public school who is now on the retired list, forfeits her pension by accepting a position as librarian in a high school, to which position there is attached a small salary.

It appears from Mr. Martin's letter that the teacher referred to receives her pension under an act of the General Assembly of 1910, page 127, Va. Code, volume 3, p. 883, and that she belongs to what is designated in said act as class "B," which includes persons who have taught in the public schools of this State for an aggregate of at least thirty years and have maintained a good record and have reached the age of fifty-eight if a man, and fifty if a woman. In other words, she does not belong to that class receiving a pension on account of physical or mental disabilities who are designated in the act as class "A."

The General Assembly later passed an act providing that persons who have been placed on the retired teachers' list may retire or be removed therefrom, etc. (Acts of 1912, p. 655, volume 4, Va. Code, p. 890.) This act provides, among other things that those who have received a pension on account of mental or physical disability in class "A" may be deprived of the same when such disability no longer exists. It also makes various provisions as to the forfeiture of pensions in case of marriage of female teachers. It also provides that when a teacher whose name is on the retired teachers,

list shall engage in teaching in any public school of this State, she shall forfeit her right to a position on the retired teachers' list and with the forfeiture of this right, she would, of course, lose her right to the pension.

There is, however, no provision of law which makes the acceptance of a position of school librarian operate a forfeiture of a pension being received by one in class "B" on the retired teachers' list, that list being made up as heretofore indicated, not of those who had retired on account of physical or mental disability, but those who are entitled to pensions because of the length of their service as teachers.

Without, therefore, passing at this time on the question of whether a teacher in class "A" on the retired teachers' list would be subject to a forfeiture of her pension by accepting a salaried position of librarian in a high school, I am of the opinion that in the case presented no such forfeiture takes place, and that the retired teacher referred to may continue to draw her pension while she serves for compensation as librarian of a public high school.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

*SCHOOLS—Teachers—Appeals by—Regulation 85, Virginia school laws, 1915.—*

Where a statute or regulation authorizes an appeal by a teacher from the decision of the school authorities dismissing him, an appeal must be taken through the various channels provided before action can be brought by the teacher dismissed against the school authorities for breach of contract.

*Same.*—The superintendent of schools of the city of Richmond has jurisdiction to hear an appeal by a teacher from the decision of the school board of the city of Richmond dismissing him. The teacher who has been dismissed by the school board is such a person as comes within the meaning of regulation 85 of the Virginia State Board of Education and the superintendent of schools in the city of Richmond should take cognizance of and pass upon such appeal.

RICHMOND, VA., *March 27, 1917.*

HON. R. C. STEARNES,

*Superintendent Public Instruction,*

*Richmond, Virginia.*

DEAR SIR: ✓

Acknowledgment is made of your letter of March 15, 1917, enclosing the letter of Dr. J. A. C. Chandler, with the exhibits thereto attached, which letter you have referred to this office for a reply. Dr. Chandler's letter is as follows:

I enclose herewith copy of petition presented to me by Mr. R. N. Thomas (marked Exhibit A) and copy of resolution adopted by the school board on February 3, 1917, (marked Exhibit B) dismissing Mr. Thomas as a teacher.

You will note that Mr. Thomas appeals to me to review the action of the school board under regulation 85, page 189, of the Virginia school laws, 1915.

Before ruling on the appeal of Mr. Thomas, I desire to have your written opinion, or the opinion of the legal advisor of the State Department of Education, as to whether I have jurisdiction in this appeal in view of the fact that the real question involved is whether or not the action of the school board may be classed as a violation of contract. My reasons for raising the question of my jurisdiction are based upon the following:

First, the school board acted under section 1538 of the Code, which, in my judgment, gives full power to the school board to employ or dismiss a teacher, and any question which may be raised as to the action of the school

board in the matter of a contract would naturally go to the courts under the general statutes relating to contracts, and could not be finally settled by any ruling made under regulation 85 of the State Board of Education.

Second. It is also a question as to whether it is within my jurisdiction as division superintendent to hear the appeal of Mr. Thomas, in view of the fact that he is no longer a teacher in the system, since regulation 85 grants the right of appeal to "any teacher or school officer or five or more interested heads of families."

Regulation 85 of the State Board of Education of Virginia, school laws (1915), p. 189, reads as follows:

In all cases not otherwise provided for, an appeal may within ninety days be taken to the division superintendent concerning the acts of any person connected with the school system or the action of any school board within his bounds, by any teacher or school officer, or by five or more interested heads of families who may feel themselves aggrieved, and from the division superintendent of schools to the Superintendent of Public Instruction, who, if he cannot satisfactorily adjust the same, shall, in his discretion, grant an appeal to the State Board of Education, and that board shall finally decide all questions at issue.

The application for such appeal, and all evidence in support of or in opposition thereto shall be in writing; provided, that the State Board of Education may, in its discretion, after an appeal is granted to such board, hear oral testimony upon any issue presented by the appeal. But in all cases of appeal to the Superintendent of Public Instruction all evidence must be reduced to writing.

Answering the first question raised by Dr. Chandler, although there are some authorities to the contrary (*People v. Board of Education, N. Y.*, 27 How. Pr. Rep. 462, 473), the weight of authority seems to be that where such a statute or regulation exists, an appeal must be taken through the various channels provided before action can be brought by the teacher dismissed against the school authorities for breach of contract.

*Van Dyke v. School District No. 77*, 43 Wash. St. 235; *Harkness v. Hutcherson et al*, 90 Tex. 383, 385; *Draper v. Com'rs of Public Instruction*, 66 N. J. L. 54; *Kirkpatrick v. Independent School District of Liberty*, 53 Iowa, 585.

In *Van Dyke v. School District No. 77*, *supra*, an action was brought to recover an alleged breach of contract. The plaintiff alleged employment by the school board as a teacher, and a discharge without cause, after teaching a certain length of time. One of the grounds of defense interposed by the school district was that the plaintiff had failed to appeal under a statute very similar in its provision to the above quoted regulation 85 of the State Board of Education. This statute provides:

Any person aggrieved by any decision or order of the board of directors may, within thirty days after the rendition of the decision or making of such order, appeal therefrom to the county superintendent of the proper county. \* \* \*

Although it was pointed out that the statute said "may" appeal, it was held by the Supreme Court of Washington that it was necessary for the teacher to appeal before he could proceed by action against the school district, therefore the judgment of the lower court was reversed and the cause remanded with instructions that the action of the plaintiff be dismissed. In so holding the court said:

The right of ultimate review by a court of competent jurisdiction is thus clearly recognized, and it was the evident policy of the legislature that matters pertaining to the schools and the conduct thereof shall first be ex-

amined and passed upon by the schools officers named in the statute before resort may be had to the courts. Good reasons may be assigned for such a policy. The duties of the officers named relate particularly to the schools, and from their training and experience it may be supposed that they are peculiarly fitted to examine and pass upon questions which arise out of the manner of conducting schools, and which necessarily involve the competency and fitness of teachers. The qualifications of teachers, both as to learning and character, are, under our system of education, first passed upon by these officers, and if subsequent conduct of the teachers calls for investigation as to their fitness, it would seem but reasonable that such conduct should be first reviewed by such school officers before resort may be had to the courts for the correction of alleged grievances.

It is argued that an appeal from the decision of the board of directors is merely optional, since the statute says any person aggrieved "may" appeal. We think it manifest that such was not the purpose of the statute. Having reference to the evident policy of the legislature as hereinbefore mentioned, we think the word "may" as used in the statute should be construed in a mandatory sense.

Under a similar statute the same result was reached by the Supreme Court of Iowa, in *Kirkpatrick v. Independent School District of Liberty*, *supra*.

Discussing a similar question it was said in *Draper v. Com'rs of Public Instruction*, *supra*.

By these various provisions the legislature has erected a series of tribunals for the speedy and inexpensive determination of all controversies arising under the school law, and the legislative intent is plain that, in the first instance, recourse is to be had to these special tribunals for the settlement of such controversies. It seems equally manifest that it was the legislative intent that these tribunals should have exclusive jurisdiction over these matters, and that the determination of each one should be final unless appealed from as provided in the act, the court of last resort being the State Board of Education. To consider otherwise is to attribute to that body the intent to compel the litigation of all such controversies before the various tribunals created by the statute, and yet leave the parties thereto at the end of such litigation in exactly the same position, so far as the final determination of such controversies is concerned, as ordinary litigants are before suit has been begun.

It was therefore held that a dismissed teacher could not test the legality of such a dismissal by an action at law, his remedy being by appealing to the proper school authorities.

It is true that the above cited authorities were cases arising under statute, but section 132 of the Constitution provides as follows in sub-section 3 as to the powers of the State Board of Education:

It shall have authority to make all needful rules and regulations for the management and conduct of the schools, which, when published and distributed, shall have the force and effect of law, subject to the authority of the General Assembly to revise, amend, or repeal the same.

The fourth sub-section of section 1433, Code of Virginia, as amended by the acts in force June 17, 1916, Acts 1916, page 836, is to the same effect, as the constitutional provision above.

It therefore follows that the authorities above cited are pertinent to the instant case, and I am of the opinion that the superintendent of schools of the city of Richmond has jurisdiction to hear the appeal therein. I am further of the opinion that it is exceedingly doubtful if any other tribunal has any jurisdiction until the superintendent has acted.

Turning now to the second question raised by Dr. Chandler, viz: whether Mr. Thomas is such a person as comes within the meaning of regulation 85 of the Virginia State Board of Education, I am of the opinion that the intent of this regulation is to include within its meaning a teacher who has been dismissed, as well as one who has been disciplined, otherwise, it seems to me the spirit of the regulation would be in a large measure defeated.

In response to your request I am herewith returning Dr. Chandler's letter with exhibits "A" and "B" thereto attached.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

STATE EMPLOYEES—*Substitute elevator men in capitol building.*—It is lawful for the Auditor to pay persons employed as substitute elevator men at the capitol building during the vacation allowed by law to the regular elevator men.

RICHMOND, VA., *April 11, 1917.*

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

DEAR SIR:

This is to confirm verbal opinion rendered you on February 28th, to the effect that it is lawful to pay E. B. Parrott and R. L. Blankenship for services as substitute elevator men at the capitol building during the vacations allowed by law to the regular elevator men.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

STATUTES AND CONSTITUTIONS—*Appropriations—Lapse of—Repeals by implication—Chapter 432, Acts of 1887-88—Boundary commission, Virginia and West Virginia.*—Under the provisions of chapter 432 of the Acts of 1887-88, the Governor has the authority to fill any existing vacancy on the commission for the ascertainment of the boundary line of the county of Hardy, State of West Virginia, and the counties of Frederick, Shenandoah and Rockingham, in the State of Virginia, and for this purpose such act is in full force and effect since a similar commission as that provided for by the act has been created by the State of West Virginia.

*Same.*—The appropriation provided for in section 5 of chapter 432 of the Acts of 1887-88 has lapsed and there is no authority for the payment of this commission out of the treasury of Virginia. The effect of section 186 of the Virginia Constitution is to prohibit permanent or annual appropriations and on its enactment by the Constitutional Convention any continuing appropriation authorized under previous laws became abrogated.

RICHMOND, VA., *March 19, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter of March 16, 1917, to the Attorney General, enclosing correspondence between you and Hon. T. W. Harrison, copy

of chapter 432, Acts of 1887-1888, correspondence between you and the Governor of West Virginia and a copy of the bill recently passed by the legislature of West Virginia, approved February 23, 1917, all with regard to the ascertainment of the boundary line between the county of Hardy, State of West Virginia, and the counties of Frederick, Shenandoah and Rockingham, in the State of Virginia.

You request the Attorney General to examine the correspondence and the acts in question, together with any other legislation on the subject and to advise you whether or not you still have the power to appoint a commission provided for by said chapter 432 of the Acts of 1887-1888, page 510, and have the work contemplated by said commission done.

By section 6 of the act aforesaid, it is provided that the same shall be in force from and after the date the similar commission as therein provided for shall be created by the State of West Virginia. The bill passed by the West Virginia legislature and approved February 23, 1917, provides for a similar commission and the Governor of West Virginia has under the provisions of the last mentioned act named a commission.

Section 5 of the Virginia act provides:

That the Auditor of Public Accounts be instructed to pay out of any money in the treasury not otherwise appropriated, on the order of the Governor, an amount not exceeding fifteen hundred dollars in order to carry out the purposes of these resolutions, but one-half of the same shall be retained until the report of the commissioners as above provided for shall be made.

I can find no other act of the General Assembly of Virginia bearing upon this matter. Section 1 of the act names the Virginia members of the commission and provides that the Governor may fill any vacancy occurring in the commission on the part of this State.

I am, therefore, of the opinion that you have the authority to fill any existing vacancy on this commission and that for this purpose the act aforesaid is in full force and effect since a similar commission as that provided for by the act has been created by the State of West Virginia.

However, I am of opinion that the appropriation provided for in section 5 of the act, as set out above, has lapsed and that there is no authority for the payment of this commission out of the treasury of Virginia.

Section 186 of the Constitution provides, among other things, as follows.

\* \* \* and no such appropriation shall be made which is payable more than two years after the end of the session of the General Assembly, at which the law is enacted authorizing the same. \* \* \*

The effect of this constitutional provision, in my judgment, is to prohibit permanent or annual appropriations and its enactment by the Constitutional Convention abrogated any continuing appropriation authorized under previous laws.

So far as the Attorney General is concerned, this matter is set at rest by the opinion of the Attorney General, rendered to the Adjutant General on April 11, 1914. (Opinions of the Attorney General, 1914, page 8). I quote from that opinion as follows:

In States that have a provision similar to ours, preventing appropriations from being made which are payable more than two years after the end of the General Assembly at which the law is enacted, I can find no instance where a continuing appropriation has been held to be valid.

*State v. Holladay*, 64 Mo. 526.

*State v. Regents*, 27 Pac. 850, 13 Kan. 220.

*Opinion of Judges*, 5 Neb. 566.

*State v. Kenney*, 11 Mont. 553, 29 Pac. 89.

*State v. Seibert*, 99 Mo. 122, 12 S. W. 348.

In *State v. Holladay*, *supra*, it was held that the provisions of the Constitution that the General Assembly should meet in regular session once only in two years, and prohibiting money to be drawn from the treasury except in pursuance of regular appropriations made by law, operated to prohibit permanent or annual appropriations and abrogated such as were authorized by previous laws.

From the above it seems clear that while there is authority vested in you to fill any vacancy existing in this commission and while such a commission can act with the West Virginia commission and carry out the purposes of the Virginia act, yet there is no appropriation out of which they can be compensated for their services in this behalf, and in the event that the vacancies are filled and the work done, the commissioners will have to look to the next legislature for reimbursement for their expenses and remuneration.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

STATUTES AND CONSTITUTIONS—*Appropriations—Repeal of statutes by the Constitution—Section 186 of the Virginia Constitution, chapter 432, Acts of 1887-88—Boundary commission, Virginia and West Virginia.*—Under section 186 of the Constitution of Virginia no money ever rightfully in the State treasury can be drawn therefrom after the adoption of the Constitution except in pursuance of an act of the legislature authorizing the same, passed within two years prior thereto. Therefore, the appropriation to pay the commission to establish a boundary between Virginia and West Virginia has lapsed.

*Same.*—Section 186 of the Constitution of Virginia is self-executing and needs no legislation in its aid.

RICHMOND, VA., April 3, 1917.

*His Excellency*, H. C. STUART,

*Governor of Virginia.*

*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of March 30, 1917, to the Attorney General, enclosing a letter from Hon. T. W. Harrison, House of Representatives, Washington, D. C., of March 27th, and with the request that the Attorney General read the enclosure and advise you with the return of Judge Harrison's letter.

Judge Harrison calls attention to the fact that section 1 of the schedule expressly continues in force all statutes not repugnant to the Constitution and not expressly repealed by it and states the general rule of construction that the courts will never give a retroactive effect to legislative enactments unless it is impossible to escape from it, and that, therefore, the holding of the Attorney General is in error in giving a retroactive effect to section 186 of the Constitution.

Judge Cooley expresses the opinion, it is true, that the Constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect. Upon a closer scrutiny of the cases cited in the former opinion of the Attorney General to General Sale, opinions of the Attorney General, 1914, page 8, and cited in my former letter, very frankly I find that the Montana case of *State v. Kenney*, 11 Montana 553, upholds the view expressed by Judge Harrison.

The constitutional inhibition prevents money from being paid out of the State treasury, except in pursuance of appropriations made by law and inhibits such appropriation which is payable more than two years after the end of the session of the General Assembly at which it is enacted. The question is as to whether the constitutional inhibition became operative and effective upon the adoption of the Constitution not only prospectively but as to all existing appropriations.

It is not claimed that section 186 of the Constitution cut off all appropriations made more than two years before this Constitution went into effect, but that all existing appropriations upon the adoption of the Constitution lapsed two years thereafter.

In this view of the question I do not see how the construction put upon this section by the Attorney General can be said to have a retroactive effect. It has a prospective operation in cutting off after two years appropriations existing at the time the Constitution went into effect.

You will note that there are two provisions of the section involved:

(a) Prohibiting a warrant on the State treasury except in pursuance of an appropriation, and,

(b) No appropriation shall have any force more than two years after the passage of the law providing therefor.

These provisions of the organic law are self-executing and need no legislation in their aid. The object of the framers of the Constitution in making this provision, it would seem, was in order that the financial status of the State might be easily ascertainable, because if old appropriations contained in the various Acts of Assembly for many, many years in the past were still in existence it would be impossible to determine just exactly how the State treasury stands. It would be impossible to advise the legislature as to the condition of the treasury and the money available for appropriations at any given session of the legislature if all of the old appropriations provided for since the foundation of the government might still be payable out of the public treasury without limitation.

While the constitutional provisions in the Constitution of Missouri and of Virginia are not identical (the Missouri Constitution more clearly inhibiting the payment of money out of the State treasury except within two years after the passage of the act appropriating such money), yet I feel constrained to follow the reasoning of the Missouri court in the case of *State v. Holladay*, 64 No. 526, cited in the opinion of the Attorney General above, and in my former letter to you.

In view of "the old law, mischief and the remedy," I am constrained to hold that the Constitution means that no money ever rightfully in the State treasury shall be drawn therefrom after the adoption of the Constitution, except in pursuance of an act of the legislature authorizing the same, passed within two years prior thereto and that, therefore, the appropriation to pay the commission to establish a boundary between Virginia and West Virginia has lapsed.

I herewith return Judge Harrison's letter.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

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TAXATION—Auditor—Powers of—Local board of review—Commissioners of the Revenue—Section 45, Code of Virginia, 1904, as amended—Chapter 215, Acts of 1916.—It is the duty of commissioners of the revenue to obey all lawful instructions of the Auditor of Public Accounts and for failure to do so, they are subject to a forfeiture of not less than \$30.00 nor more than \$50.00. For violation of a lawful in-

struction of the Auditor by a commissioner of the revenue, the latter may be proceeded against for the forfeiture and can relieve himself of the same only by showing that the instructions given by the Auditor were not authorized by law.

*Same.*—The Auditor has the power to instruct the commissioners of the revenue to disregard the directions of the local boards of review and to follow the instructions of the Auditor so far as the same are authorized by law and the commissioners of the revenue are required to obey the lawful instructions of the Auditor in that respect.

RICHMOND, VA., *November 15, 1916.*

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

DEAR SIR:

Acknowledgment is made of your letter, asking my advice, as follows:

The point I now desire your opinion upon is as follows. Should a local board of review in certifying its report to the commissioner of the revenue violate my instructions involving the construction of a statute providing for the assessment of taxes, have I the power to instruct the commissioner of the revenue to disregard the directions of the local board of review and to follow my instructions, and is he required, under the law, to obey my instructions in that respect?

Under the terms of section 450 of the Code, as amended by Acts of 1916, chapter 242, the Auditor of Public Accounts is required to give such instructions by letter, printed circular or otherwise to commissioners of the revenue in respect to their duties as to him shall seem judicious, and it is then provided "if any commissioner refuse to obey the Auditor's instructions he shall forfeit not less than thirty nor more than fifty dollars."

By section 10 of the act creating the State Tax Board, as amended, Acts 1916, page 413, it is provided:

Nothing in this act shall in any way abridge or change the duties and powers now conferred by law upon the Auditor of Public Accounts relating to the assessment and collection of the revenue of the State, and he shall continue to exercise all the powers now conferred upon him by law relative to the assessment and collection of the State revenue; and his instructions to officers, so far as the same are authorized by law, shall be carried out subject to the penalty prescribed by law for failure to carry out his instructions.

It will be seen from the foregoing that it is the duty of commissioners of the revenue to obey all of your lawful instructions, and for failure to do so they are subject to a forfeiture of not less than thirty nor more than fifty dollars. If, therefore, any commissioner of the revenue has disobeyed your lawful instructions, you may proceed against him for the forfeiture above referred to, and he can relieve himself of said forfeiture only by showing that the instructions given by you were not authorized by law.

Answering, therefore, your question specifically, I advise you that you have the power to instruct the commissioners of the revenue to disregard the directions of the local board of review and to follow your instructions so far as the same are authorized by law, and the commissioners of the revenue are required to obey your lawful instructions in that respect.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

*TAXATION—Examiners of Records—Reports of—Assessment by Commissioners of the Revenue—Powers of Auditor.*—It is the duty of the commissioners of the revenue to obey the lawful instructions of the Auditor of Public Accounts.

*Same—Attorney General not the adviser of Commissioners of the Revenue.*—The Attorney General is the adviser of the officers of the executive departments of the State and cannot, therefore, advise commissioners of the revenue as to matters in conflict between them and the Auditor of Public Accounts.

RICHMOND, VA., December 22, 1916.

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

DEAR SIR:

I beg to acknowledge receipt of your letter, returning to me the letter from Mr. H. E. Tresnon, commissioner of revenue, of Richmond, Va., of recent date, informing me that the examiner of records for the tenth judicial circuit has filed with him a report of the omitted capital of the Tredegar Company, pursuant to the instructions of the Auditor of Public Accounts, and that the Auditor of Public Accounts had directed him to make the assessment of values reported by the examiner of records as of December 11, 1916, against this company. He requests me to advise him as to what disposition should be made of this report, and especially as to whether or not it should be returned to the local board of review for their approval before making the assessment, or whether the assessment should be made under the instructions received from you without the approval of the local board of review.

I beg to enclose you herein a copy of my letter of October 24th to you in which I expressed the opinion that the proper definition of capital is embodied in the instructions of the Auditor to the commissioners of the revenue. Your attention is also directed to a copy of my letter of November 15, 1916, in which I expressed the opinion that it is the duty of the commissioners of the revenue to obey the lawful instructions of the Auditor of Public Accounts, for the reason that it is specifically provided in the act creating the State Tax Board and local boards of review, that nothing in the act shall in any way abridge or change the duties and powers conferred by law upon the Auditor of Public Accounts relative to the assessment and collection of taxes, and that his instructions so far as authorized by law, shall be carried out.

You realize that my duty is that of adviser of the officers of the executive departments and I cannot, of course, assume duties that are not conferred upon me by law, and, therefore, I could not be put in the position of advising Mr. Tresnon in the premises.

I can only repeat what I have already advised you, to-wit, that your instructions to the commissioners of the revenue in regard to the capital of manufacturers is, in my opinion, correct, and that it being the duty of the said officers to follow your instructions, so far as authorized by law, they should make the assessment of capital of manufacturers as directed by you.

Very truly yours,

JNO. GARLAND POLLARD,  
*Attorney General.*

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*ELECTIONS—Capitation taxes—Payment of.*—May 6, 1917, is the last day for one to pay his capitation tax to enable him to qualify for the August, 1917, primary and the November 1917 election.

RICHMOND, VA., *April 3, 1917.*

HON. B. GRAY TUNSTALL,  
*City Treasurer,*  
*Norfolk, Va.*

DEAR SIR:

I beg to acknowledge your letter of March 29th, asking me to advise you as to what ruling has been made regarding the last date for the payment of poll taxes for the year 1916, so as to enable tax-payers to qualify for the coming August primary, or in other words, for the election to be held on November 6, 1917.

According to previous opinions of the Attorney General, May 6th is the last day for the payment of the poll tax to enable a person to qualify for the August primary and the November election.

Very truly yours,  
LESLIE C. GARNETT,  
*Assistant Attorney General.*

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TAXATION—*Deeds—Recordation of—Duty of clerks.*—In assessing the tax for recording a deed of bargain and sale, the clerk must be guided by the actual value of the property conveyed and not by the statement in the deed or by the assessed value. It is not necessary that the actual value of the property conveyed be stated on the face of the conveyance.

RICHMOND, VA., *April 20, 1917.*

MCGUIRE, RIELY, BRYAN & EGGLESTON,  
*Mutual Building,*  
*Richmond, Va.*

GENTLEMEN:

Your letter of the 19th instant to the Attorney General with regard to the clipping cut from a recent issue of the Daily Record, stating that the Attorney General had approved an instruction issued by the Auditor to the effect that it was necessary to recite on the face of the conveyance the actual value of the property conveyed is before me for attention.

The only instruction that the Attorney General has approved is that in assessing the tax for recording a deed of bargain and sale the clerk must be guided by the actual value of the property conveyed, and not by the statements in the deed, or by the assessed value. We have not held and do not hold that it is necessary that the actual value of the property conveyed be stated on the face of the conveyance.

Yours very truly,  
LESLIE C. GARNETT,  
*Assistant Attorney General.*

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TAXATION—*Tax on deeds—Refunding taxes on deeds not paid into the public treasury—Sections 567-8 of the Code of Virginia, 1904—Privilege taxes.*—The State tax upon the recordation of deeds is a privilege tax and not a license nor property tax and where paid voluntarily, clerks of court are not authorized to refund the same out of State funds in their hands even though such tax has been illegally exacted.

RICHMOND, VA., February 5, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter of January 24th, in which you propound to the Attorney General the following questions:

The points upon which I now desire your opinion are: *First:* Can clerks of courts refund out of State money now in their hands the recordation tax based upon interest charged for recording deeds of trust and mortgages between July 1, 1916, and August 31, 1916, inclusive, or must the parties who paid the tax have recourse to the General Assembly for refund of that tax by direct appropriation from the treasury?

*Second:* Can the clerks of courts refund out of State money now in their hands the recordation tax based upon interest charged for recording deeds of trust and mortgages between September 1, 1916, and this date?

These questions arise from the recent decision in the case of *Virginia Blue Ridge Railway v. Kidd, Clerk*.

In *Virginia Brewing Company v. Commonwealth*, 113 Va. 145, the Supreme Court of Appeals held that a liquor dealer's license tax unlawfully paid into the treasury, paid voluntarily though unwillingly, could not be recovered.

After the amendment of sections 567 and 568 of the Code of 1904, which provided that persons illegally assessed with a license tax could within one year procure a refund, the court held, in *Richmond Hotel Corporation v. Commonwealth*, 88 S. C. 173, 174, that the general rule was expressly negatived by the statute. The statute, however, is limited to license taxes, and I am of the opinion that you are not justified in extending the rule by construction any further than the Supreme Court of Appeals extended it in the last named case.

In *Pocahontas Collieries Company v. Commonwealth*, 113 Va. 108, 112, the court, in considering the tax for recording deeds, held:

This is not a tax upon property, either within or out of the State, but a tax upon a civil privilege, that is, for the privilege of availing upon the terms prescribed by statute, of the benefits and advantages of the registration laws of the State.

I am of opinion, therefore, that the tax computed by the clerks on the interest as well as the principal charged for recording deeds of trust, being a privilege tax and not a license tax and having been paid voluntarily, though unwillingly paid, the clerks of the courts are not authorized in either of the cases stated by you to refund the tax.

As I have said, I do not think that you would be justified in extending the doctrine laid down in *Hotel Richmond Corporation v. Commonwealth*, *supra*, to privilege taxes, but that the parties paying such taxes to the clerk should be left to their recourse before the courts, if they be so advised, or, in any event, to reimbursement by the legislature.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

**TAXATION—Funds of Hollywood Cemetery Company.**—Chapter 345 of the Acts of 1855-6.—There is nothing in the act incorporating the Hollywood Cemetery Company, exempting it from taxation, therefore, its liability to taxation is to be determined by the general law upon the subject.

*Same.*—Section 183 of the Constitution of Virginia—Section 168 of the Constitution of Virginia—Section 457 of the Code of Virginia, 1904.—It is expressly provided by section 183 of the Constitution of Virginia that no other property than that set out in this section shall be exempt from taxation, State and local, therefore, this section must be looked to for some permission, either express or implied, for the personal property of a cemetery company, which is a private corporation, to be exempted from taxation.

*Same.*—Section 457, sub-section 8 of the Code enacts sub-section 8 of section 183 of the Constitution.

*Same.*—Under the doctrine of *expressio unius, exclusio alterius*, it is clear that the fact that section 183 of the Constitution expressly exempts from taxation public burying grounds and lots therein exclusively used for burial purposes and not conducted for profit, excludes the idea that the intangible property of a cemetery company which has been invested in mortgages and other evidences of debt is not taxable.

*Same—Tax Statutes—Exemptions—Construction of.*—It is provided by section 168 of the Virginia Constitution that all property except as hereinafter provided, shall be taxed and there being nothing in the Constitution nor anything in the previous policy of the State to exempt money invested by a private corporation from taxation, such exemptions must be strictly construed.

RICHMOND, VA., December 29, 1916.

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

DEAR SIR:

I acknowledge your request for an opinion as to whether or not the Hollywood Cemetery Company, which has large sums of money invested in loans, should be taxed upon the evidences of these loans.

Since receiving this request for an opinion, Messrs. Meredith & Cocke, attorneys for the Hollywood Cemetery Company, have filed a short brief with me, enclosing a statement from the president of the corporation, showing the nature of the business of the corporation, the property held by it, and setting forth its position in the matter of taxation.

From this statement I find that the Hollywood Cemetery Company was organized in 1845, chartered by the legislature on February 25, 1856, Acts of 1885 and 1886, page 238. By this act the grounds and improvements thereon and all other property and things connected therewith, for police purposes, are put under and subject to ordinances of the city of Richmond.

This company is governed by a board of directors, elected annually by the lot owners, and it is claimed that no person receives any pecuniary benefit from the company except those actually employed by it in the conduct of its business, who are paid salaries and wages. The lot owners are charged for the upkeep of the ground and many lot owners in order to provide perpetual care for the lots pay a certain sum in gross to the company, the income from which the company uses for the annual care of the lots. The principal of this sum amounts to about \$175,000. In addition to this fund, the company has accumulated a sum of \$270,000, which is chiefly in mortgages

and the State of Virginia under a written contract for the perpetual care of the soldier section, has turned over to the company the sum of \$8,000, which is also invested in mortgages.

There is nothing in the act incorporating this association exempting it from taxation, so we are relegated to the general law upon the subject in order to ascertain whether or not its property is taxable.

Section 183 of the Constitution provides as follows:

Except as otherwise provided in this Constitution, the following property, and no other, shall be exempt from taxation, State and local; but the General Assembly may hereafter tax any of the property hereby exempted save that exempted in sub-section (a.)

The property mentioned in sub-section (a) is the property held by the State, counties, cities, towns and school districts.

Sub-section (c) of section 183 is as follows:

(c) Private family burying-grounds not exceeding one acre in area, reserved as such by will or deed, or shown by other sufficient evidence to be reserved as such, and so exclusively used, and public burying-grounds and lots therein exclusively used for burial purposes, and not conducted for profit, whether owned or managed by local authorities or by private corporations.

It is contended, and for the purposes of this opinion, it may be admitted that Hollywood Cemetery is not conducted for profit, and, therefore, the burying ground and lots therein are exempt under the Constitution, from taxation.

The express terms of this constitutional provision are that no other property than that set out in section 183 shall be exempt from taxation, State and local. Clearly it would seem that we must look to the provisions of this section, therefore, for some permission either express or implied, for the personal property of a cemetery company, which is a private corporation, to be exempted from taxation. Certainly, there is no express exemption from taxation in the Constitution of such personal property and if an exemption exists it is an exemption by implication.

Counsel for the Hollywood Cemetery Company says that section 457 (which they overlooked simply re-enacts sub-section (c) of section 183 of the Constitution) shows the intention of the legislature to exempt all the property of such cemetery companies from taxation, because such companies have no assets but the land used for burial purposes, and, as a further evidence of this intention, quote that portion of section 457-g of the Code, which provides that no inheritance tax shall be charged against legacies or devises for the benefit of any institution or other body or natural or corporate person, whose property is exempt from taxation as hereinbefore mentioned in this section.

Section 457-g of the Code enacts sub-section (g) of section 183 of the Constitution. It may be fairly contended that under this section of the Constitution no inheritance tax should be charged against the legacy or devise to the Hollywood Company, although this is not entirely clear, for the reason that all of the property of the Hollywood Company is not exempt under section 183 of the Constitution; but if you concede that legacies and devises to this company are exempt, such concession does not help in arriving at a true conclusion of the question submitted by you.

For instance, under the provisions of the inheritance tax law of 1916, Acts 1916, page 812, inheritances by direct kindred not exceeding \$15,000 are exempt from inheritance taxes, but it cannot be for a moment contended that this \$15,000 is not taxable as money or if loaned out by the heir or devises, the evidences of debt are taxable as intangible property is taxable.

Therefore, the question resolves itself into whether or not the Constitution, which expressly exempts the real estate of a cemetery company from taxation, can be held by implication also to exempt personal property of a cemetery company. I am forced to the conclusion that the doctrine of *expressio unius, exclusio alterius* is applicable, and that the fact that the Constitution says that "public burying grounds and lots therein exclusively used for burial purposes and not conducted for profit" shall be exempt from taxation, clearly excludes the idea that the intangible property of the Hollywood Cemetery Company, which they have invested in mortgages and other evidences of debt are not taxable.

Section 183 of the Constitution sets out very fully the numerous classes of property which is exempt from taxation and expressly provides that no other property shall be exempt from taxation.

Your attention is especially directed to sub-section e of section 183, which expressly excepts "personal property, including endowment funds belonging to Young Men's Christian Associations and other similar religious associations, orphan or other asylums, reformatories, hospitals and nunneries, which are not conducted for profit, but purely and completely as charities."

Clearly, if the Constitution had intended to exempt the personal property, including endowment funds and money derived from sales of land or cemetery companies or of private corporations conducting cemeteries, the Constitution itself would have so declared.

It is provided in sub-section (g) that:

Whenever any building or land, or part thereof, mentioned in this section and not belonging to the State shall be leased or shall be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town.

If the leased lands of a private corporation owning a cemetery can be taxed, *a fortiori*, the money derived from the sale of lands and invested in mortgages and bonds must be taxed.

In addition, section 168 of the Constitution provides that all property except as hereinafter provided, shall be taxed.

I am aware that the Supreme Court of Appeals in *Commonwealth v. Lynchburg Y. M. C. A.*, 115 Va. 745, said that while the general rule is that provisions exempting property or funds of private corporations from taxation must be strictly construed, taxation of such property being the rule, and exemption from taxation the exception, yet, the policy of the State having always been to exempt property of the character mentioned in section 183 of the Constitution, it should not be construed with the same degree of strictness that applies to provisions making exemptions contrary to the policy of the State, since as to such property exemption is the rule and taxation the exception.

This doctrine may be invoked in passing upon whether the lots in a burial ground which are held for sale by private corporation owning them should be taxed under the theory that the burying grounds are conducted for profit; but there is nothing in the Constitution nor has it ever been the policy of the State to exempt money invested by such a private corporation from taxation, and it would, therefore, seem that the general rule must prevail that exemptions must be strictly construed.

In any event, however, in the case of *Commonwealth v. Hampton Institute*, 106 Va. 614, which involved the right of an educational institution to exemption from taxation under the provisions of section 183 of the Constitution, sub-section "A," it was held that property leased to third persons is liable to taxation, although the

rents be applied to the educational purposes of the institution. This case is approved in *Commonwealth v. Lynchburg Y. M. C. A.*, *supra*, where the question arose as to whether the Y. M. C. A. building was subject to taxation, some of the rooms in which were let to roomers, and thus was a source of revenue and profit to the association. The court said:

If the dominant purpose in the use made of these rooms is to obtain revenue or profit, although it is to be applied to the general objects of the association, it would render the property liable to taxation. But if the use made of those rooms has direct reference to the purposes for which the association was incorporated, and tends immediately and directly to promote those purposes, then its use is within the provisions exempting the property from taxation, although revenue or profit is derived therefrom as incident to such use.

It cannot be contended, I think, that the dominant purpose of the Hollywood Company in making loans is other than to obtain revenue or profit, although such revenue or profit is to be applied to the general objects of the company. It would seem to follow beyond question therefore that the evidences of these loans are liable to taxation.

In the *Hampton Institute Case*, *supra*, the court held that lands of the institute operated by the institute, even though a source of revenue, could not be taxed, but that lands leased by the institute to the National Soldiers' Home for \$4,000 per year and land leased to the Electric Railway Company for \$750 per year were proper subjects of taxation even though the rentals were devoted to educational purposes.

Bearing in mind that there is no direct exemption of personal property of corporations conducting cemeteries and applying the principles in the last named case to the question under consideration, we find that the land of the Hollywood Company operated by them as a burial ground even though incidentally a source of revenue or profit, is not subject to taxation. If, however, the company, out of its funds derived from the sale of its exempt lands for burial purposes, purchases other lands and leases them to third persons, such lands are taxable even though the revenue derived therefrom is used for the purposes of the company as set out in their charter. If then, lands in which the company invests and which are a source of revenue are taxable, how can it be questioned that mortgages and bonds in which the company invests, and which are a source of revenue, are taxable.

I am, therefore, clearly of opinion that the Hollywood Cemetery Company should be taxed upon their bonds and mortgages.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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TAXATION—*Delinquent capitation taxes—Collection of—Garnishment—Section 627 of the Code of Virginia, 1904.*—The collector of delinquent capitation taxes is not required to institute garnishment proceedings through the regular court channels for the collection of delinquent capitation taxes unless the person of whom payment is demanded refuses to pay. If such person refuses to pay, court proceedings are necessary.

RICHMOND, VA., March 23, 1917.

L. E. TURNER, ESQ.,  
*Collector of Delinquent Capitation Taxes,*  
*Suffolk, Va.*

DEAR SIR:

Your letter to the Hon. C. Lee Moore, Auditor of Public Accounts has been referred to this office for reply. Your letter is as follows:

Please advise me in what manner I shall proceed to garnishee or levy for delinquent capitation taxes for the years 1912-1913. In the event it is necessary to garnishee to enforce the payment of these taxes is it necessary to go through the regular court channels to obtain garnishment papers, or have I the authority to go to the employer and demand the payment out of the employee's wages, if any is due him, a sufficient amount to cover the taxes due by him, or will it first be necessary for me to summons him to court and obtain garnishment papers through the court before proceeding to garnishee his wages.

Section 627 of the Code of Virginia, 1904, reads as follows:

When the officer cannot find sufficient goods or chattels to distrain for taxes or levies any person indebted to or having in his hands estate of the party assessed with such taxes or levies may be applied to for payment thereof out of such debt or estate; and a payment by such person of the said taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. If the persons applied to do not pay so much as may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall, if the sum due for such taxes or levies does not exceed twenty dollars, procure from a justice a summons directing such person to appear before some justice at such time and place as may seem reasonable; and if the sum due exceed twenty dollars, shall procure from the clerk of the court of the county or city a summons, directing such person to appear before the court of the county or city on the first day of the next term thereof; and from the time of the service of any such summons, the said taxes and levies shall constitute a lien on the debt so due from such person, or on the estate in his hands.

You will therefore see that it is not necessary to institute garnishment proceedings through the regular court channels unless the person of whom you demand payment refuses to pay. If he refuses it will be necessary to proceed through the courts.

Yours very truly,

LEON M. BAZILE,  
*Law Assistant*

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TAXATION—*Delinquent capitation taxes—Collection of—Chapter 488, Acts of 1916.*—Under chapter 488 of the Acts of 1916, delinquent capitation tax collectors could proceed in 1917 against persons for taxes which are delinquent for the years 1911 and 1912.

*Same—Who are liable for capitation taxes—Unnaturalized persons—Section 5 of the Virginia tax bill.*—Every males citizen of Virginia who has attained the age of twenty-one years except those pensioned by the State for military services, is liable for the capitation tax of \$1.50 provided for in section 5 of the Virginia tax bill, therefore, persons who have not been naturalized but who are inhabitants of this State, are required to pay the capitation tax therein provided for.

*Same.*—Veterans are not exempt from the payment of the State capitation tax unless they are pensioned by the State for military services.

*Same.*—One who pays his capitation tax in a county cannot be required to pay a similar tax assessed against him in a city.

*Same.*—Delinquent capitation taxes may be collected from one who has moved out of the State or out of the jurisdiction in which he was assessed.

*Same.*—Bankruptcy does not discharge capitation taxes due the State.

*Same.*—One is not required to pay a capitation tax assessed against him before he reaches the age of twenty-one years.

RICHMOND, VA., *January 2, 1917.*

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

DEAR SIR:

Acknowledgment is made of letter of L. B. Hancock, delinquent capitation tax collector, referred to this office for reply. Mr. Hancock asks a number of questions in his letter, which, for sake of convenience, I shall set out and answer in the order in which they appear in his letter.

Mr Hancock's first question is:

Can I proceed against a man who owes taxes for 1911 and 1912?

On July 18, 1916, I wrote you that the taxes for 1911 and 1912 were more than three years delinquent, and, therefore, came within the provisions of chapter 488 of the Acts of 1906; therefore Mr. Hancock can proceed against persons for taxes under this act whose capitation taxes are delinquent for the years 1911 and 1912.

Mr. Hancock's second question is:

Can I collect from foreigners who claim they have not been naturalized and are not citizens, although some have lived here ten or more years?

In response to this question, I call your attention to section 5 of Virginia tax bill, Va. Code, volume 4, page 545, which reads as follows:

Upon every male person, classified in schedule A, there shall be a tax of one dollar and fifty cents, of which one dollar shall be paid for aid of the public free schools, and fifty cents shall be returned and paid into the treasury of the county or city in which it shall have been collected.

Every male inhabitant of the State who has attained the age of 21 years, except those pensioned by the State for military services is liable for the capitation tax of \$1.50, provided for in section 5 of the tax bill.

Therefore, persons who have not been naturalized but who are inhabitants of this State, are required to pay the capitation tax provided for in section 5 of the Virginia tax bill.

Mr. Hancock's third question is:

Are veterans exempt?

Not unless they are pensioned by the State for military services.

Mr. Hancock's fourth question is:

If a person shows receipts from any county in Virginia, and I have him on list furnished me by city is he supposed to pay both?

The answer is "No"

Mr. Hancock's fifth question is:

Can I collect from any one who has moved out of State or to another section of this State?

The answer is "Yes"

Mr. Hancock's sixth question is:

Can I proceed against a bankrupt?

It is provided by sub-section 1 of section 17 of the United States bankrupt act that taxes due the United States, State, county or municipality, in which the bankrupt resides, are not released by the bankrupt obtaining a discharge; therefore, the delinquent capitation tax collectors can proceed against a bankrupt. Of course, if there are any assets, the collector should notify the trustee and the tax will be paid out of the bankrupt's estate. If there is no estate, then he may proceed to collect it out of any property subsequently acquired by the bankrupt.

Mr. Hancock's last question is:

Some claim not to have been of age in 1911 or 1912, how about them?

The capitation tax is annually assessed only upon persons who have reached the age of 21 years on February 1st of that year; therefore, persons who are not of age are not responsible for capitation taxes assessed before reaching the age of 21 years.

Very truly yours,

JNO. GARLAND POLLARD,

*Attorney General.*

TAXES—*Delinquent capitation taxes—Collection of—Chapter 488, Acts of 1916.*—The first capitation taxes which are as much as three years delinquent on October 1, 1917, are the capitation taxes which were payable December 1, 1913, and the capitation taxes that are delinquent not exceeding five years from October 1, 1917, are those which were payable December 1, 1912.

RICHMOND, VA., *September 27, 1917.*

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

DEAR SIR:

Acknowledgment is made of your letter of September 17, 1917, which is in the following terms:

Please examine chapter 488, p. 823, Acts 1916, and advise me for what years clerks of courts should, this year, furnish lists of delinquent capitation taxes to the collectors appointed under the provisions of that act.

I enclose you copy of opinion of Hon. Leslie C. Garnett, assistant attorney general, dated July 18, 1916, in which he advised me the list to be furnished last year related to the taxes for 1911 and 1912 and, as I have inquiries from clerks of courts as to what years the lists furnished this year must include, I request your opinion so I may communicate it to the clerks of courts.

In an opinion given you July 18, 1916, by Hon. Leslie C. Garnett, then Assistant Attorney General, report of Attorney General, 1916, p. 230, it was held that the first capitation taxes which were three years delinquent on October 1, 1916, were those which were payable December 1, 1912, and in this opinion it was held that only the capitation taxes delinquent for the years 1911 and 1912 came within the provisions of chapter 488 of the Acts of 1916, which, so far as is applicable to the question here under consideration, reads 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.

It was held in an opinion given T. W. Carper, June 29, 1916, by Hon. Leslie C. Garnett, then assistant attorney general, report of the Attorney General, 1916, p. 231, that 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 of each year, and therefore, that capitation taxes do not become delinquent until the first day of December.

It therefore follows that the first capitation taxes which are as much as three years delinquent on October 1, 1917, are the capitation taxes which were payable December 1, 1913, and that the capitation taxes that are delinquent not exceeding five years are those which were payable December 1, 1912.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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TAXATION—*Delinquent capitation taxes—Collector of.*—While the act providing for the collection of delinquent capitation taxes past due three years or more provides for the appointment of a delinquent capitation tax collector at the term of court preceding October 1 of each year, this does not preclude a subsequent appointment if for any reason the appointment was not made at that time.

RICHMOND, VA., *April 19, 1917.*

MR D. J. CRIGLER,  
*Madison, Virginia.*

DEAR SIR:

I acknowledge your letter of the 18th instant to the Attorney General, making inquiry if a delinquent capitation tax collector can be lawfully appointed at the May term of your court.

While the act providing for the collection of delinquent capitation taxes past due three years or more provides for the appointment at the term preceding October 1st of each year, I am of opinion that this does not preclude a subsequent appointment if for any reason the appointment was not made at that time, and I am quite sure your circuit judge will so hold.

You will understand that the Attorney General is by law made the legal adviser of certain officers at the seat of government and, therefore, this opinion to you must not be taken as official, and I very sincerely trust that the judge of your court will not think me officious in giving you my personal opinion in the premises.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

**TAXATION—Collateral inheritance tax—Section 2281, Code of Virginia, 1904.**—The renouncing of a bequest or devise in a will by a beneficiary by an instrument in writing, for a valuable consideration, is a sale of whatever interest may have been derived by such beneficiary under the will, and the fact that a beneficiary is willing to dispose of such interest upon other terms than those fixed by the will, does not deprive the State of a right to an inheritance tax upon the privilege of taking by devise such legacy. In the case of a life annuity, such tax should be based upon a commutation of the legacy calculated as provided for by section 2281 of the Code of Virginia, 1904.

*Same.*—The contract of a beneficiary renouncing a legacy for a valuable consideration, is a contract of sale, and the recordation tax should be based upon the actual value of the thing passing and in the absence of other information, it is the duty of the clerk to fix the value of the same at a commutation of the life estate disposed of, based upon a calculation provided for by section 2281 of the Code of Virginia, 1904, unless he is satisfied that a sum greater or less than that amount was actually paid for the annuity.

RICHMOND, VA., January 2, 1917.

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

DEAR SIR:

I beg to acknowledge your reference to the Attorney General of the matter of the assessment of an inheritance tax on the annuity of \$5,000 devised to Anna B. Chamblin under the will of David Dunlop, probated in the clerk's office, circuit court of Chesterfield county.

I also have before me copy of your letter of the 28th instant to Mr. E. Randolph Williams, in which you hold that inasmuch as Miss Chamblin, who is not related to the decedent, has released or renounced this annuity, the same does not pass under the will of Mr. Dunlop, and is, therefore, not subject to the collateral inheritance tax in force January 1, 1916, the date of the decedent's death.

I have before me also a copy of the instrument of writing acknowledged for recordation by which Miss Chamblin *in consideration of* the sum of \$10.00 and other valuable considerations certifies that she does "hereby disclaim, renounce, relinquish and waive all provisions made for me by said will, and do hereby give, grant, release, remise and forever quit-claim unto the Old Dominion Trust Company, executor and trustee of and under said will, and to any other person or persons who shall qualify as executor or trustee and unto the other beneficiaries named in said will, and unto any other person or persons who may be or become entitled to any share in said estate, all of my right, title and interest in and to said annuity, whether now due or hereafter, but for this renunciation, to become due."

From a consideration of this instrument of writing and of the foregoing facts, I am of opinion that property of value passed under the will of David Dunlop to Miss Chamblin and that a collateral inheritance tax is assessable thereon. The instrument of writing by which Miss Chamblin purports to renounce under the will is clearly a sale of whatever interest she may have derived under the will and shows on its face that something of value must have passed to her under the will which for \$10.00 and other valuable considerations she releases or grants to the executor and trustee named in the will.

Of course, I do not know what were the considerations moving Miss Chamblin to sell to the estate or to the other heirs her annuity of \$5,000, but the annuity vested under the will and the fact that she is willing to dispose of it upon other terms than

those fixed by the will does not deprive the State of its right to an inheritance tax upon the privilege of taking by devise this legacy.

I am, therefore, of the opinion that the clerk of Chesterfield county should assess against the executor a collateral inheritance tax based upon a commutation of the annuity of \$5,000 passing to Miss Chamblin. I am informed that she is twenty-nine years old, and under the Code of Va. an annuity of \$1.00 per year for a person of this age is \$13,096 which would make a commutation of her interests \$65,480. It would seem to me that the tax should be based upon this amount.

I have also before me the letter of Mr. P. V. Cogbill, clerk of the circuit court of Chesterfield county, requesting advice as to what tax should be levied for the recordation of this instrument of writing purporting to renounce the annuity. This is a contract of sale in my judgment, and the tax should be based upon the actual value of the thing passing.

In the absence of other information, I think it is the duty of the clerk to fix the value at \$65,480, unless he is satisfied that a sum greater or less than this amount was actually paid Miss Chamblin for her annuity.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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TAXATION—*Collateral inheritance tax.*—Although there is no direct authorization in the collateral inheritance tax law, as it existed in 1915, to require the commutation of the collateral inheritance tax on a life estate, it has been the custom of the Attorney General's office to agree in such cases that by consent of the parties such tax on the life estate may be commuted. In the absence of such consent of the parties to the commutation of the tax, such tax must be annually assessed upon the actual amount received by the life tenant.

*Same.*—At the termination of a life tenancy, the collateral inheritance tax must be paid by the remainderman.

RICHMOND, VA., *March 8, 1917.*

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

DEAR SIR:

Acknowledgment is made of your reference to this office of March 6th of the letter of Frank W. Gwathmey, Esq., executor of the estate of the late Frank V. Winston, of Louisa, Virginia.

From Mr. Gwathmey's letter, it appears that the sum of \$12,000 passed under the will of the decedent collaterally to Mrs. H. W. Gwathmey "for her sole and separate use during her natural life with the remainder in fee to her children or descendants *per stirpes*."

The executor desires to be advised as to whether under the Virginia statute in existence at the death of the decedent in 1915 the amount of the collateral inheritance tax against the fund in which Mrs. Gwathmey has a life interest should be deducted and paid now or whether it should be paid at the termination of the life estate.

There is no authorization in the law as it then existed to require the commutation of the collateral inheritance tax on a life estate, but it has been the custom for the Attorney General's office to agree, in cases arising in the chancery court of the city of Richmond, that by consent of parties collateral inheritance tax on the life

estate might be commuted. This would not, of course, affect the five per cent. inheritance tax chargeable against the remainderman at the time the life estate falls in.

In the absence of any consent of parties to the commutation of the collateral inheritance tax on the life estate, I know of no other method of assessing it than to annually assess the collateral inheritance tax upon the actual amount received by the life tenant, as, for instance in the instant case, if the \$12,000 life interest should yield the life tenant \$600.00 she would be annually chargeable with five per cent. collateral inheritance tax upon that amount, or \$30.00.

My opinion is, therefore, that the life tenant would have to pay annually the collateral inheritance tax on the amount received by her under the will and that at the termination of the life tenancy the five per cent. on the whole sum will have to be paid into the treasury.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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TAXATION—*Inheritance taxes—Chapter 80 of the Acts of 1916.*—The imposition of an inheritance tax is governed by the law in existence at the death of the testatrix so far as the first taker under the will is concerned, at least.

*Same—Collateral inheritance tax.*—While there is no direct authorization under the collateral inheritance tax law for the commutation of such taxes on a life estate, it has been the custom of the office of the Attorney General to agree in cases where the other parties in interest consent, that such inheritance tax on life estates might be commuted. The fact that such inheritance tax is commuted on a life estate does not affect the inheritance tax properly chargeable against the remainderman when the life estate expires.

*Same.*—The law in existence at the time of the vesting of a contingent interest governs the inheritance tax to be imposed thereon.

RICHMOND, VA., May 25, 1917.

H. D. HINMAN, ESQ.,

*Attorney at Law,*

*Binghamton, New York.*

DEAR SIR:

Your letter of May 14th to the Attorney General of Virginia is today before me for consideration. From the statements therein it appears that the testatrix of the estate of which you are executor died October, 1915, and that the estate is being settled in Fairfax county, Virginia. At the date of the death of the testatrix there was no direct inheritance tax imposed by the State of Virginia, but only a collateral inheritance tax. It seems from your letter that the clerk of the circuit court of Fairfax county is of the opinion that chapter 80 of the Acts of 1916 governs the imposition of the inheritance tax upon this estate. This is erroneous. The imposition of the inheritance tax is governed by the law in existence at the death of the testatrix, so far as the first taker under the will is concerned at least.

By reference to the case of *Commonwealth v. Wellford*, 114 Va. 372, you will observe that the Virginia court holds that the inheritance tax law is not retrospective in its operation, and does not warrant the imposition of such a tax on a remainder which vested prior to the enactment of the law, although the life tenant did not die until after the passage of the law.

It follows, therefore, that for the purposes of assessing this inheritance tax now, we must consider what estate has passed under the will to collateral kindred. From

the statements in your letter, it appears that the testatrix created a trust fund of \$100,000.00 to be kept invested, and the interest, income and profits therefrom to be paid over to a niece, who is now about twelve years of age, for and during the term of her natural life. There is no direct authorization under the collateral inheritance tax law for the commutation of such taxes on a life estate, but it has been the custom of this office to agree, in cases arising in the chancery court of the city of Richmond, where the other parties in interest consent, that such inheritance tax on the life estate might be commuted. This does not affect, of course, the inheritance tax properly chargeable against the remainderman when the life estate falls in.

Under the case of *Commonwealth v. Wellford*, *supra*, the court seems to reach the conclusion that the time of vesting in interest of the estate fixes the time for the imposition of an inheritance tax. Therefore, if the niece of the testatrix dies during the life time of the testatrix's sister, and the contingent interest of the testatrix's sister then becomes vested, it would seem that the inheritance tax law, if any then in force, would govern the imposition of such a tax upon the estate so vested. The same principle would be true of any estate vested in the other nieces and nephews of the testatrix at the death of the life tenant, since the remainders created by the devise are contingent and not vested, and since the court has held that the law existing at the vesting in interest of the estate is the law which governs the imposition of this tax.

As before said, there was, at the time of the death of the testatrix in this case, no direct authorization for the commutation of the collateral inheritance tax on a life estate, and in cases arising in the city of Richmond it has been the custom of the courts to require the life tenant, when no commutation was had, to pay an annual inheritance tax of five per cent. on the actual amount received under the devise. To illustrate by the instant case, if the \$100,000.00 trust fund yields in interest, income and profits \$5,000.00 annually to the life tenant, the personal representative or trustee would be required, during the continuance of the trust fund to annually pay to the State an inheritance tax of five per cent. on the annual income of \$5,000.00, to-wit, \$250.00. This custom of the courts to determine this matter this way rests upon the theory that while the right to the whole interest, income and profits of the estate created by the will vests immediately upon the death of the testatrix, there is no way of forecasting how many years such income, interest and profits will come into the possession of the life tenant, and, therefore, the only equitable method of imposing the tax is to assess and collect it upon the amount which annually comes into the possession of the life tenant.

Of course, it may be conceded that the proper construction and enforcement of the law is not without doubt. I should be very glad to hear from you further in the premises, and at the suggestion of the Auditor of Public Accounts of Virginia, under whose jurisdiction these matters come, I am forwarding a copy of this letter to the clerk of the circuit court of Fairfax county.

Yours very truly,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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TAXATION—*Merchants—Merchants license tax—Army canteen operated by Y. M. C. A.*—The purpose of establishing a canteen at the Y. M. C. A. at Yorktown would be to derive revenue or profit although the revenue or profit is to be applied to the general business of the association, therefore, such business would be liable to taxation as is the business of other merchants.

RICHMOND, VA., *April 16, 1917.*

MR. J. G. HOLLADAY,  
*Secretary, Norfolk Branch Navy Y. M. C. A.,  
Norfolk, Va.*

MY DEAR SIR:

I beg to acknowledge your letter of April 13th, which has been returned to me by the Auditor of Public Accounts, since that official was of opinion that in order for your Y. M. C. A. to run a canteen for the purpose of selling articles as souvenirs of various kinds to the men of the Navy. It would be necessary for you to take out a merchant's license based upon the probable purchases which you would make.

These licenses, of course, would have to be taken out from the commissioner of the revenue of the county in which you propose to establish your canteen.

The Auditor desired me to confirm his opinion with regard to this, and, therefore, returned the letter to me with the request that I communicate with you directly.

In the case of *Commonwealth v. Lynchburg Y. M. C. A.*, the Supreme Court of Appeals of Virginia held that rooms in the Y. M. C. A. in that city were not leased and that, therefore, the Y. M. C. A. did not have to pay any tax on this property, under section 183 of the Constitution which exempts property of Young Men's Christian Associations "which are not conducted for profit but purely and completely as charities." However, the court said in regard to this proposition, page 752, that "if the dominant purpose in the use made of these rooms is to obtain revenue or profit, although it is to be applied to the general business of the association, it would render the property liable to taxation."

It cannot be doubted that the purpose of establishing a canteen at the Y. M. C. A. at Yorktown would be to derive revenue or profit, although the revenue or profit is to be applied to the general business of the association, the business would nevertheless be liable to taxation as would the business of other merchants.

I regret that we cannot see our way clear to advise you that you have a right to establish this canteen without license, but the law it seems to me is very clearly against this contention.

Very truly yours,  
LESLIE C. GARNETT,  
*Assistant Attorney General.*

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TAXATION—*Merchants—License taxes—Capital.*—No merchants license tax is required of parties who combine to buy food products for their own use nor is the money used by them in the purchase of these products capital employed in business.

RICHMOND, VA., *March 19, 1917.*

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

DEAR SIR:

Acknowledgment is made of the reference of the letter of Hon. Benjamin L. Purcell, Dairy and Food Commissioner, to the Attorney General and your request for his advice if State merchant's license is required or is the capital employed subject to taxation in the following case, set out in Mr. Purcell's letter:

Individuals impressed with the idea that they are paying too large a profit to the distributor in their purchases of food products, have determined

to establish a direct connection with producers which will enable the consumer to eliminate the profit of the middle man on some of their purchases. Several parties desire to enter into an agreement whereby shipments of specific amounts of foods may be made by the producer to one of the consumers, a party to the agreement for distribution to other interested parties who have placed beforehand an order for a specific amount of the food which may be shipped. On arrival of the food at the residence of one of the parties to the agreement, other parties are notified, come forward, pay their portion of the original cost only, no profit being retained by the party to whom the shipment was made by the producer, and take the foods ordered by them away. The money so collected is transmitted by the original consignee of the shipment to the producer or shipper. No membership fees are charged, but any one desiring to purchase foods on this plan can do so by communicating with the party who does the ordering, and giving their orders and paying for the same at the time of placing the order.

I am of opinion that no State merchant's license is required of parties who get together and desire to buy food products for their own use, nor is the money used by them in the purchase of these products capital employed in business.

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

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TAXATION—MILITARY FUND—*Omitted taxes—School funds—Section 376 of the Code of Virginia, 1904, as amended—Section 508 of the Code of Virginia, 1904, as amended.*—Although it is provided by section 376 of the Code of Virginia, 1904, as amended, that the Auditor of Public Accounts shall set aside annually to the credit of the Adjutant General one and one-half per centum of all receipts into the treasury derived from sources of income except the school fund, and the assessment and collection of omitted taxes is a *nunc pro tunc* proceeding and such taxes must be assessed and collected under the laws and at the rate existing at the time at which they should be assessed and collected, this does not in any way limit the right of the legislature to dispose of the public revenue in such a way as it sees fit. Therefore, the legislature having provided that all omitted taxes collected shall be devoted to the public free school fund, by section 508 of the Code of Virginia, 1904, as amended, which is later in its enactment than section 376 of the Code of Virginia, 1904, as amended, the latter enactment must prevail and the Auditor is not authorized to set aside for the military fund any part of the omitted taxes collected and paid into the treasury.

RICHMOND, VA., March 7, 1917.

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

DEAR SIR:

Acknowledgment is made of your letter to the Attorney General, calling attention to the fact that section 376 of the Code of Virginia, as amended, provides that:

It shall be the duty of the Auditor of Public Accounts to set aside annually one and one-half per cent. of all receipts into the treasury derived from regular sources of income, except the school fund, which sum so set aside shall constitute and be known as the military fund, which is hereby appropriated to the uses and purposes set forth in this chapter,

and that during the existence of this law a large amount of property has been omitted by the assessors and that no tax was thereon collected until after the passage of the amendment to section 508 of the Code of Va. by an act approved March 22,

1916, by section 6 of which all omitted State taxes assessed and collected are appropriated to the public free schools.

You state your contention as follows:

Our contention is that this omitted taxes was a part of the regular income of the State; that if it had been collected when due, or any time prior to the act of February 22, 1916, one and one-half per cent. of it, less the school fund as provided at that time, would have been credited to the military fund; that this being true the act of March 22, 1916, should not operate to prevent the military fund from receiving one and one-half per cent. of this revenue, as it is a general statute and does not in any sense repeal the act of February 26, 1908, and cannot, therefore, deprive the military fund of the one and one-half per cent. of revenue less the school fund as provided on the date of February 22, 1908.

Sub-section 6 of section 508 of the Code, as amended, is as follows:

All State taxes hereafter assessed and collected under this act are hereby appropriated to the public free schools of the primary and grammar grades, except the State taxes hereafter assessed and collected for pensions; provided, however, that not more than two hundred and fifty thousand dollars shall be paid for the appropriation year ending February 28, 1917, and not more than two hundred and fifty thousand dollars shall be paid for the appropriation year ending February 28, 1918.

Section 376 of the Va. Code, as amended by Acts of 1912, page 622, provides, as you say, that the Auditor of Public Accounts shall set aside annually to the credit of the Adjutant General "one and one-half per centum of all receipts into the treasury derived from regular sources of income, except the school fund."

While it is the contention of this office that the assessment and collection of omitted taxes is a *nunc pro tunc* proceeding and that such taxes must be assessed and collected under the laws and at the rate existing at the time at which they should have been assessed and collected, yet we cannot agree that this in any way limits the right of the legislature to dispose of the public revenue in such way as it sees fit.

If there is any conflict between section 376 of the Code, directing the Auditor to set aside a certain proportion of the receipts of his office from regular sources of income for the military fund, and sub-section 6 of section 508 as amended, the amendment to section 508 being the last pronouncement of the legislature on the subject, would have to govern.

Therefore, without going into an analysis of whether or not there is a conflict it is clear that the legislature intended to devote to the public free school fund all of the collections from omitted taxes, and I am of opinion that this is unquestionably within the power of the legislature.

I, therefore, concur in the opinion of the Auditor of Public Accounts rendered you on January 31, 1917, in which he held as follows:

In setting aside for the support of the military the percentage provided by law at the close of the fiscal year, September 30, 1916, I did include omitted taxes in which the military fund had a right to participate, viz., those assessed, collected and paid into the treasury prior to June 17, 1916, also omitted taxes assessed prior to June 17, 1916, which were paid into the treasury prior to October 1, 1916.

The military fund will, at the end of this fiscal year, September 30, 1917, when I set aside the military fund, participate in omitted taxes to the extent that those taxes were assessed prior to June 17, 1916, but were not collected and paid into the treasury until after October 1, 1916.

Very truly yours,

LESLIE C. GARNETT,

Assistant Attorney General.

**TAXATION—Tax on seals—Notaries public—Section 589, Code of Virginia, 1904.**—There is no State law requiring the seal of a notary public to be affixed to any paper but when a seal is affixed thereto unless the paper comes under the exemptions of the statute, a State revenue stamp must be affixed.

*Same.*—If the notary's seal is affixed to an original and to each of two copies of a contract, such stamp must be affixed on each of the copies of the contract as well as the original unless such papers come under the exemption contained in section 589 of the Code of Virginia, 1904.

RICHMOND, VA., May 11, 1917.

JOHN UPTON, ESQ.,  
*Attorney at Law,*  
*Norfolk, Va.*

DEAR SIR:

Your letter of May 7th, addressed to the Attorney General, which was referred to the Auditor of Public Accounts for his attention, has been returned by that official to this office with the request that we answer your communication directly and furnish him a copy thereof.

The inquiry propounded by you is as to whether or not the adhesive stamp must be affixed on each copy of a contract executed in triplicate, or if it is sufficient for the notary to affix one tax stamp on the original copy with a certificate on the other two copies that the tax stamp was affixed to the original.

The State of Virginia, as a means of raising revenue, demands a fee of \$1.00 for each seal affixed by a notary to any paper except in certain cases exempt by law, such as documents to be used in obtaining the benefit of a pension or revolutionary claim, and money due on account of military services or land bounty or when the seal is affixed to an affidavit or deposition. (See section 589 of the Code.)

There is no State law requiring the seal of a notary to be affixed to any paper but when a seal is affixed thereto, unless the paper comes under the exemptions above set out the adhesive stamp must be affixed.

Therefore, if in the case you cite the seal is affixed to both the original and to each of the two copies of the contract, the adhesive stamp must be affixed on each of the copies of the contract as well as the original, unless these papers come under the exemption contained in section 589 of the Code.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

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**TAXATION—State seal—Means and instrumentalities of federal government—Taxation of—Constitutional law—Section 16 of the Virginia tax bill—Section 589 of the Code of Virginia, 1904.**—The State and national governments must each exercise their respective powers so as not to interfere with the free and full exercise of the powers of the other, therefore, where the federal government has prescribed that no appointment shall be made to certain positions except from a list of those who have passed an examination and as a prerequisite to the taking of said examination, a certificate shall be filed, signed by a county or State officer with his official seal attached, which seal is necessary to such certificate, the State cannot tax a seal so used because such a tax is in effect, a tax on instrumentalities deemed necessary by the federal government for the proper conduct of the business entrusted to it by the federal constitution.

*Same—Affidavit.*—A written statement of facts certified by an officer to administer oaths is not an affidavit within the meaning of section 589 of the Code of Virginia, 1904.

RICHMOND, VA., December 6, 1917.

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

DEAR SIR:

Acknowledgment is made of your request for my opinion as to whether a tax is imposed by this State on the seal of a notary public attached to certificate required by feederal statute to accompany application for examination before the United Stats Civil Service Commission.

Section 16, of the tax bill (Va. Code, volume 4, p. 558) provides as follows:

When the seal of the State, of a court, or notary public, is affixed to any paper except in cases exempted by law, the tax shall be as follows: \* \* \*  
For the seal of a court or notary public, \$1.00.

The cases exempted by law may be found in section 589 of the Code, reading as follows:

No tax shall be charged when the seal is annexed to any paper or document to be used in obtaining the benefit of a pension, revolutionary claim money due on account of military services or land bounty, under any act of Congress, or under a law of this or any other State, or when a seal is annexed by a notary to an affidavit or deposition.

The certificate required to accompany the application for the United Staes Civil Service examination is in the following words and figures:

I, a \_\_\_\_\_, of the county of \_\_\_\_\_ and State of \_\_\_\_\_, do hereby certify that \_\_\_\_\_, the applicant, who signs the above application for Civil Service examination, is now an actual *bona fide* resident of the county of \_\_\_\_\_ and the State of \_\_\_\_\_, and has been such resident for \_\_\_\_\_ years and \_\_\_\_\_ months next preceding the date hereof.

Dated at \_\_\_\_\_, county of \_\_\_\_\_ and State of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 191\_\_\_\_\_.

(Seal of Officer.)

\_\_\_\_\_  
Signature of Officer.

There are two reasons urged why no tax is required on the seal of notary signing the above certificate.

First, it is claimed that the certificate is in the nature of an affidavit and is therefore exempt under the provisions of section 589. I do not consider this point well taken for the following reasons:

An affidavit is a declaration on oath reduced to writing and affirmed or sworn to by affiant before some person who has authority to administer oaths.—*Bowvier's Law Dictionary.*

The certificate is lacking in two elements entering into the above definition. It is not a declaration on oath and neither is it affirmed or sworn to before some person who has authority to administer oaths. It is a mere written statement of fact certified by an officer authorized to administer oaths. It is therefore not exempt under the terms of the statute.

The second reason advanced why there should be no tax upon the notary's

seal is that the certificate is required by federal statute and that the State therefore has no right to tax the same. The federal statute on the subject reads as follows:

\* \* \* That hereafter every application for examination before the Civil Service Commission for appointment in the departmental service in the District of Columbia shall be accompanied by a certificate of an officer, *with his official seal attached*, of the county and State of which the applicant claims to be a citizen, that such applicant was, at the time of making such application, an actual and *bona fide* resident of said county, and had been such resident for a period of not less than six months next preceding (now 1 year). \* \* \* (26 Stat. L., 235, act of July 11, 1890.)

Under the federal statutes a large proportion of the federal employees are appointed only after examination before the Civil Service Commission and as a prerequisite to such examination application must be made bearing the certificate of an officer, with his official seal attached. Since the passage of the federal statute Virginia has imposed a tax on notaries' seals.

The question that therefore arises is whether the State of Virginia can levy a tax on a seal which must be attached to an application for examination for federal employment?

The State and national governments must each exercise their respective powers so as not to interfere with the free and full exercise of the powers of the other. This is clearly implied in the Constitution of the United States. (*South Carolina v. United States*, 199 U. S. 437.)

The United States government has prescribed that no appointments shall be made to certain positions except from a list of those who have passed an examination; and, as a prerequisite to the taking of said examination, a certain certificate shall be filed signed by a county or State officer, with his official seal attached. This seal is therefore necessary to an appointment to certain federal positions.

I am therefore of the opinion that the State cannot tax a seal so used because such a tax is in effect a tax on instrumentalities deemed necessary by the federal government for the proper conduct of the business entrusted to it by the federal Constitution.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

**TREASURY—State depositories—Bonds of—Section 753, Code of Virginia, 1904, as amended.**—Under the provisions of section 753 of the Code of Virginia, 1904, as amended, the treasurer is not permitted at any time to have on deposit in any State depository enumerated in this section deposits in excess of 50% of the amount of the bond given by the depository in accordance with the statute.

**Same.**—The fact that the treasurer issues transfers to out of town depositories simultaneously with the deposit in one of the designated depositories in excess of 50% of the bond of such depository which transfer would reduce the amount on deposit within the limits prescribed by law would not prevent a deposit in excess of 50% of the depository bond from being a violation of the statute as such transfers could not operate before the deposit was made.

RICHMOND, VA., October 19, 1917.

C. H. URNER, ESQ., *Treasurer,*  
*State of Virginia,*  
*City.*

DEAR SIR:

Acknowledgment is made of your communication in reference to the conditions

existing in regard to the deposit of the taxes paid by the various railroad companies in the various State depositories.

You inform me that the Chesapeake and Ohio Railroad Company pays in one check about the sum of \$349,000 and that the Norfolk and Western Railroad Company pays its taxes generally in two checks of \$360,000 and \$365,000 each. You further inform me that the largest depository bond now in force amounts to only \$500,000. Under this state of facts, you wish to be advised what to do in reference to these deposits, as in each instance the same exceed 50% of the amount of the largest depository bond.

It is provided by section 753 of the Code of Virginia, 1904, as amended, that moneys paid into the public treasury of the State shall be deposited in certain enumerated banks designated as State depositories. This section provides in the second paragraph thereof, as follows:

But no money shall be deposited in either of the said banks until it shall have secured some person other than the bank itself in its behalf to enter into a bond, approved and accepted by the Governor, for a sum in the penalty of at least one hundred thousand dollars, *which sum, however, shall at all times be double the amount of money of the Commonwealth that is on deposit in any such designated State depository*, with condition faithfully to account for and pay over, when and as required, whatever amount may, at the time such bond is given, be on deposit in said bank to the credit of the Commonwealth, and such other sums as may hereafter be deposited in said bank on behalf of the Commonwealth, and with further condition to pay the State not less than two and one-half per centum on daily balances, and for the faithful discharge by said bank of all the duties and obligations pertaining to it as such depository. Any such bank may deposit with the Treasurer of the State as a part of such bond, bonds of the State of Virginia, to be held upon the same condition and trusts for the protection and indemnity of the State stipulated above in relation to the bond to be given hereunder, and the amount of such bond may be diminished by the amount of State bonds so deposited with the Treasurer of the State; provided, that the aggregate of the amount of the bond so given, together with the amount of State of Virginia bonds so deposited, shall not be less than one hundred thousand dollars.

Under the provisions of this section, I am of the opinion that you are not permitted at any time to have on deposit in any State depository enumerated in section 753 of the Code of Virginia, 1904, as amended, deposits in excess of one-half the amount of the bond given you by the depository in accordance with the provisions of this section.

You call my attention to the fact that it might be possible for you to issue transfers to out of town depositories simultaneously with the deposit of these checks in one of the designated depositories so as to reduce the amount on deposit within the limits prescribed by law. I am of the opinion, however, that this could not be done without a violation of the statute, as it expressly provides that the bond of a State depository shall, at all times, be double the amount of money of the Commonwealth that is on deposit in any such designated State depository. As your transfers could not operate at least before the deposit was made, the deposit would be in violation of the statute.

The only remedy that I can suggest is that the enumerated State depositories increase the amount of their bonds or that they deposit with you as part of such bonds, bonds of this State to be held upon the same condition and trust for the protection and indemnity of the State stipulated in the statute in relation to the bond given in accordance therewith.

Yours very truly,

LEON M. BAZILE,  
*Law Assistant.*

TREASURY—*State depositories—Interest on State deposits—Section 753, Code of Virginia, 1904, as amended.*—Under section 753 of the Code of Virginia, 1904, as amended, in the absence of a custom or usage to the contrary between the State and the banks in their dealings under the statute the banks should pay interest on the State's deposits only from the date of the collection of checks deposited and not from the date of deposit. There being no custom or usage between the State and the State depositories, interest is chargeable only from the date of the collection of checks deposited, assuming of course that the collection is made by the depository with all due dispatch.

*Same.*—Each State depository must pay interest from the date of deposit on all checks upon itself or upon banks located in the same city.

RICHMOND, VA., November 9, 1917.

HON. C. H. URNER,

*Treasurer, State of Virginia,  
Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of your request for my opinion as to the proper construction to be placed on that provision of section 753, Va. Code, 1904, as amended, providing that the bonds of State depositories shall contain a condition "to pay the State not less than two and one-half per centum on daily balances."

You inform me that a dispute has arisen between you and some of the State depositories as to whether the "daily balance" here referred to is the *book* balance or *actual* balance; or, in other words, whether the State is entitled to interest from the day it deposits its checks in bank or must the beginning of interest be postponed until the check is collected.

I have been able to find no judicial determination of the meaning of the term "daily balance" as applied to bank deposits. Its meaning must therefore be determined without the aid of judicial precedent.

The banks contend that interest should begin not when the check is deposited but when the check is collected, that is to say the banks should be chargeable with interest only on actual balances. They assert, and it is not denied, that such a course is in accordance with usage among banks and that all other depositors have their interest calculated in this manner. In the absence of usage or agreement to the contrary, this method of calculation would seem just. It would hardly appear reasonable to require a bank to pay interest on money before it receives the same. Again, a large part of the State's deposits consist of transfer checks from one depository to another, and if interest be charged on book balances rather than actual balances the State would be receiving double interest on the same amount during the period of transfer from one depository to the other.

I think, therefore, that if we consider the statute by itself and unrelated to any construction which may have been accepted by the State and the banks in their dealings under this statute, we are forced to the conclusion that the banks should pay interest on the State's deposits only from the date of the collection of checks deposited. Some good reason must be shown for requiring the banks to depart from this equitable method followed by them in their allowance of interest to other customers.

The question then arises as to whether the State and the banks by their dealings with each other under this statute have followed such a course as to have established by implied agreement a different method of calculating interest from that which would otherwise properly obtain.

From information obtained from your office I find that no uniform rule has been applied. Five of the twelve depositories in the city of Richmond allow interest on checks deposited beginning from the day after the deposit and this rule obtains whether the checks deposited are drawn on themselves, other Richmond banks or out of town banks. Seven Richmond depositories allow interest from the day of deposit on all checks whether on in town or out of town banks; one Richmond bank allows interest on checks upon Roanoke from the third day after deposit; one Richmond bank on the deposits made to the credit of the Commonwealth by the city of Richmond, allows interest from the day of the deposit, provided the check deposited is drawn upon itself. As to out of town depositories, some allow interest from the day of the date of the check deposited; some from the date of the receipt of the check and some from the date of the collection of the money represented by the check. As to the Union Bank of Winchester and the Seaboard National Bank of Norfolk in which institutions, under special statute, local officials make direct deposits of the State's money, interest is allowed on all checks from the date of deposit.

Thus it will be seen that utter lack of uniformity has characterized the dealings of the State with its depositories. The course of dealing has been so inconsistent that it cannot be said that usage has established a construction of the term "daily balance" as used in the statute.

It will also be observed that the course of dealing, as above related, in the case of some depositories results in the State losing interest to which she is entitled, while in other cases the State receives interest to which she is not entitled; for instance: in the case of the ten depositories in the city of Richmond, above referred to, the State loses one day's interest on checks drawn upon Richmond banks and these depositories receive the money represented by the checks one day before they begin to pay interest on the same. On the other hand, in the case of those banks in Richmond and in other Virginia cities where interest on out of town checks begins the day of deposit, the bank is paying the State interest on money it has not collected. Justice to the State and its depositories requires that this condition be remedied.

I therefore advise you that in making your interest settlements with State depositories, interest is chargeable only from the date of the collection of checks deposited, assuming of course that the collection is made by the depository with all due dispatch.

I am aware of the fact that this rule is inconvenient in that disputes may sometimes arise between your office and the banks as to what is a reasonable time to be allowed for the collection of checks. It is hoped that this inconvenience may be remedied by an early amendment to the statute which will fix for the beginning of interest some definite time alike just to the State and its depositories. This would avoid disputes and furnish the Treasurer with a fixed rule by which he could verify the allowance of interest made by the banks on State deposits.

I further advise you to require each depository to pay interest from the date of deposit on all checks upon itself or upon banks located in the same city. This would be in keeping with the custom prevailing between the banks and their other interest depositors and will at the same time save the State the interest she is now losing by the unwarranted deduction of one day's interest now made by some of the banks on this class of deposits.

Yours truly,

JNO. GARLAND POLLARD,

*Attorney General.*

TREASURY—*State depositories*.—Depositories must treat the Commonwealth as one of their most favored depositors.

RICHMOND, VA., December 7, 1917.

MR. GEORGE BRYAN,  
Counsel for Richmond Clearing House Association,  
Richmond, Va.

DEAR SIR:

Yours of December 6th received. The information which you give me concerning the lack of uniformity in the practice of the banks as to the allowance of interest on in-town items is in entire keeping with information which I had received from other sources; and in as much as it seems apparent that many if not a majority of the State depositories allow interest to their other customers on in-town items from the day of deposit, I do not see how I can take any other position than that the banks must treat the State as one of their most favored depositors.

Yours very truly,

JNO. GARLAND POLLARD,  
Attorney General.

TREASURY—*Compensation of Treasurer—Collecting from insurance companies—Section 1271, Code of Virginia, 1904*.—The incumbent of the office of State Treasurer in the month of January of any year is entitled to collect 1-20th of 1% of the face value of the bonds deposited with him as his compensation for care and labor in connection with said securities and to receipt therefor as assessment on deposits due in January, 1918.

RICHMOND, VA., June 25, 1917.

MR. C. H. URNER,  
Treasurer of Virginia,  
City.

DEAR SIR:

I beg to acknowledge your letter of the 15th instant in which you desire the opinion of this office as to the construction of section 1271 of the Code of Virginia, with regard to the compensation of the State Treasurer collected from insurance companies.

This section provides that the Treasurer shall collect annually in the month of January, 1-20th of 1% of the face value of the bonds deposited with him as his compensation for his care and labor in connection with said securities.

I am, therefore, of the opinion that the incumbent of the office of State Treasurer in the month of January of any year is entitled to collect this entire 1-20th of 1% as his commissions, and to receipt therefor as "assessment on deposits due in January, 1918."

Very truly yours,

LESLIE C. GARNETT,  
Assistant Attorney General.

TREASURY—*Bonds of insurance companies—United States liberty bonds—Certificates of same—Chapter 112, Acts of 1906*.—Under the provisions of section 14 of chapter 2 of chapter 112 of the Acts of 1912, permitting the Treasurer to accept from insurance companies bonds of the United States or the cities or counties of this State the Treasurer is permitted to accept obligations of the United States govern-

ment issued in lieu of the liberty bonds of 1917, which are designed to represent the same and which upon their surrender without indorsement the federal government binds itself to deliver one of the bonds commonly known as liberty bonds.

*Same—Words and phrases—Bond.*—The word bond as used in section 14 of chapter 2 of chapter 112 of the Acts of 1916 means any instrument in writing that legally binds the United States or the cities or counties of this State to do a certain thing.

RICHMOND, VA., August 4, 1917.

MR. C. H. URNER, *State Treasurer,*  
*City.*

DEAR SIR:

Acknowledgment is made of your communication of this morning in which you requested this office to advise you whether or not, under the provisions of section 14 of chapter 2 of chapter 112 of the Acts of 1906, you could accept obligations of the United States issued in lieu of the new liberty bonds, which are designed to represent the same, and upon the surrender of which, without endorsement, the federal government binds itself to deliver one of the bonds commonly known as the liberty bonds.

The obligation referred to certifies that the holder thereof has paid to the United State government a certain sum of money for a United States bond commonly known as a liberty bond, and binds the federal government to deliver to the bearer without endorsement a United States bond representing the amount of money certified to have been paid the United States government upon the surrender of this obligation. The obligation is signed by William G. McAdoo, Secretary of the Treasury, and by the cashier or assistant cashier of the federal reserve bank of the fifth district.

The bonds permitted to be accepted by the State Treasurer under the provisions of section 14 of chapter 2 of chapter 112 of the Acts of 1906 are specified as "bonds of the United States or of the cities or counties of this State." Although many cases have given the definition of a bond in its most technical sense a narrower meaning, I am of the opinion that the definition of a bond given by the Supreme Court of Texas in *Conrad v. Vollmer*, 31 Texas, 397, 401 (1868), correctly defines the word "bond" as used in the statute here under consideration. The definition there given is as follows:

A bond is what binds. Therefore any instrument in writing that legally binds a party to do a certain thing, may be called a bond.

The obligations here under consideration being instruments in writing that legally bind the federal government to perform the conditions of the obligation, I am of the opinion that they are bonds within the meaning of section 14 of chapter 2 of chapter 112 of the Acts of 1906.

Very truly yours,

LESLIE C. GARNETT,

*Assistant Attorney General.*

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TREASURY—*Bonds of insurance companies—Town bonds—Chapter 112, Acts of 1906—Section 116, Virginia Constitution.*—The bonds required to be deposited with the Treasurer by insurance companies are specified in section 14 of chapter 2 of chapter 112 of the Acts of 1906 as bonds of the United States of the State of Virginia or of the cities or counties of the State of Virginia. While it is true that every city is

a town it is nevertheless equally true that a town is not always a city. Therefore, a clear distinction between the two exists in this State and the Treasurer is not authorized to accept town bonds from an insurance company under the terms of section 14 of chapter 2 of chapter 112 of the Acts of 1906.

RICHMOND, VA., August 2, 1917.

HON. C. H. URNER, *Treasurer,*  
*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter of August 2, 1917, which reads as follows:

Concerning the kind of securities to be accepted by the State Treasurer from insurance companies to protect policy holders, the law specifies: "Bonds of the United States, or of the State of Virginia, or of the cities or counties of the State." I would be glad to know if bonds issued by towns located in the State of Virginia will come within the scope of the law.

It is provided by section 14 of chapter 2 of chapter 112 of the Acts of 1906, known as the Virginia insurance laws, so far as applicable to this question, as follows:

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.

\* \* \*

It will, therefore, be seen that the bonds required to be deposited with the Treasurer by insurance companies are specified in this section of the act as bonds of the United States or the State of Virginia, or of the cities or counties of the State of Virginia, to which fact you have called attention in your letter.

While it is true that it has been held generally that every city is a town, it is nevertheless well settled that a town is not always a city. *Harvey v. Osborn*, 55 Ind. 534, 542. In Virginia, the Constitution has drawn a distinction between cities and towns, and has defined each. Section 116, article VIII. It is provided by this section of the Constitution that the words, "incorporated communities" shall be construed to relate only to cities and towns and that all incorporated communities having within defined boundaries a population of 5,000 or more, shall be known as cities, and all incorporated communities having with undefined boundaries a population of less than 5,000 shall be known as towns, an exception being made as to incorporated communities having less than 5,000 inhabitants which had a city charter at the time of the adoption of the Constitution.

It will, therefore, be seen that a clear distinction exists in this State between the legal meaning of the words "city" and "town" and, therefore, I am of the opinion that if the legislature of Virginia had intended to permit the acceptance by the Treasurer of town bonds, it would have employed either the word "town" or the words "incorporated communities."

I therefore conclude that under the terms of section 14, chapter 2 of chapter 112 of the Acts of 1906, you are not authorized to accept town bonds.

Yours very truly,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

**TREASURY—Bonds of insurance companies—Duty of Treasurer.**—It is the duty of the Treasurer to require insurance companies to deposit sufficient bonds to make good any depreciation in the value of the bonds below the limit required by law to be kept on deposit.

RICHMOND, VA., June 25, 1917.

MR. C. H. URNER,  
*Treasurer of Virginia,  
City.*

DEAR SIR:

Acknowledgment is made of your letter of June 15, informing me that the late State Treasurer failed to make the examination required by law to be made in December for the purpose of ascertaining whether or not there has been any reduction in the value of bonds deposited by insurance companies in the State, and inquiring, since many of the securities have depreciated, whether it is your duty to require them to make good any depreciation of bonds deposited with your office.

I am of the opinion that it is your duty to require the insurance companies to deposit sufficient bonds to make good any depreciation in the value of the bonds below the limit required by law to be kept on deposit.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

**TREASURY—Payment of money out of public treasury—Money erroneously deposited in State treasury—Schools—Smith-Hughes act.**—Although public funds are erroneously placed in the treasury by the Auditor of Public Accounts, there is no way in which such funds may be withdrawn from the treasury except in pursuance of a legislative act, as no officer of the State is authorized to pay money out of the treasury except in pursuance of a legislative act.

RICHMOND, VA., December 19, 1917.

HON. R. C. STEARNES,  
*Superintendent of Public Instruction,  
Richmond, Virginia.*

DEAR SIR:

Acknowledgment is made of yours of December 14th enclosing a letter of the Auditor of Public Accounts addressed to you under date of December 12th.

It appears from the Auditor's letter that he has already turned into the treasury the money received under the Smith-Hughes act. This being true, there is no way in which the funds may be withdrawn from the treasury except in pursuance of legislative act.

I am inclined to think that the Auditor of Public Accounts made a mistake in putting this money into the treasury; but this question is not material inasmuch as the fund is in fact in the treasury.

I do not think that the Governor in designating the State Treasurer as custodian

of the fund intended that the same should be turned into the State treasury, but simply that the individual holding the office of State Treasurer should be the custodian of the fund and that the same should be paid out as directed by the State Board of Education. I shall not, however, go into this question for the reason above indicated.

The act of the Auditor in putting the money into the treasury makes it necessary for the General Assembly to pass an act to get it out of the treasury as no officer of the State is authorized to pay money out of the treasury except in pursuance of legislative act.

Yours very truly,

JNO. GARLAND POLLARD,

*Attorney General.*

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VOCATIONAL EDUCATION—*Governor—Powers of—Vocational education—Senate Bill 703 of the 64th Congress, second session.*—It is within the authority of the Governor of Virginia to accept the provisions of Senate Bill 703 of the 64th Congress, second session, and to name a State board to act in co-operation with the Federal Board of Vocational Education, provided the board so named has under its control funds to be expended in co-operation with the Federal Board of Vocational Education.

RICHMOND, VA., March 14, 1917.

*His Excellency*, H. C. STUART,

*Governor of Virginia,*

*Richmond, Va.*

DEAR SIR:

Acknowledgment is made of your letter enclosing Senate Bill 703 of the 64th Congress, second session, being an act "to provide for the promotion of vocational education; to provide for co-operation with the States in the promotion of such education in agriculture and the trades and industries; to provide for co-operation with the States in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure."

You desire to be advised as to whether or not under section 5 of the said act you are authorized to accept the provisions of the act and name a State board to act in co-operation with the Federal Board of Vocational Education.

Section 5 provides that in order to secure the benefit of the appropriations provided for in the act any State shall, through the legislative authority thereof, accept the provisions of this act and designate or create a State board consisting of not less than three members to have all necessary power to co-operate with the Federal Board of Vocational Education in the administration of the provisions of this act.

It is also provided that in any State the legislature of which does not meet in 1917, that the Governor of the State so far as he is authorized to do so shall accept the provisions of this act and name a State board of not less than three members to act in co-operation with the Federal Board of Vocational Education. The federal board shall recognize such local board for the purposes of this act until the legislature of the State meets in due course and has been in session sixty days.

Section 9 of the act provides that moneys expended under the provisions of this act in co-operation with the States for certain purposes shall be conditioned that for each dollar of federal money expended for such purposes, the State or local community, or both, shall expend an equal amount for such purposes.

I am of opinion that it is within your authority to accept the provisions of this act and to name a State board to act in co-operation with the Federal Board of Vocational Education, provided the board so named has under its control funds to be ex-

pended in co-operation with the Federal Board of Vocational Education; for instance, such a board as the State Board of Education or the State board in control of some of the normal schools, or the College of William and Mary or the Virginia Polytechnic Institute.

In other words, inasmuch as the act requires the State or local community to expend an equal amount of money with that to be expended under the provisions of the act for the salaries of teachers, supervisors or directors of agricultural subjects or of teachers of trade and home economics and industrial subjects, and for the training of teachers of vocational subjects, it will be necessary in the exercise of your discretion in accepting the benefits of this act to name such a board as has under control some institution or institutions where such work is now being carried on.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

WEIGHTS AND MEASURES—*Standard barrel.*—What is a standard barrel within the meaning of the federal statute providing for same.

RICHMOND, VA., June 29, 1917 .

HON. JOHN W. RICHARDSON,  
*Superintendent of Weights and Measures,  
Richmond Va.*

DEAR SIR:

In response to your letter inquiring whether or not your construction of the federal statute providing for a standard barrel is correct, wherein you hold that if a smaller barrel is used than the numerical count, or the weight of the vegetables contained in the barrel are plainly printed on the outside, that the use of such barrel is not unlawful.

I am today in receipt of a letter from the Bureau of Standards of Washington, D. C., copy of which is herewith enclosed, in which the federal authorities hold that your instructions are erroneous in this regard, and that the provision,

that nothing in this act shall apply to barrels used in packing or shipping commodities sold exclusively by weight or numerical count,

only authorizes the exemption of such commodities as flour, sugar and cement, but does not authorize the use of barrels used for the shipment of fruits or vegetables.

I agree to the interpretation made by the Bureau of Washington and that any other interpretation would fail to give the word, "exclusively" its plain meaning.

We know that fruits and vegetables are not exclusively sold by weight, and that the intention of Congress was to provide a standard barrel in this behalf.

Very truly yours,

LESLIE C. GARNETT,  
*Assistant Attorney General.*

WORKMEN'S COMPENSATION LAW—*Words and phrases*—*Steam railway employees.*—The words "steam railway employees" have a broad meaning and can reasonably be construed to include all steam railway employees regardless of the employment, the occupation of the employer being the test. Therefore, the words "steam railway employees" used in section 9 of the tentative draft of a workmen's

compensation law for this State prepared by the commission on workmen's compensation would probably include railroad shop employees and for this reason the meaning of such words should be made clear by an amendment before the same is enacted into law.

RICHMOND, VA., August 14, 1917.

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

SIR:

Acknowledgment is made of the communication of Mr. Frank Kruck, secretary of the commission on workmen's compensation, appointed under authority of a joint resolution agreed to by the General Assembly of Virginia, February 5, 1916, in which the Attorney General is requested to express an opinion as to whether or not section 9 of the tentative draft of a bill providing for workmen's compensation in Virginia, prepared and submitted by the commission on workmen's compensation, includes railroad shop employees.

It is provided by section 2 of the tentative draft of the bill:

From and after the taking effect of this act, every employer and employee, except as herein stated, shall be presumed to have accepted the provisions of this act respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment, and shall be bound thereby, unless he shall have given prior to any accident resulting in injury or death notice to the contrary in the manner herein provided.

Section 9 of the draft prepared by the commission on workmen's compensation, is an exception to the general provisions of the proposed law, and reads as follows:

This act shall not apply to casual laborers, steam railway employees, farm laborers and domestic servants, nor to employers of such persons, nor to any person, firm, or private corporation, including any public service corporation that has in service less than three operatives regularly in the same business; unless such employees and their employers voluntarily elect in the manner hereinafter specified to be bound by this act.

The words "steam railway employees" have a broad meaning and, to say the least, can reasonably be construed to include all steam railway employees, regardless of the employment, the occupation of the employer being the test. The word "employee" has been defined as:

One who works for an employer; a person working for a salary or wages; a person employed; one who is employed; a person who is employed; one who works for wages or salary or who is engaged in the service of another; one whose time and skill are occupied in the business of his employer; one who works for another for his hire; a person hired to work for wages as the employer may direct; a laborer when engaged in services under a contract for compensation. \* \* \* (5 Cyc. 1031-2.)

It is true that the United States circuit court for the southern district of Massachusetts in *Cotton v. Fidelity & Casualty Company*, 41 Fed. 501, 511, said that the words "railroad employee" used in an accident insurance policy included within their meaning a baggage checker for a transfer company who was not employed by the railroad company, the court saying:

\* \* \* The words of exception, "railroad employees," have reference to the character of employment, rather than to who is their employer. \* \* \*

It was said by the Supreme Court of Georgia, however, in *Yancey v. Aetna Life Insurance Company*, 108 Ga. 349, 351, that the term "railway employee" as used in accident insurance policies refer to a person employed "to work on and about a railroad; one whose employer operates a railroad." Extending its definition somewhat, which was wholly unnecessary to a decision of this case, the court said:

Giving to the words "railway employee" the meaning which the context requires, no other person can be embraced within that term than one whose employment requires him to work on or about a railroad, and whose employer is one who operates a railroad either as owner or otherwise.

It will, therefore, be seen that the words "steam railway employees" may include within their meaning all persons employed by a steam railroad regardless of the particular occupation, or they may be so limited as to include only those persons engaged in the operation of a railroad. Personally, I am of the opinion, however, that these words as used in the act should be construed so as to include within their meaning any one who is engaged in the service of a steam railroad or whose time and skill are occupied in the business of such corporation. Fortunately, however, the meaning desired to be conveyed by the commission on workmen's compensation can be easily made clear by an amendment to the tentative draft of the bill prepared by the commission.

Yours very truly,

LEON M. BAZILE,

*Law Assistant.*

## Statement

Showing the Current Expenses of the Office of the Attorney General from October 31, 1916, to January 3, 1918.

| 1916. |     |  |          |
|-------|-----|--|----------|
| Nov.  | 13. | Jno. Garland Pollard, stamps.....  | \$ 10 00 |
| Dec.  | 1.  | Jno. Garland Pollard, stamps.....  | 10 00    |
|       | 7.  | Everett-Waddey Co., merchandise.....   | 45 25    |
|       | 7.  | S. B. Adkins & Company, repairing books.....   | 5 00     |
|       | 7.  | Gunn Disinfecting Company, liquid soap.....  | 217 04   |
|       | 7.  | Miss L. M. Krouse, water tickets.....  | 3 00     |
|       | 7.  | Western Union Telegraph Company, messages.....   | 1 40     |
|       | 7.  | West Publishing Company, Va. & W. Va. Digest, Vol. 7.....  | 7 50     |
|       | 7.  | Chesapeake & Potomac Telephone Company, telephone messages.....  | 1 20     |
|       | 8.  | John A. Skinner, taking down awnings.....  | 1 00     |
|       | 8.  | Morris Hunter, work on buzzers, etc.....   | 3 25     |
|       | 28. | Jno. Garland Pollard, stamps.....  | 10 00    |
| 1917. |     |  |          |
| Jan.  | 30. | Smith & Sanders, copy of Virginia Prohibition act.....   | 2 50     |
|       | 30. | Western Union Telegraph Company, messages.....   | 50       |
|       | 30. | Bancroft-Whitney Company, Volume 14, Ruling Case Law.....  | 6 00     |
|       | 30. | Lawyers Co-operative Publishing Company, Vol. 60 of United States Reports.....                         | 4 50     |
|       | 30. | Hill Directory Company, business directory and gazetteer.....  | 7 00     |
|       | 30. | Sydnor & Hundley, Incorporated, one oak costumer.....  | 1 25     |
|       | 30. | Everett Waddey Company, office supplies.....   | 35 70    |
|       | 30. | Jno. Garland Pollard, stamps.....  | 10 00    |
|       | 30. | Chesapeake & Potomac Telephone Company, telephone messages.....  | 3 30     |
| Feb.  | 1.  | Virginia Law Review Association, Vol. 4 of Virginia Law Review.....                                    | 2 50     |
|       | 19. | Western Union Telegraph Company, messages.....   | 2 28     |
|       | 19. | Miss L. M. Krouse, drinking water.....   | 3 00     |
|       | 19. | West Disinfecting Company, drinking cups.....  | 4 75     |
|       | 19. | Everett Waddey Company, 3 pamphlet binders.....  | 5 50     |
|       | 19. | Jno. Garland Pollard, postage stamps.....  | 10 00    |
|       | 28. | Chesapeake & Potomac Telephone Company, messages.....  | 50       |
|       | 28. | Jno. Garland Pollard, postage stamps.....  | 14 21    |
| March | 27. | Western Union Telegraph Company, telegrams.....  | 13 95    |
|       | 27. | Appeals Press, subscription to Virginia Appeals.....   | 5 00     |
|       | 27. | Everett Waddey Company, transfer case.....   | 1 75     |
|       | 27. | E. B. Taylor Company, one feather duster.....  | 1 25     |
|       | 27. | Southern Stamp & Stationery Company, rubber stamps.....  | 1 00     |
|       | 27. | Bancroft-Whitney Company, Vol. 15 of Ruling Case Law.....  | 6 00     |
|       | 27. | Hill Directory Company, 1917 Directory.....  | 7 00     |
| April | 9.  | American Law Book Company, payment on account of Corpus Juris.....                                     | 50 00    |
|       | 9.  | Western Union Telegraph Company, telegrams.....  | 2 05     |
|       | 9.  | American Law Book Company, Corpus Juris annotations.....   | 8 00     |
|       | 9.  | Chesapeake & Potomac Telephone Company, messages.....  | 15 45    |
|       | 9.  | Chesapeake & Potomac Telephone Company, rent of extension sets and extra listing.....                  | 27 00    |
|       | 9.  | Jno. Garland Pollard, postage stamps.....  | 10 00    |
| May   | 9.  | Michie Company, Vol. 19 Virginia Law Register, four copies of monthly issue Virginia Law Register..... | 8 50     |
| June  | 5.  | Chesapeake & Potomac Telephone Company, messages.....  | 1 85     |
|       | 5.  | Miss L. M. Krouse, drinking water.....   | 3 00     |
|       | 5.  | Michie Company, Vol. 16, Enc. Dig. Va. & W. Va. Rep.....   | 7 50     |
|       | 5.  | West Disinfecting Company, drinking cups.....  | 4 75     |
|       | 5.  | Meister & Smethie, making labels for Virginia Rep.....   | 3 00     |
|       | 5.  | Underwood Typewriter Company Inc., platen and adjusting typewriter.....                                | 2 00     |
|       | 5.  | Western Union Telegraph Company, telegrams.....  | 93       |
|       | 5.  | Jno. Garland Pollard, stamps.....  | 10 00    |
|       | 30. | Jno. Garland Pollard, postage stamps.....  | 10 00    |
| July  | 6.  | S. B. Adkins & Company, binding four volumes of Virginia Law Register.....                             | 4 50     |
|       | 6.  | M. Branch & Company, one set of typewriter paper holders.....  | 1 00     |
|       | 6.  | Bancroft-Whitney Company, Vol. 16 Ruling Case Law.....   | 6 00     |
|       | 6.  | Western Union Telegraph Company, telegrams.....  | 1 58     |
|       | 6.  | Chesapeake & Potomac Telephone Company, messages.....  | 7 95     |
|       | 31. | West Disinfecting Company, paper towels, rack and drinking cups.....                                   | 8 25     |
|       | 31. | Everett Waddey Company, file cards and case.....   | 6 60     |
|       | 31. | John A. Skinner repairing and placing awnings.....   | 2 00     |
|       | 31. | Clyde W. Saunders, 1 p. ordinance.....   | 1 50     |
|       | 31. | Michie Company, subscription to Virginia Law Register, May, 1917, to May, 1918.....                    | 15 00    |
| Aug.  | 9.  | Chesapeake & Potomac Telephone Company, messages.....  | 2 00     |
|       | 9.  | Bancroft-Whitney Company, Vol. 17, Ruling Case Law.....  | 6 00     |
|       | 9.  | Western Union Telegraph Company, telegrams.....  | 1 14     |
|       | 17. | Jno. Garland Pollard, postage stamps.....  | 10 00    |
| Sept. | 5.  | Jno. Garland Pollard, postage stamps.....  | 10 00    |
|       | 5.  | Western Union Telegraph Company, telegrams.....  | 53       |
|       | 5.  | Expert Letter Writing Company, multigraphing letters.....  | 2 75     |
|       | 5.  | Chesapeake & Potomac Telephone Company, messages.....  | 4 10     |
|       | 13. | Miss L. M. Krouse, drinking water.....   | 3 00     |
|       | 14. | Jno. Garland Pollard, postage stamps.....  | 15 00    |
|       | 29. | M. B. Watts, copy of opinion in <i>Jeffries et als, v. Commonwealth</i> .....                          | 7 16     |

## STATEMENT SHOWING CURRENT EXPENSES—CONTINUED.

|       |     |  |           |
|-------|-----|--|-----------|
| Sept. | 30. | West Disinfecting Company, towels.....   | \$ 2 00   |
| Oct   | 4.  | Everett Waddey Company, cards and folders.....   | 3 85      |
|       | 4.  | Western Union Telegraph Company, telegrams.....  | 1 98      |
|       | 5.  | Jno. A. Skinner, repairing shades and removing awnings.....  | 3 50      |
|       | 8.  | Miss E. A. Sanders, copy of depositions in <i>Corn Products Refining Co. v. Commonwealth</i> ..... | 7 65      |
|       | 11. | Jno. Garland Pollard, postage stamps.....  | 10 00     |
|       | 29. | Everett Waddey Company, binding Annual Report, 1916.....   | 60 08     |
| Nov.  | 5.  | Bancroft-Whitney Company, Vol. 18, Ruling Case Law.....  | 6 00      |
|       | 5.  | Everett Waddey Company, folders.....   | 3 00      |
|       | 5.  | Western Union Telegraph Company, telegrams.....  | 98        |
|       | 5.  | Jno. Garland Pollard, postage stamps.....  | 10 00     |
|       | 21. | Chesapeake & Potomac Telephone Company, messages.....  | 1 90      |
|       | 23. | Jno. Garland Pollard, stamps.....  | 10 00     |
| Dec.  | 8.  | Miss L. M. Krouse, drinking water.....   | 3 00      |
|       | 8.  | West Disinfecting Company, towels and drinking cups.....   | 6 75      |
|       | 8.  | Western Union Telegraph Company, telegrams.....  | 5 43      |
|       | 8.  | Chesapeake & Potomac Telephone Company, messages.....  | 13 55     |
|       | 28. | Jno. Garland Pollard, postage stamps.....  | 10 00     |
| 1918. |     |  |           |
| Jan.  | 3.  | Jno. A. Skinner, weather stripping windows, repairing book cases.....                              | 19 00     |
|       | 3.  | Bell Book & Stationery Company, supplies.....  | 1 75      |
|       | 3.  | Remington Typewriter Company, 2 sets speed keys.....   | 8 00      |
|       | 3.  | Lawyers Co-operative Publishing Company, Vol. 61, L. Ed., U. S. Report.....                        | 6 50      |
|       | 3.  | Western Union Telegraph Company, telegrams.....  | 3 74      |
|       |     | Total.....   | \$ 942 83 |

## Statement

Showing Amounts Expended from the Appropriation for Traveling Expenses from November 1, 1916, to January 3, 1918.

|       |     |   |           |
|-------|-----|---|-----------|
| 1916. |     |   |           |
| Nov.  | 27. | Jno. Garland Pollard, expenses to Smithfield, Virginia, on labor law prosecutions.....                  | \$ 8 43   |
| Dec.  | 14. | Leslie C. Garnett, expenses in case of <i>Smith-Courtney Co. v. Governor</i> .....                      | 13 20     |
| 1917. |     |   |           |
| Jan.  | 23. | Leslie C. Garnett, expenses in case of <i>Commonwealth v. Southern Railway</i> .....                    | 7 75      |
| Feb.  | 1.  | Jno. Garland Pollard, expenses to Washington in W. Va. Debt Case.....                                   | 34 59     |
| March | 7.  | Leslie C. Garnett, expenses to Norfolk in Twohy Case.....   | 10 05     |
|       | 10. | Jno. Garland Pollard, expenses to Washington in W. Va. Debt Case.....                                   | 7 34      |
| April | 24. | Leslie C. Garnett, expenses to Hopewell in <i>Commonwealth v. Anderson, et al.</i> .....                | 4 60      |
| May   | 15. | Leslie C. Garnett, expenses to Hopewell in labor law prosecutions.....                                  | 3 00      |
| June  | 9.  | Leslie C. Garnett, expenses to Wytheville in Commonwealth cases.....                                    | 21 95     |
|       | 29. | Leslie C. Garnett, expenses to Wytheville in <i>Tidewater &amp; Western v. Commonwealth</i> .....       | 17 90     |
| Aug.  | 28. | J. D. Hank, Jr., expenses to Phoebus in gambling cases.....   | 7 55      |
| Sept. | 14. | J. D. Hank, Jr., expenses to Staunton in Commonwealth cases.....  | 20 05     |
|       | 19. | Leon M. Bazile, expenses to New York in case of <i>Corn Products Refining Co. v. Commonwealth</i> ..... | 29 15     |
|       | 24. | J. D. Hank, Jr., expenses to Mathews in <i>Commonwealth v. Lane</i> .....                               | 10 35     |
| Oct.  | 17. | J. D. Hank, Jr., expenses to Norfolk and Hampton in Commonwealth cases.....                             | 18 85     |
|       | 17. | J. D. Hank, Jr., expenses to Williamsburg in Marie Marshall Case.....                                   | 5 95      |
| Nov.  | 3.  | J. D. Hank, Jr., expenses to Williamsburg in Marie Marshall Case.....                                   | 10 10     |
| Dec.  | 12. | J. D. Hank, Jr., expenses to Phoebus in gambling cases.....   | 12 33     |
|       |     |   | \$ 243 14 |

## Statement

Showing Amounts Expended from Appropriation for Additional Clerical and Stenographic Services in the Office of the Attorney General from November 1, 1916, to January 3, 1918.

|       |     |  |          |
|-------|-----|--|----------|
| 1916. |     |  |          |
| Nov.  | 1.  | Miss M. L. Hunter, services as stenographer..... | \$ 57 50 |
| Dec.  | 1.  | Miss M. L. Hunter, services as stenographer..... | 57 50    |
| 1917. |     |  |          |
| Jan.  | 1.  | Miss M. L. Hunter, services as stenographer..... | 57 50    |
|       | 30. | Miss M. L. Hunter, services as stenographer..... | 20 00    |
|       | 31. | Miss Dora Wiles, services as stenographer.....   | 16 67    |

STATEMENT SHOWING AMOUNTS EXPENDED FROM APPROPRIATION FOR ADDITIONAL CLERICAL AND STENOGRAPHIC SERVICES—CONTINUED.

|   |     |   |            |
|---|-----|---|------------|
| Feb.  | 15. | Miss Dora Wiles, services as stenographer.....          | \$ 25 00   |
|   | 28. | J. Sidney Fitzgerald, extra night work.....             | 20 00      |
|   |     | Miss Dora Wiles, services as stenographer.....          | 25 00      |
| March   | 15. | Miss Dora Wiles, services as stenographer.....          | 25 00      |
| April   | 2.  | Miss Dora Wiles, services as stenographer.....          | 25 00      |
|   | 16. | Miss Dora Wiles, services as stenographer.....          | 25 00      |
| May   | 1.  | Miss Dora Wiles, services as stenographer.....          | 25 00      |
|   | 15. | Miss Dora Wiles, services as stenographer.....          | 25 00      |
| June  | 1.  | Miss Dora Wiles, services as stenographer.....          | 25 00      |
|   | 15. | Miss Ethel L. Young, services as stenographer.....      | 25 00      |
| July  | 2.  | Miss Elise S. Fitzwilson, services as stenographer..... | 32 50      |
|   | 2.  | Miss Ethel L. Young, services as stenographer.....      | 30 00      |
|   | 15. | Miss Elise S. Fitzwilson, services as stenographer..... | 32 50      |
|   | 15. | Miss Ethel L. Young, services as stenographer.....      | 30 00      |
| 1918.   |     |   |            |
| Jan.  | 3.  | Miss Isabel Eason, services as stenographer.....        | 15 00      |
| From July 15, 1917, to January 1, 1918, Miss Elise S. Fitzwilson received for her services as stenographer sixty-five dollars per month, aggregating..... |     |   | 357 50     |
| From July 15, 1917, to September 1, 1917, Miss Ethel L. Young received for her services as stenographer sixty dollars per month, aggregating.....         |     |   | 90 00      |
| From September 1, 1917, to January 1, 1918, Miss M. L. Hunter received for her services as stenographer sixty dollars per month, aggregating.....         |     |   | 240 00     |
| Leon M. Bazile, law assistant, received for his services from November 1, 1916, to January 1, 1918, one hundred dollars per month, aggregating.....       |     |   | 1,400 00   |
|   |     |   | \$2,681 67 |

**List of Books Added to the Attorney General's Office Since November 1, 1916.**

*Encyclopedias:*

Corpus Juris, Vols. 9 to 12.  
Ruling Case Law, Vols. 15 to 18.

*Digests:*

Enc. Digest of Virginia and West Virginia Reports (Michie), Vol. 16.

*Reports:*

Virginia Report, Vol. 119.  
U. S. Supreme Court Rep. (Law Ed.), Vols. 242-4, 64 L. Ed. (1 Vol.)

*Law Magazines:*

Virginia Law Register, Vol. 18. Also Vols. 1 and 2 of N. S.  
Virginia Law Review, Vols. 3 and 4.

*Text Books:*

Taylor on Due Process of Law, 1 Vol.

*Reports omitted from list given in 1916 Report:*

Virginia Appeals, Vols. 3, 4, 5, 6, 7, 9.

In addition to the above books, the office has a number of reports of departments of this and other States, which it is deemed unnecessary to list in detail at this time.

# APPENDIX

## IN THE SUPREME COURT OF THE UNITED STATES.

Original No. 2. October Term, 1916.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ, President of the Senate; HONORABLES BENJ. L. ROSENBLOOM, ELMER HOUGH, W. H. CARTER, W. F. BURGESS, ROBERT L. GREGORY, M. K. DUTY, WARREN MILLER, RAYMOND DODSON, W. P. McAVOY, J. E. FRAZIER, J. W. LUTHER, W. P. HAWLEY, C. C. COALTER, MARTIN V. GODBEY, A. R. MONTGOMERY, GORY HOGG, H. G. VENCILL, E. H. MORTON, FRED L. FOX, SCOTT C. LOWE, CHARLES A. SINSEL, ROY E. PARRISH, WALLACE B. GRIBBLE, RICHARD E. TALBOTT, GOHEN C. ARNOLD, S. O. BILLINGS, S. L. COBURN, FRANK BECKWITH, G. K. KUMP, Senators of the State of West Virginia; HONORABLE JOSEPH S. THURMOND, Speaker of the House of Delegates; HONORABLES CLYDE POLING, HARRY P. HENSHAW, JOHN N. PARKS, LUTHER R. JONES, LEE RADER, L. T. HARVEY, T. J. MAHAN, W. C. W. RENSHAW, JOHN L. CONNOR, A. J. BAXTER, W. N. CLAY, KENNA LESTER, PAUL HARDMAN, A. K. FLEMING, J. ALFRED TAYLOR, CHARLES J. MASSAU, GEORGE H. SKAGGS, J. WILBUR DAVIS, E. E. COTTRELL, P. A. DIXON, A. B. C. BRAY, W. W. CARDER, J. NESS PORTER, J. D. CHIPLEY, S. R. HARRISON, JR., JOHN MOORE, GEORGE W. STURM, LOUIS A. JOHNSON, KENNA CASTO, EVERETT HUGHES, MILTON BURR, L. V. KOONTZ, J. F. BOUCHELLE, ANGUS W. McDONALD, JOHN PATRICK, O. F. PAYNE, A. W. PRICE, JAMES BASSEL, CHARLES CABELL, ROBERT BLAND, IRA A. AKINS, FRANK C. HAYMOND, E. O. MURRAY, C. H. HUNTER, GEORGE W. BYRNES, PAT M. WILSON, W. D. CURRY, R. B. FERGUSON, W. B. HONAKER, A. F. WYSONG, S. N. MOORE, JOSEPH B. STRATTON, WM. S. JOHN, PERRY C. MCBEE, CLARENCE SYMNS, W. H. SOMERS, HARVEY HAGERMAN, E. HOWARD HARPER, J. BUELL SWOPE, FLOYD WALDRON, W. G. GRAVES, J. E. EMSLEY, W. T. OTTO, HARRY A. WEISS, N. PRICE WHITAKER, G. A. HINER, GILBERT D. SMITH, B. M. YEAGER, W. H. GLOVER, LEROY SHAW, C. W. TAYLOR, C. L. HEABERLIN, V. E. SULLIVAN, E. H. ARNOLD, JAMES W. WEIR, B. R. TWYMAN, A. M. HERSMAN, G. T. SARVER, A. A. RIDDLEBARGER, J. SIDNEY BURDETT, H. R. WERNER, F. R. HICKMAN, JOHN B. HILLEARY, W. K. FERGUSON, F. W. TERRILL, W. T. TALBOTT, SEPTIMUS HALL, J. FRIEND ALLEY, S. F. WELLS, W. D. PRICE, P. F. WELLS, JOHN D. SWEENEY, and A. J. MULLENS, Members of the House of Delegates of the State of West Virginia, *Defendants*.

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Commonwealth of Virginia, by John Garland Pollard, her Attorney General, moves for leave to file a petition for a writ of mandamus hereto annexed, and further moves that a rule be entered and issued directing the said Wells Goodykoontz, President of the Senate; Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester,

Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George E. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wyson, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney and A. J. Mullens, members of the House of Delegates of the State of West Virginia, to show cause why a writ of mandamus should not issue commanding the said Honorable Wells Goodykoontz, President of the Senate; Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, A. H. Morton, Fred L. Fox, Scott C. Lowe, Charles Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia: Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wyson, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symns, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swoope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney and A. J. Mullens, members of the House of Delegates of the State of West Virginia, forthwith and at the present session of the Legislature to assess and levy a tax upon the property within the State of West Virginia, sufficient to provide for the payment of the decree and judgment of this court, entered on June 14, 1915, in favor of the Commonwealth of Virginia, in the suit of Virginia against West Virginia, for \$12,393,929.50, with interest thereon from July 1, 1915, until paid, at the rate of five per centum per annum, and costs, according to the terms of the said judgment, unless the Legislature shall forthwith and at its present session make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash, and costs, according to the terms of the said judgment, and for such other and further relief in the premises as shall seem just and meet. The said motion will be based upon the said decree and judgment entered as aforesaid, and on the petition and answer on the motion for a writ of execution heretofore made on June 5, 1916, and on the facts stated in the annexed petition and the exhibits filed therewith.

Respectfully,

COMMONWEALTH OF VIRGINIA,

By JOHN GARLAND POLLARD,

*Attorney General of Virginia.*

## IN THE SUPREME COURT OF THE UNITED STATES.

v. Original No. 2. October Term, 1916.

COMMONWEALTH OF VIRGINIA, *Complainant*,

vs.

STATE OF WEST VIRGINIA, HONORABLE WELLS GOODYKOONTZ, President of the Senate; HONORABLES BENJ. A. ROSENBLUM, ELMER HOUGH, W. H. CARTER, W. F. BURGESS, ROBERT L. GREGORY, M. K. DUTY, WARREN MILLER, RAYMOND DODSON, W. M. McAVOY, J. E. FRAZIER, J. W. LUTHER, W. P. HAWLEY, C. C. COALTER, MARTIN V. GODBEY, A. R. MONTGOMERY, GORY HOGG, H. G. VENCILL, E. H. MORTON, FRED L. FOX, SCOTT C. LOWE, CHARLES A. SINSEL, ROY E. PARRISH, WALLACE B. GRIBBLE, RICHARD E. TALBOTT, GOHEN C. ARNOLD, S. O. BILLINGS, S. L. COBURN, FRANK BECKWITH, G. K. KUMP, Senators of the State of West Virginia; HONORABLE JOSEPH S. THURMOND, Speaker of the House of Delegates; HONORABLES CLYDE POLING, HARRY P. HENSHAW, JOHN N. PARKS, LUTHER R. JONES, LEE RADER, L. T. HARVEY, T. J. MAHAN, W. C. W. RENSHAW, JOHN L. CONNOR, A. J. BAXTER, W. N. CLAY, KENNA LESTER, PAUL HARDMAN, A. K. FLEMING, J. ALFRED TAYLOR, CHARLES J. MASSAU, GEORGE H. SKAGGS, J. WILBUR DAVIS, E. E. COTTRELL, P. A. DIXON, A. B. C. BRAY, W. W. CARDER, J. NESS PORTER, J. D. CHIPLEY, S. R. HARRISON, JR., JOHN MOORE, GEORGE W. STURM, LOUIS A. JOHNSON, KENNA CASTO, EVERETT HUGHES, MILTON BURR, L. V. KOONTZ, J. F. BOUCHELLE, ANGUS W. McDONALD, JOHN PATRICK, O. F. PAYNE, J. W. PRICE, JAMES BASSEL, CHARLES CABELL, ROBERT BLAND, IRA A. ADKINS, FRANK C. HAYMOND, E. O. MURRAY, C. H. HUNTER, GEORGE W. BYRNES, PAT. M. WILSON, W. D. CURRY, R. B. FERGUSON, W. B. HONAKER, A. F. WYSONG, S. N. MOORE, JOSEPH B. STRATTON, WILLIAM S. JOHN, PERRY C. MCBEE, CLARENCE SYMNS, W. H. SOMERS, HARVEY HAGERMAN, E. HOWARD HARPER, J. BUELL SWOPE, FLOYD WALDRON, W. G. GRAVES, J. E. EMSLEY, W. T. OTTO, HARRY A. WEISS, N. PRICE WHITAKER, G. A. HINER, GILBERT D. SMITH, B. M. YEAGER, W. H. GLOVER, LEROY SHAW, C. W. TAYLOR, C. L. HEABERLIN, V. E. SULLIVAN, E. H. ARNOLD, JAMES W. WEIR, B. R. TWYMAN, A. M. HERSMAN, G. T. SARVER, A. A. RIDDLEBARGER, J. SIDNEY BURDETT, H. R. WERNER, F. R. HICKMAN, JOHN B. HILLEARY, W. K. FERGUSON, F. W. TERRILL, W. T. TALBOTT, SEPTIMUS HALL, J. FRIEND ALLEY, S. F. WELLS, W. D. PRICE, P. F. WELLS, JOHN D. SWEENEY, and A. J. MULLENS, members of the House of Delegates of the State of West Virginia, *Defendants*.

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of the Commonwealth of Virginia by John 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 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.

V. On June 5, 1916, the Commonwealth of Virginia moved the court to issue its writ of execution directed to the marshal of this court against the State of West Virginia, directing the marshal of this court to levy upon the property of the State of West Virginia, subject to such levy, for the satisfaction of the decree and judgment in the suit of the Commonwealth of Virginia against the State of West Virginia herein above mentioned, and that the Commonwealth of Virginia be granted such other and further relief in the premises as was just and meet. This court denied the motion for the reason stated in the opinion of the court.

VI. The answer and return of the State of West Virginia to the petition and motion of the Commonwealth of Virginia for a writ of execution asserted that the writ of execution prayed for by the Commonwealth of Virginia should not be issued for the following, among other, reasons, and upon the following, among other, grounds:

"Because not only presumptively, but in fact, the State of West Virginia did not before or at the time of the rendition of the judgment herein, own, and has not since owned, and does not now own, any property, real or personal, except such property as was and is devoted exclusively to public use, and none of the property so devoted may be levied upon or sold under execution."

VII. On November 14, 1916, the Virginia Debt Commission learning that the Governor of West Virginia was about to convene the Legislature of West Virginia in extra session, through its chairman telegraphed the Governor of West Virginia requesting him to include in the call to be issued for that purpose, as one of the matters to be considered, the settlement of the decree of this court rendered in favor of Virginia in the suit of the State of Virginia against West Virginia, to which the Governor of West Virginia replied by telegraph, on November 15, 1916, giving his reasons for not embodying the matter of the debt settlement in his call, that the time the Legislature would be in session was too short for a proper consideration of the matter, and, in addition, that on the second Wednesday of January, 1917, the Legislature would convene in regular session composed, with the exception of hold-over Senators, of newly-elected members to whom, as the Governor thought, the question should be submitted, copies of which telegrams are hereto annexed and made a part of this petition. Thereafter, on or about November, 1916, the Governor of West Virginia issued a call convening the Legislature of West Virginia in extra session, and did not include in said call as one of the matters to be considered, the settlement of the decree of this court in favor of Virginia in the suit of Virginia against West Virginia. Thereafter, in November, 1916, the Legislature of the State of West Virginia met in extra session and remained in session until December 1, 1916, without giving any consideration in any respect to the settlement of said decree of this court.

VIII. On December 29, 1916, the chairman of the Virginia Debt Commission, in pursuance of authority from that body, addressed a letter to the Governor of West Virginia requesting him by a special message to urge upon the Legislature, soon to assemble, the prompt enactment of such legislation as may be requisite to provide the proper means for the liquidation of the decree entered against the State of West Virginia in favor of the Commonwealth of Virginia, and on said December 29, 1916, the chairman of the Virginia Debt Commission, in pursuance of authority from that body, also addressed a letter to the President of the Senate and the Speaker of the House of Delegates of the State of West Virginia, requesting that the Legislature of the State of West Virginia at its coming session take such steps, and make such enactments as may be necessary to insure the prompt payment of the aforesaid indebtedness, to which letters the Governor of the State of West Virginia replied by a communication dated January 9, 1917, and the President of the Senate replied by communication dated January 11, 1917, respectively, copies of which letters are hereto annexed and made a part of this petition. No reply has as yet been received from the Speaker of the House of Delegates.

IX. The West Virginia Legislature convened on January 10, 1917, and since that date has been in session at the Capitol in Charleston, West Virginia.

The Legislature of the State of West Virginia consists of the Senate and the House of Delegates.

The members of the Senate of the State of West Virginia are Honorables Wells Goodykoontz, Benj. J. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Coburn, Frank Beckwith, G. K. Kump.

The members of the House of Delegates of the State of West Virginia are Honorables Joseph S. Thurmond, Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Adkins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symms, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R.

Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney and A. J. Mullens.

The Honorable Wells Goodykoontz is the President of the Senate, and Honorable Joseph S. Thurmond is the Speaker of the House of Delegates of the State of West Virginia.

X. It was the absolute ministerial duty of the Legislature of the State of West Virginia, and of the aforesaid Senators and members of the House of Delegates thereof, to take the necessary steps and make the necessary enactments to provide for the payment of the said judgment of \$12,393,929.50, with interest and costs as provided in said judgment, upon the convening of said Legislature on January 10, 1917, but, although respectfully requested to do so by your petitioner, the Legislature and the members thereof have taken no step and have made no enactment to provide for, or insure payment of the aforesaid indebtedness. Nor have any steps been taken by the Legislature, or the Senate, or the House of Delegates to give any indication or hope that the Legislature will or intends to make provision for the payment of said indebtedness. On the contrary the Governor of West Virginia, in a special message on the "Virginia Debt," submitted to the Legislature of that State on January 18, 1917, a copy of which is attached hereto, recommended that the Legislature

"present to the court a petition for a re-hearing of the matter of the interest upon the debt";

and further recommended that

"Provision should be made also by the Legislature for having presented to the Supreme Court of the United States the contentions of West Virginia as to why Virginia should be restrained from pressing her claim against West Virginia further, until the State of Virginia sues in the Court of Claims; as I am informed she can, for the purpose of recovering her claim growing out of the cession of the Northwest Territory, and thereby reducing the joint assets of the two States to a common fund, which will place the States in a position to receive their proportionate credits and to end further litigation,"

and concluded with the expression of the hope

"that some suggestion will be forthcoming that will result in the protection of the interests of our State in this litigation, and bringing about the consideration of further equities which West Virginia is entitled to receive, and after the proper equities have been conceded to the State, the prompt liquidation of the residue, if any there be."

XI. Under the Constitution of the State of West Virginia the session of the Legislature now convened will be adjourned on or before the 24th day of February, 1917, unless, by the concurrence of two-thirds of the members elected to each house, its session shall be further continued beyond said date; and the Legislature must assemble biennially and cannot assemble oftener unless convened by the Governor.

In consequence of the time which has already elapsed without any effort being made by said Legislature to perform its duty in the matter of making provision for the payment of said decree and judgment, there will be insufficient time therefor unless the Legislature promptly, and without further delay, performs its said duty.

Your petitioner avers that it is not the intention of the authorities of West Virginia to take any steps by legislation, or otherwise, to make provision for the payment of the said judgment and decree, but that it is the intention to delay making provision for such payment under the pretexts set forth in the letter from the Governor of West Virginia dated January 9, 1917, and in the special message submitted to the Legislature of that State on January 18, 1917, copies of which are hereto attached, until it will be too late for the Legislature of West Virginia now assembled to take any action in the premises.

It is further averred that your petitioner is without remedy in the premises unless this court shall command the Senators and members of the House of Delegates of the State of West Virginia to assess and levy a tax upon the property in the State of West Virginia to provide for the payment of said judgment and decree according to the terms thereof, as they are in duty bound to do.

WHEREFORE, your petitioner, Commonwealth of Virginia, prays that a rule be made and issued from this court, directed to the said Honorable Wells Goodykoontz, President of the Senate, Honorables Benj. L. Rosenbloom, Elmer Hough, W. H.

Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates, Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles K. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symms, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney, and A. J. Mullens, members of the House of Delegates of the State of West Virginia, to show cause why a writ of mandamus should not issue commanding the said Honorable Wells Goodykoontz, President of the Senate Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsel, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Gohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates; Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Casto, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, William S. John, Perry C. McBee, Clarence Symms, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney and A. J. Mullens, members of the House of Delegates of the State of West Virginia, forthwith and at the present session of the Legislature to assess and levy a tax upon the property within the State of West Virginia sufficient to provide for the payment of said judgment of \$12,393,939.50, with interest thereon from July 1, 1915, until paid, at the rate of five per cent. per annum, and costs, according to the terms of said judgment, unless the Legislature shall forthwith and at its present session make provision for the payment of said judgment by a duly authorized issue of bonds, the proceeds of which shall be sufficient to pay said judgment in full in cash, and for such other and further relief in the premises as shall seem just and meet; and your petitioner will ever pray, etc.

COMMONWEALTH OF VIRGINIA,

By JOHN GARLAND POLLARD,

*Attorney General of Virginia.*

With the petition there was filed a number of exhibits which are too voluminous to be reproduced here. After considering the same, the Supreme Court, on February 5, 1917, entered the following rule against the members of the Senate and House of Delegates of the State of West Virginia to show cause why a writ of mandamus should not issue against them as prayed for in the aforesaid petition:

"SUPREME COURT OF THE UNITED STATES.

Original No. 2—October Term, 1916.

*"Commonwealth of Virginia, Complainant,*

*vs.*

*State of West Virginia, Honorable Wells Goodykoontz, et al., Senators of the State of West Virginia; Honorable Joseph S. Thurmond, et al., Members of the House of Delegates of the State of West Virginia.*

"ON CONSIDERATION of the petition of the Commonwealth of Virginia,

IT IS NOW HERE ORDERED BY THIS COURT that cause be shown by Honorable Wells Goodykoontz, President of the Senate; Honorables Benj. L. Rosenbloom, Elmer Hough, W. H. Carter, W. F. Burgess, Robert L. Gregory, M. K. Duty, Warren Miller, Raymond Dodson, W. P. McAvoy, J. E. Frazier, J. W. Luther, W. P. Hawley, C. C. Coalter, Martin V. Godbey, A. R. Montgomery, Gory Hogg, H. G. Vencill, E. H. Morton, Fred L. Fox, Scott C. Lowe, Charles A. Sinsell, Roy E. Parrish, Wallace B. Gribble, Richard E. Talbott, Cohen C. Arnold, S. O. Billings, S. L. Cobun, Frank Beckwith, G. K. Kump, Senators of the State of West Virginia; Honorable Joseph S. Thurmond, Speaker of the House of Delegates; Honorables Clyde Poling, Harry P. Henshaw, John N. Parks, Luther R. Jones, Lee Rader, L. T. Harvey, T. J. Mahan, W. C. W. Renshaw, John L. Connor, A. J. Baxter, W. N. Clay, Kenna Lester, Paul Hardman, A. K. Fleming, J. Alfred Taylor, Charles J. Massau, George H. Skaggs, J. Wilbur Davis, E. E. Cottrell, P. A. Dixon, A. B. C. Bray, W. W. Carder, J. Ness Porter, J. D. Chipley, S. R. Harrison, Jr., John Moore, George W. Sturm, Louis A. Johnson, Kenna Castro, Everett Hughes, Milton Burr, L. V. Koontz, J. F. Bouchelle, Angus W. McDonald, John Patrick, O. F. Payne, A. W. Price, James Bassel, Charles Cabell, Robert Bland, Ira A. Akins, Frank C. Haymond, E. O. Murray, C. H. Hunter, George W. Byrnes, Pat. M. Wilson, W. D. Curry, R. B. Ferguson, W. B. Honaker, A. F. Wysong, S. N. Moore, Joseph B. Stratton, Wm. S. John, Perry C. McBee, Clarence Symms, W. H. Somers, Harvey Hagerman, E. Howard Harper, J. Buell Swope, Floyd Waldron, W. G. Graves, J. E. Emsley, W. T. Otto, Harry A. Weiss, N. Price Whitaker, G. A. Hiner, Gilbert D. Smith, B. M. Yeager, W. H. Glover, Leroy Shaw, C. W. Taylor, C. L. Heaberlin, V. E. Sullivan, E. H. Arnold, James W. Weir, B. R. Twyman, A. M. Hersman, G. T. Sarver, A. A. Riddlebarger, J. Sidney Burdett, H. R. Werner, F. R. Hickman, John B. Hilleary, W. K. Ferguson, F. W. Terrill, W. T. Talbott, Septimus Hall, J. Friend Alley, S. F. Wells, W. D. Price, P. F. Wells, John D. Sweeney, and A. J. Mullens, members of the House of Delegates of the State of West Virginia, before this court, at the city of Washington, on Tuesday, March 6, 1917, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of mandamus should not issue against them as prayed in said petition.

"February 5, 1917."

The defendants moved to discharge the rule in mandamus issued by the Supreme Court and both parties filed briefs in support of their respective contentions on which briefs the question involved was submitted to the court for decision. Up to this time (January, 1918) no disposition of the matter has been made by the court.

# GENERAL INDEX

## ABSENT VOTERS LAW,

*see Elections.*

## ADVERTISEMENTS,

*see Elections.*

## ADVERTISEMENT,

*see Flag.*

*see Intoxicating liquors.*

## AFFIDAVITS,

*see Intoxicating liquors.*

*see Taxation.*

## AGRICULTURE,

Commissioner of Agriculture authorized by chap. 506, Acts of 1916, to adopt rules and regulations necessary to secure enforcement of the act..... 15  
 interpretation of sec. 12, chap. 207, Acts of 1903, Crop Pest Law, providing for the sale into this State of nursery stock..... 17  
 inspection of nursery stock. Crop Pest Law does not discriminate between resident and non-resident nurserymen..... 18  
 the Virginia Crop Pest Commission, under sec. 2 of chap. 207 of the Acts of 1903, has authority to control nursery stock imported into this State from foreign countries..... 19

## AMBASSADORS,

*see Game and fish.*

## ANNUITY,

*see Taxation.*

## ARDENT SPIRITS,

*see Intoxicating liquors.*

## ASYLUMS,

*see Insane asylums.*

## AUDITOR,

*see Costs.*

*see Taxation.*

## AUTOMOBILES,

the owner of a machine who demonstrates his machine and attempts to secure orders therefor is required to take out a license even though his efforts are fruitless..... 20  
 conflict of town and State law relating to automobiles..... 21

## BALLOTS,

*see Elections.*

## BANKS AND BANKING,

power of State Corporation Commission to authorize banks having certain capital to establish branches..... 21  
 right of depositor to examine books of bank on proper occasions..... 22

## BARREL,

*see Weights and measures.*

## BILLS OF EXCEPTION,

counsel cannot change stipulations where order has been entered fixing time for the signing thereof and the court has adjourned..... 24

**BOARDS OF REVIEW,***see Taxation.**see Examiners of Records.***BOARDS OF SUPERVISORS,***see Employment agents,**see Game and fish.***BONDS,***see Game and fish.**see Jails and prisoners.**see Roads and highways**see Schools.**see Treasury.***CANDIDATES,***see Elections.***CAPITATION TAXES,**

payment of.....277, 61

*see Taxation.***CATAWBA SANATORIUM***see Health, Public.***CERTIFICATES OF REGISTRATION,***see Commission merchants.***CHARTERS,***see Cities and towns.**see Corporations.***CHILD LABOR,**a parent, superintendent or employer who knowingly permits a child under  
fourteen years of age to be employed, is subject to criminal prosecution.... 25**CHILDREN,***see Justices of the Peace.***CHIROPRACTORS,***see Physicians and surgeons.***CITIES AND TOWNS,**the Governor has no right by executive authority to change the name of a  
town chartered by the General Assembly..... 27**CITIZENSHIP,**subjects of an alien enemy are not permitted to become citizens of the  
United States..... 27persons desiring naturalization papers should apply to a United States  
district court..... 27**CIVIL ENGINEERS,***see Licenses.***CLERKS,***see Intoxicating liquors.**see Officers, Public.**see Game and fish.**see Taxation.***CLERK'S FEES,***see Costs.**see Fees.*

**COMMISSION MERCHANTS,**

|   |    |
|---|----|
| no one is permitted to sell on commission within this State any kind of farm produce without obtaining a certificate of registration..... | 30 |
| commission merchants who are exempt from obtaining certificate of registration.....   | 31 |
| who is commission merchant.....   | 32 |
| <i>see Licenses.</i>  |    |

**COMMISSIONER OF GAME AND INLAND FISHERIES,**

*see Game and fish.*

**COMMISSIONER OF INSURANCE,**

*see Insurance.*

**COMMISSIONER OF LABOR,**

*see Employment agents.*

**COMMISSIONER OF PROHIBITION,**

*see Intoxicating liquors.*

**COMMISSIONERS OF THE REVENUE,**

*see Taxation.*

**COMMISSIONS,**

*see Schools.*

**COMMONWEALTH'S ATTORNEYS,**

*see Costs.*

*see Fees.*

*see Game and fish.*

*see Insurance.*

*see Physicians and surgeons.*

**CONCEALED WEAPONS,**

|   |    |
|---|----|
| person must apply to judge of the circuit court for permission.....                               | 34 |
| any person has right to carry a revolver unconcealed.....   | 34 |
| justices of the peace permitted to carry while in discharge of official duties                    | 34 |
| jurisdiction of justice of the peace limited to county or corporation of which he is officer..... | 34 |

**CONFEDERATE MILITARY RECORDS,**

|  |    |
|--|----|
| purpose of appropriation of military fund of Virginia..... | 33 |
|--|----|

**CONFLICT OF LAWS,**

|                              |    |
|------------------------------|----|
| relating to automobiles..... | 21 |
|------------------------------|----|

**CONSTITUTIONS,**

*see Statutes and constitutions.*

**CONSTITUTIONAL LAW,**

*see Health, Public.*

**CONTRACTS,**

*see Roads and highways.*

**CONTRACT OF SALE,**

*see Taxation.*

**CO-OPERATION,**

*see Departments of government.*

**CONVICT LIME BOARD,**

|  |    |
|--|----|
| is not body corporate, and property should be conveyed directly to the Commonwealth of Virginia..... | 35 |
| form of deed to Convict Lime Board.....  | 35 |

**CORONERS,**

|  |    |
|--|----|
| appointment and jurisdiction of.....                                       | 36 |
| duties of.....   | 37 |
| additional coroners of city of Richmond.....                               | 38 |
| power of to order autopsy in absence of consent of family of deceased..... | 39 |

**CORPORATIONS,**

|  |    |
|--|----|
| charters, forfeiture of for failure to pay tax which has never been assessed....   | 41 |
| never assessed for taxation by State Corporation Commission cannot be<br>subjected to penalty provided by section 41 of Virginia Tax Bill..... | 41 |
| construction of phrase "doing business in this State".....   | 44 |
| consolidation or merger of.....  | 45 |

**COSTS,**

|  |    |
|--|----|
| fees of Commonwealth's attorneys for indictments for misdemeanors and<br>for felonies under the Prohibition Law..... | 46 |
| clerk's fees to be taxed by justices of the peace in criminal cases.....   | 47 |
| fees of officers for proceedings on complaint to put under bond to keep the<br>peace.....                            | 48 |
| express statutory direction necessary to authorize Auditor to pay claims<br>out of State treasury.....               | 48 |
| fees of Commonwealth's attorneys to be taxed as costs.....   | 48 |
| witness fees.....  | 48 |
| <i>see Game and fish.</i>  |    |

**COUNTIES,**

|   |    |
|---|----|
| jurisdiction of courts over waters bounding counties and cities in this State..   | 51 |
| effect of election held with reference to the issuance of district road bonds<br>is question for county authorities and courts..... | 51 |

**CRAB FISHING,**

*see Game and fish.*

**CRIMES,**

|  |    |
|--|----|
| venue of criminal prosecution for offenses committed on waters in State .... | 52 |
|--|----|

**CROP PEST LAW,**

*see Agriculture.*

**DEEDS,**

*see Convict Lime Board.*  
*see Taxation.*

**DEEDS OF TRUST,**

*see Schools.*

**DEER,**

*see Game and fish.*

**DELINQUENT TAXES,**

*see Fees.*

**DENTISTS,**

*see Physicians and surgeons.*

**DEPARTMENTS OF GOVERNMENT,**

|   |    |
|---|----|
| discussion of co-operation between..... | 53 |
|---|----|

**DEPUTY SHERIFFS,**

*see Officers, Public.*

**DIVISION SUPERINTENDENT,**

*see Schools.*

**DOCKETS,**

*see Records, Public.*

**EASTERN STATE HOSPITAL,***see Insane asylums.***ELECTORAL BOARDS,***see Elections.***ELECTIONS,**

|  |     |
|--|-----|
| payment of capitation taxes.....   | 277 |
| registration books must be closed thirty days prior to the general spring election.....                      | 54  |
| registration of voters.....  | 55  |
| residence of soldiers as to right of suffrage.....   | 57  |
| residence a question of intention.....   | 58  |
| qualifications of voters.....  | 59  |
| a city is a separate and distinct political sub-division.....  | 59  |
| requisites for acquisition of residence for purpose of voting.....   | 60  |
| payment of capitation tax.....   | 61  |
| poll taxes not paid when sum is deposited in mail, but only when actually received by treasurer.....         | 61  |
| meaning of "qualified voters".....   | 62  |
| petitions of candidates for House of Delegates.....  | 62  |
| electoral board has the duty of electing judges of election every year.....                                  | 64  |
| duty of electoral board to appoint registrars.....   | 64  |
| appointment by electoral board of clerks for each place of voting.....                                       | 64  |
| removal of election officials.....   | 64  |
| a person not qualified to vote at a town election is not qualified to offer for office at the same time..... | 65  |
| fees required of candidates for offices of Secretary of Commonwealth and State Treasurer.....                | 65  |
| steps necessary for filing of declaration of candidacy for Governor.....                                     | 67  |
| requisites for filing of declaration of candidacy for nomination for House of Delegates.....                 | 68  |
| legislative district composed of two districts; declaration of candidacy.....                                | 69  |
| printing of official ballots.....  | 70  |
| who may vote in Democratic primary.....  | 71  |
| expenses of candidates in primary elections.....   | 72  |
| one may be candidate for office without having name on ballot.....   | 72  |
| statement of campaign expenditures.....  | 72  |
| special elections to fill vacancy created by death.....  | 74  |
| advertisements.....  | 76  |
| presidential electors.....   | 76  |

**EMINENT DOMAIN,***see Roads and highways.***EMPLOYMENT AGENTS,**

|  |    |
|--|----|
| regulation of.....   | 78 |
| duties of Commissioner of Labor.....   | 78 |
| boards of supervisors of counties not authorized to license labor agents.....    | 79 |
| power of city councils to pass laws regulating soliciting hiring of laborers.... | 80 |
| police power.....  | 81 |
| license tax.....   | 82 |
| construction of word "laborers".....   | 82 |

**EXAMINERS OF RECORDS,**

|  |    |
|--|----|
| term and appointment of.....   | 83 |
| to whom reports are made.....  | 84 |
| duty of local boards of review.....  | 84 |
| compensation of.....   | 85 |
| no authority in sec. 492 of Code for assessing omitted property of decedents | 86 |
| change of duties of.....   | 88 |
| West fee bill.....   | 87 |
| payment of expense accounts of examiners of records.....                     | 88 |
| <i>see Taxation.</i>   |    |

**EXPATRIATION,***see Naturalization.***FEDERAL DRAFT LAW,***see Military**see Officers, Public.***FEDERAL MIGRATORY BIRD LAWS,***see Game and fish.***FEES,**

|  |    |
|--|----|
| Commonwealth's attorneys.....  | 89 |
| Commonwealth's attorneys not permitted to draw from State treasury for prosecution under chap. 44, Acts of 1916..... | 91 |
| gambling.....  | 91 |
| collection of by officers.....   | 92 |
| duty of Commonwealth's attorney.....   | 92 |
| recovery of delinquent taxes.....  | 92 |
| clerks of courts fee for filling prescriptions required by Virginia Prohibition law.....                             | 93 |
| for issuance of hunting license to clerks of courts.....   | 94 |
| deposit of before institution of suit.....   | 94 |
| of sheriff for serving summons in misdemeanor case.....  | 96 |
| town sergeant entitled to expenses incurred in discharge of official duties.....                                     | 96 |
| of treasurers.....   | 97 |
| of county and city treasurers.....   | 98 |
| reports of by officers.....  | 99 |
| <i>see Costs.</i>  |    |
| <i>see Elections.</i>  |    |
| <i>see Examiners of Records.</i>   |    |
| <i>see Justices of the Peace.</i>  |    |
| <i>see Physicians and surgeons.</i>  |    |

**FINES,***see Pardons.***FIRES,***see Insurance.***FISH LAWS,***see Game and fish.***FISH LADDERS,***see Game and fish.***FLAG,**

|                                      |     |
|--------------------------------------|-----|
| desecration of.....                  | 100 |
| use of for advertising purposes..... | 182 |

**FORESTRY,**

|   |     |
|---|-----|
| setting on fire of knowingly.....                                 | 101 |
| setting on fire of by operation of engines.....                   | 101 |
| duty of State forester and wardens to warn of danger.....         | 101 |
| posters of State forestry department, penalty for destroying..... | 103 |

**FUNDS,***see Confederate Military Records.***FOX HUNTING,***see Game and fish.***GAMBLING,**

|                               |     |
|-------------------------------|-----|
| prohibited in all places..... | 182 |
| <i>see Fees.</i>              |     |

**GAME AND FISH,**

|  |     |
|--|-----|
| unlawful catching of fish.....   | 105 |
| restrictions and conditions in catching of fish.....   | 105 |
| prosecutions for violation of fish laws.....   | 107 |
| is violation of fish law a misdemeanor.....  | 107 |
| chap. 92, Acts of 1916, prescribes time in which black bass or southern<br>chub may be killed or captured.....   | 109 |
| chap. 92, Acts of 1916, does not permit sale or purchase of bass when caught<br>out of season.....   | 109 |
| period during which black bass can be caught.....  | 111 |
| pollution of streams by matter which destroys fish.....  | 112 |
| duty of Commissioner of Game and Inland Fisheries.....   | 112 |
| crab fishing.....  | 113 |
| construction of license laws.....  | 113 |
| necessity for fish ladders.....  | 114 |
| meaning of term "Tidewater Virginia".....  | 114 |
| counties of Floyd, Grayson and Carroll, exempt from operation of law<br>relating to fish ladders.....  | 115 |
| law relating to fish ladders applicable only to rivers.....  | 116 |
| sec. 2108 of amended Code prohibiting killing and capture of certain enu-<br>merated fish at certain seasons, applicable to all public waters of State.....  | 117 |
| provisions of sec. 2108 of Code applicable to public lakes.....  | 117 |
| ownership of fish in private waters subject to control by legislature.....   | 119 |
| construction of words "actually resided".....  | 121 |
| oyster laws construed.....   | 121 |
| meaning of corporate property when construed with reference to hunt-<br>ing.....   | 123 |
| the word "landlord" synonymous with owner of land.....   | 123 |
| who are required to obtain hunting licenses.....   | 124 |
| fox hunting.....   | 125 |
| who are hunters.....   | 125 |
| tenant may hunt on rented land without license with consent of owner but<br>cannot invite friends.....   | 125 |
| hunting license to non-residents.....  | 126 |
| tenants hunting on rented land.....  | 126 |
| construction of hunting statutes.....  | 127 |
| ambassadors of foreign countries are immune from procuring hunting<br>license.....   | 129 |
| students in colleges and universities may obtain hunting license.....  | 131 |
| hunting on posted lands.....   | 132 |
| hunting on lands of another.....   | 133 |
| exhibition of licenses to hunt and refusal of hunter to exhibit same.....  | 134 |
| fees of wardens.....   | 134 |
| hunting of wild deer in counties of Prince George, Surry, Chesterfield and<br>Mecklenburg.....   | 135 |
| prosecution for violation of game laws.....  | 137 |
| costs in prosecution for violation of game and fish laws, how and to whom<br>paid.....   | 138 |
| where it is the duty of a State officer to perform legal services for State, pri-<br>vate attorney employed by him cannot be paid out of State treasury..... | 140 |
| duties of Attorney General.....  | 140 |
| property bought by department of State.....  | 140 |
| duties of Commonwealth's attorney's.....   | 140 |
| reports of results of prosecution under game and fish laws.....  | 141 |
| duties of justices of peace in game prosecutions.....  | 141 |
| duties of clerks of courts in game and fish prosecutions.....  | 142 |
| power of game wardens over hunters violating law.....  | 143 |
| disposition of guns seized.....  | 143 |
| powers and duties of game wardens.....   | 144 |
| game wardens have no power to punish violators of Federal bird laws unless<br>it is also violation of State law.....   | 146 |
| bonds of game wardens.....   | 146 |
| liability of game wardens for malicious acts.....  | 146 |

**GAME AND FISH—Continued.**

|   |     |
|---|-----|
| qualification of game wardens in addition to giving bond.....   | 147 |
| duties of game wardens to punish violators of State law.....  | 147 |
| regulations relating to game passed by board of supervisors.....  | 148 |
| manner of filling office of game warden created by death.....   | 149 |
| office of State game warden incompatible with game warden to enforce<br>Federal Migratory Bird Law..... | 150 |

**GARNISHMENT,***see Taxation.***GOVERNOR,***see Notaries.**see Pardons.***GRAIN,***see Mills.***HEALTH, PUBLIC,**

|   |     |
|---|-----|
| who may be treated at Catawba Sanatorium.....   | 151 |
| who are residents.....  | 151 |
| duty of officers of Catawba Sanatorium.....   | 151 |
| what persons may be admitted to Catawba.....  | 152 |
| only <i>bona fide</i> residents of State should be admitted to Catawba Sana-<br>torium..... | 152 |
| construction of statute relating to Trachoma hospital.....                                  | 153 |
| rules and regulations of State Board of Health, force and effect of.....                    | 155 |
| violation of health regulations constitutes misdemeanor.....                                | 156 |
| powers of State Board of Health regarding sanitary privies.....                             | 156 |
| construction of statutes regarding public towels.....                                       | 159 |
| constitutional law.....   | 159 |
| public lavatory or washroom defined.....  | 159 |
| <i>see Schools.</i>   |     |

**HIGHWAYS,***see Roads and highways.***HOME GUARDS,***see Military.***HUNTING,***see Game and fish.**see Fees.***INCOMPATIBILITY OF OFFICES,***see Game and fish.**see Officers, Public.***INDIANS,**

|   |     |
|---|-----|
| tribes of Indians governed by tribal laws and exempt from taxation..... | 160 |
| Pamunkey and Mattaponi Indians wards of State .....                     | 160 |
| trespassers on Indian reservations.....                                 | 161 |
| appointment of trustees for benefit of tribe.....                       | 161 |
| members of Pamunkey tribe exempt from military service.....             | 163 |

**INHERITANCE TAX,***see Taxation.***INTEREST,***see Treasury.***INSANE ASYLUMS,**

|  |     |
|--|-----|
| estate of inmates of asylums not to be charged with expense for mainte-<br>nance of such inmate..... | 164 |
| admission of non-resident to Eastern State Hospital.....   | 164 |

**INSURANCE,**

|   |     |
|---|-----|
| duty of Commissioner of Insurance to investigate origin of fires.....   | 165 |
| duty of Commonwealth's attorney to prosecute persons charged with arson   | 165 |
| all insurance companies in this State required to deposit bonds with Treasurer of Virginia.....   | 167 |
| power of attorney of insurance company.....   | 168 |
| type in which applications for policies should be printed.....  | 169 |
| Commissioner of Insurance has power to require insurance companies issuing policies against bodily injury or disease to provide application blanks printed in at least 10-point type..... | 169 |
| construction of sec. 8, chap. 2 of chap. 112, Acts of 1912.....   | 170 |

**INSTITUTIONS,**

*see Public institutions.*

**INTOXICATING LIQUORS,**

|   |     |
|---|-----|
| object of prohibition law, chap. 146, Acts of 1916.....                                     | 172 |
| keeping of ardent spirits in <i>bona fide</i> home.....                                     | 173 |
| <i>bona fide</i> home defined.....  | 174 |
| destruction of ardent spirits.....  | 175 |
| storage of seized ardent spirits.....   | 176 |
| prescriptions and affidavits.....   | 177 |
| clerks permitted to charge fee for entering order granting license to sell soft drinks..... | 177 |
| stamp tax.....  | 178 |
| advertisement of.....   | 179 |
| Federal law governing transportation of liquor.....   | 179 |
| advertisement of.....   | 182 |
| jurisdiction of justice of peace for violation of Prohibition Law.....                      | 183 |
| Reed amendment.....   | 184 |
| duty of Commissioner of Prohibition.....  | 184 |

**JAILS AND PRISONERS,**

|  |     |
|--|-----|
| conflicting rights of city and State to labor of jail prisoners..... | 185 |
| imprisonment for failure to give peace bonds.....                    | 187 |

**JUDGES,**

*see Elections.*

*see Officers, Public.*

**JUDGMENT DOCKETS,**

*see Records, Public.*

**JUSTICES,**

*see Justices of the Peace.*

**JUSTICES OF THE PEACE,**

|   |     |
|---|-----|
| jurisdiction of for issuance of warrants.....   | 188 |
| return of warrants.....   | 188 |
| trial of warrants outside of district.....  | 188 |
| juvenile and domestic relations court, jurisdiction of.....   | 190 |
| misdemeanors may be tried in juvenile and domestic relations court.....   | 192 |
| juvenile and domestic relations court has jurisdiction of all offenses committed by children under age of 18 years..... | 193 |
| associate justices.....   | 194 |
| associated justices in trial of cases.....  | 195 |
| fees to be taxed for clerk of court by justice of the peace.....  | 195 |
| fees of justice of the peace for misdemeanors and felonies.....   | 196 |
| <i>see Game and fish.</i>   |     |
| <i>see Intoxicating liquors.</i>  |     |

**JUVENILE AND DOMESTIC RELATIONS COURTS,**

*see Justices of the Peace.*

**LABORERS,**

*see Employment agents.*

|  |     |
|--|-----|
| <b>LEGACY,</b>   |     |
| <i>see Taxation.</i>   |     |
| <b>LEGAL ETHICS,</b>   |     |
| not duty of Attorney General to pass upon questions of legal ethics.....               | 156 |
| <b>LIBERTY BONDS,</b>  |     |
| <i>see Treasury.</i>   |     |
| <b>LIBRARY,</b>  |     |
| removal of State manuscripts from.....   | 197 |
| <b>LICENSES,</b>   |     |
| commission merchants.....  | 198 |
| civil engineers.....   | 200 |
| <b>LICENSE TAX,</b>  |     |
| <i>see Employment agents.</i>  |     |
| <i>see Fees.</i>   |     |
| <i>see Game and fish.</i>  |     |
| <b>LITERARY FUND,</b>  |     |
| <i>see Schools.</i>  |     |
| <b>LOANS,</b>  |     |
| <i>see Schools.</i>  |     |
| <b>MATTAPONI INDIANS,</b>  |     |
| <i>see Indians.</i>  |     |
| <b>MEASURES,</b>   |     |
| <i>see Weights and measures.</i>   |     |
| <b>MEDICAL OFFICERS,</b>   |     |
| <i>see Physicians and surgeons.</i>  |     |
| <b>MERCHANTS,</b>  |     |
| <i>see Commission merchants.</i>   |     |
| <b>MERCHANTS LICENSE TAX,</b>  |     |
| <i>see Taxation.</i>   |     |
| <b>MILITARY,</b>   |     |
| organization of home guards.....   | 201 |
| oath of Virginia State Volunteers.....   | 201 |
| Federal draft law.....   | 204 |
| V. M. I. Cadets, use of military fund.....   | 205 |
| <b>MILITARY FUNDS,</b>   |     |
| <i>see Confederate Military Records.</i>   |     |
| <i>see Taxation.</i>   |     |
| <b>MILITARY SERVICE,</b>   |     |
| <i>see Indians.</i>  |     |
| <b>MILLS,</b>  |     |
| tolls due miller for ground grain.....   | 206 |
| <b>MISDEMEANOR,</b>  |     |
| <i>see Justices of the Peace.</i>  |     |
| <i>see Health, Public.</i>   |     |
| <b>NATURALIZATION,</b>   |     |
| recognition of right of expatriation by laws of Virginia and of the United States..... | 28  |
| <i>see Citizenship.</i>  |     |

**NON-RESIDENTS,***see Game and fish.***NOTARIES,**

authority of Governor to appoint notaries public..... 207

**NOTARY'S SEAL,***see Taxation.***NURSERY STOCK,***see Agriculture.***NURSES,**

certificates issued by State Board of Examiners of Nurses..... 208

**OFFICERS, PUBLIC,**

who are State officers under Federal draft act..... 209

State officials exempt under Federal draft law..... 209

deputy clerks of court not State officers..... 212

incompatibility of Federal and State service..... 214

compatibility of office of Commissioner of Fisheries with office of post,  
trust or emolument under Federal government..... 214incompatibility of office of State Board of Health with office under Fed-  
eral government..... 217position with Internal Revenue Department of U. S. incompatible with  
member of State Board of Charities..... 218

offices of sheriff and game warden not incompatible..... 219

Commonwealth's attorney is State officer..... 219

increase in salary of Commonwealth's attorney..... 219

executive officers..... 220

payment out of State treasury of mileage of judges..... 220

salaries of Judges Sims and Prentiss..... 221

who can receive railroad passes..... 223

appointment of deputy sheriffs..... 224

**OPTOMETRISTS,***see Physicians and surgeons.***OYSTER LAWS,***see Game and fish.***PAMUNKEY INDIANS,***see Indians.***PARDONS,**

power of Governor to refund fines that have been paid..... 224

power of Governor to commute sentences..... 227

**PASSES,***see Officers, Public.***PENALTIES,***see Corporations.***PENSIONS,***see Schools.***PHYSICIANS AND SURGEONS,**

admission of to practice..... 228

who are entitled to certificates to practice..... 228

certificates to practice to medical officers of public service of United States ... 230

fee for issuing certificates to medical officers of U. S..... 230

who is entitled to certificate to practice medicine..... 232

registrations of certificates..... 233

examination of..... 233

reciprocity agreements as to admission to practice..... 233

**PHYSICIANS AND SURGEONS—Continued,**

|   |     |
|---|-----|
| revocations of certificates to practice.....  | 235 |
| duty of Commonwealth's attorney in such cases.....  | 235 |
| certificate to practitioners of chiropody.....  | 235 |
| chiropody.....  | 236 |
| chiropractors.....  | 237 |
| chiropractors not required to be licensed to practice optometry.....                            | 237 |
| time of filing application for exemption certificates.....                                      | 237 |
| when State Board is justified in refusing to grant certificate to practice.....                 | 238 |
| dentists appeal from decision of State Board of Dental Examiners for re-<br>voking license..... | 239 |
| reports of vital statistics by physician.....   | 241 |
| duty upon physician last in attendance upon deceased to make certificate<br>of death.....       | 241 |
| duty of physician to report births.....   | 242 |
| form of certificates of births and deaths.....  | 243 |

**POLICE POWER,**

*see Employment agents.*

**POLL TAXES,**

|                 |    |
|-----------------|----|
| payment of..... | 61 |
|-----------------|----|

**PRESCRIPTIONS,**

*see Intoxicating liquors.*

**PRIMARY ELECTIONS,**

*see Elections.*

**PRINTING, PUBLIC,**

|  |     |
|--|-----|
| report of Commission of Workmen's Compensation to be paid for out of<br>appropriation for public printing..... | 244 |
|--|-----|

**PRISONERS,**

*see Jails and prisoners.*

**PROHIBITION LAW,**

*see Fees.*

**PUBLIC INSTITUTIONS,**

|                          |     |
|--------------------------|-----|
| sale of products of..... | 245 |
|--------------------------|-----|

**PUBLIC LAVATORY,**

*see Health, Public.*

**RECIPROCITY AGREEMENT.**

*see Physicians and surgeons.*

**RECORDS, PUBLIC,**

|   |     |
|---|-----|
| judgment dockets required to be kept by courts..... | 245 |
|---|-----|

**REED AMENDMENT,**

*see Intoxicating liquors.*

**REGISTRATION OF VOTERS,**

*see Elections.*

**REPORTS.**

*see Printing, Public.*

*see Reports of officers.*

**REPORTS OF OFFICERS,**

|  |     |
|--|-----|
| printing of report of Prohibition Commissioner.....                  | 247 |
| printing of report of Commissioner of Game and Inland Fisheries..... | 248 |

**ROADS AND HIGHWAYS,**

|   |     |
|---|-----|
| condemnation.....                           | 251 |
| injury to.....                              | 251 |
| passing of title of material for.....       | 251 |
| eminent domain.....                         | 252 |
| liability for injury to.....                | 253 |
| contracts by State Highway Commission.....  | 253 |
| application of proceeds of bond issues..... | 254 |

**SALARIES,**

*see Officers, Public.*  
*see Schools.*

**SCHOOLS,**

|  |     |
|--|-----|
| failure of superintendent of to qualify.....               | 255 |
| increase during term of salary of superintendent of.....   | 255 |
| salary of division superintendent of.....                  | 256 |
| eligibility of school trustees.....                        | 257 |
| incompatibility of officers.....                           | 258 |
| compensation of clerk of school boards.....                | 258 |
| rules and regulations for public health of.....            | 259 |
| commission of treasurer of county.....                     | 260 |
| compensation of county treasurer.....                      | 261 |
| disposition of tuition fees.....                           | 262 |
| legal residence.....                                       | 262 |
| property of schools.....                                   | 262 |
| appropriation for agricultural high schools.....           | 263 |
| appropriation for public high schools.....                 | 264 |
| loans from literary fund.....                              | 266 |
| school bonds need not be secured by deed of trust.....     | 266 |
| pensions of school teachers.....                           | 267 |
| appeals by teachers.....                                   | 268 |
| jurisdiction of Superintendent of Schools of Richmond..... | 268 |

**SHERIFFS,**

*see Fees.*  
*see Officers, Public.*

**SMITH-HUGHES ACT,**

*see Treasury.*

**STATE BOARD OF EXAMINERS OF NURSES,**

*see Nurses.*

**STATE BOARD OF HEALTH,**

*see Health, Public.*

**STATE DEPOSITORIES,**

*see Treasury.*

**STATE EMPLOYEES,**

|  |     |
|--|-----|
| substitute elevator men in capitol building..... | 271 |
|--|-----|

**STATE OFFICERS,**

*see Officers, Public.*

**STATUTES AND CONSTITUTIONS,**

|  |     |
|--|-----|
| boundary commission, Virginia and West Virginia..... | 271 |
| lapse of appropriation.....                          | 271 |
| repeal of statutes by the Constitution.....          | 273 |

**STREAMS,**

|                   |     |
|-------------------|-----|
| pollution of..... | 112 |
|-------------------|-----|

**SUPERINTENDENT,**

*see Schools.*

**SURGEONS,***see Physicians and surgeons.***TAXATION,**

|   |     |
|---|-----|
| affidavit.....  | 295 |
| duty of Commissioners of Revenue to obey Auditor, and penalty for failing to do so.....       | 274 |
| Auditor's power greater than local boards of review.....                                      | 275 |
| reports of examiners of records.....  | 276 |
| Attorney General not advisor of Commissioners of Revenue.....                                 | 276 |
| duty of clerks in assessing tax for recordation of deeds.....                                 | 277 |
| refunding taxes on deeds not paid into public treasury.....                                   | 277 |
| Hollywood Cemetery Company not exempt from taxation.....                                      | 279 |
| construction of tax statutes regarding exemptions.....  | 279 |
| collection of delinquent capitation taxes by garnishment.....                                 | 282 |
| who are liable for capitation taxes.....  | 283 |
| veterans not exempt from capitation tax unless pensioned.....                                 | 284 |
| delinquent capitation taxes.....  | 285 |
| collector of delinquent capitation taxes.....   | 286 |
| collateral inheritance tax.....   | 287 |
| basis of tax for life annuity.....  | 287 |
| contract of beneficiary renouncing legacy for valuable consideration is contract of sale..... | 287 |
| collateral inheritance tax on life estate may be commuted.....                                | 288 |
| collateral inheritance tax must be paid by remainderman at termination of life tenancy.....   | 288 |
| inheritance tax governed by law in existence at death of testatrix.....                       | 289 |
| army canteen operated by Y. M. C. A. would be liable to taxation as merchant.....             | 291 |
| merchants license tax on capital employed in business.....                                    | 291 |
| omitted taxes.....  | 292 |
| military fund.....  | 292 |
| tax on seals of notaries public.....  | 294 |
| notary's seal must be attached to original and each copy of contract.....                     | 294 |
| State cannot tax seal used on instrumentalities of Federal government.....                    | 295 |

**TAXES,***see Taxation.***TENANTS,***see Game and fish.***TOLLS,***see Mills.***TOWELS,***see Health, Public.***TOWN SERGEANT,***see Fees.***TRACHOMA HOSPITAL,***see Health, Public.***TREASURER,***see Schools.**see Fees.***TREASURY,**

|  |     |
|--|-----|
| bonds of State depositories.....   | 295 |
| amount of money treasurer is permitted to have on deposit.....             | 297 |
| interest on State depositories.....  | 298 |
| depositories must treat State as one of their most favored depositors..... | 300 |
| compensation of Treasurer.....   | 300 |
| bonds of insurance companies.....  | 301 |

**TREASURY—Concluded.**

|  |     |
|--|-----|
| United States liberty bonds.....             | 301 |
| town bonds.....                              | 302 |
| duty of Treasurer.....                       | 303 |
| payment of money out of public treasury..... | 303 |
| Smith-Hughes act.....                        | 303 |

**TRUSTEES,**

*see Schools.*

**UNITED STATES FLAG,**

*see Flag.*

**VENUE,**

*see Crimes.*

**VIRGINIA MILITARY INSTITUTE,**

*see Military.*

**VIRGINIA STATE VOLUNTEERS,**

*see Military.*

**VITAL STATISTICS,**

*see Physicians and surgeons.*

**VOCATIONAL EDUCATION,**

|                         |     |
|-------------------------|-----|
| powers of Governor..... | 304 |
|-------------------------|-----|

**VOTERS,**

*see Elections.*

**WARDENS,**

*see Game and fish.*

**WARRANTS,**

*see Justices of the Peace.*

**WEAPONS,**

*see Concealed weapons.*

**WEIGHTS AND MEASURES,**

|  |     |
|--|-----|
| standard barrel within meaning of Federal statute..... | 305 |
|--|-----|

**WEST FEE BILL,**

*see Examiners of Records.*

**WITNESSES,**

*see Costs.*

**WORKMAN'S COMPENSATION LAW,**

|   |     |
|---|-----|
| meaning of words "steam railway employees"..... | 306 |
|---|-----|

**WORKMEN'S COMPENSATION,**

*see Printing, Public.*

**WORDS AND PHRASES,**

*Bonds of insurance companies,*

|  |     |
|--|-----|
| "Bond" defined, as used in section 14 of chapter 2 of chapter 112 of the Acts of 1916..... | 301 |
|--|-----|

*Workmen's Compensation Law,*

|   |     |
|---|-----|
| "Steam railway employees" as used in workmen's compensation law, defined..... | 305 |
|---|-----|

*Appeals heard by boards of review,*

|                          |     |
|--------------------------|-----|
| "To review" defined..... | 239 |
|--------------------------|-----|

**WORDS AND PHRASES—Concluded.**

|  |     |
|--|-----|
| <i>Public Health,</i>  |     |
| "Public lavatory or washroom" defined.....                                     | 159 |
| <i>Employment Agents,</i>  |     |
| "Laborers," as used in section 128 of the Virginia tax bill, defined.....      | 82  |
| <i>Game and Fish,</i>  |     |
| "Tidewater Virginia," defined.....   | 114 |
| "Fish ladders" defined.....  | 116 |
| "Actually resided," defined.....   | 121 |
| "Landlord" defined.....  | 123 |
| "Court" as used in section 37 of chapter 152 of the Acts of 1916, defined..... | 141 |
| <i>Corporations,</i>   |     |
| "Doing business in this State" defined.....                                    | 44  |

**Consecutive List of Sections of the Constitution, Code and Acts of Assembly  
Cited in Opinions Included in this Report.**

**CONSTITUTION OF VIRGINIA.**

|                 | PAGE          |                  | PAGE               |
|-----------------|---------------|------------------|--------------------|
| Section 18..... | 75            | Section 102..... | 221                |
| Section 21..... | 75            | Section 116..... | 301                |
| Section 24..... | 121, 122, 131 | Section 161..... | 223                |
| Section 32..... | 65, 207       | Section 168..... | 279                |
| Section 41..... | 75            | Section 175..... | 121, 122           |
| Section 52..... | 159           | Section 183..... | 279                |
| Section 73..... | 224, 225      | Section 186..... | 224, 226, 271, 273 |
| Section 83..... | 220           | Section 457..... | 279                |

**UNITED STATES STATUTES.**

|  |          |
|--|----------|
| U. S. Comp. Stats. 1916, Sec. 10410..... | 179, 181 |
|--|----------|

**VIRGINIA STATUTES.**

|                          |     |                           |     |
|--------------------------|-----|---------------------------|-----|
| 7 Hening's Statutes..... | 160 | 12 Hening's Statutes..... | 160 |
| 8 Hening's Statutes..... | 160 |                           |     |

**CODE OF VIRGINIA, 1904.**

|  |                         |  |               |
|--|-------------------------|--|---------------|
| Chap. 21 Code.....                             | 205                     | Sec. 739 Code.....                                     | 224, 225      |
| Sec. 45.....                                   | 274, 5                  | Sec. 740 Code.....                                     | 224, 525      |
| Sec. 56 Code.....                              | 92                      | Sec. 741 Code.....                                     | 224, 225      |
| Sec. 122-a Code.....                           | 70, 71, 72, 73, 74      | Sec. 742 Code.....                                     | 224, 225      |
| Sec. 122-b Code.....                           | 72, 73, 74              | Sec. 743 Code.....                                     | 224, 225      |
| Chap. 140 Code.....                            | 96                      | Sec. 753 Code.....                                     | 296, 297, 298 |
| Sec. 145-a Code.....                           | 72, 76, 77              | Sec. 817 Code.....                                     | 212, 224      |
| Sec. 149 Code.....                             | 259                     | Sec. 923 Code.....                                     | 207           |
| Sec. 162 Code.....                             | 216                     | Sec. 1013-a Code.....                                  | 256           |
| Sec. 163 Code,<br>150, 214, 215, 216, 217, 218 |                         | Sec. 1021 Code.....                                    | 65            |
| Sec. 164 Code.....                             | 214, 215, 216, 217, 218 | Sec. 1105 Code.....                                    | 252           |
| Sec. 168 Code, 147, 148, 201, 202, 203         |                         | Sec. 1271 Code.....                                    | 300           |
| Sec. 169 Code.....                             | 201, 202, 203           | Sec. 1271-a Code.....                                  | 167, 168      |
| Sec. 170 Code.....                             | 147, 148, 202, 203      | Sec. 1359 Code.....                                    | 206           |
| Sec. 260 Code.....                             | 197, 198                | Sec. 1433 Code.....                                    | 265           |
| Sec. 275 Code.....                             | 244                     | Sec. 1437 Code.....                                    | 255           |
| Sec. 276 Code.....                             | 244                     | Sec. 1438 Code.....                                    | 255, 256, 257 |
| Sec. 280 Code.....                             | 248                     | Sec. 1449 Code.....                                    | 260, 262      |
| Sec. 300 Code.....                             | 201, 202, 203           | Sec. 1459 Code.....                                    | 257, 258      |
| Sec. 304 Code.....                             | 205                     | Sec. 1465 Code.....                                    | 258           |
| Sec. 305 Code.....                             | 205                     | Sec. 1506 Code.....                                    | 260           |
| Sec. 310 Code.....                             | 201, 202, 203           | Sec. 1515 Code.....                                    | 260, 261      |
| Sec. 376 Code.....                             | 205, 292                | Sec. 1538 Code.....                                    | 257           |
| Sec. 377 Code.....                             | 205, 206                | Sec. 1677 Code.....                                    | 164, 165      |
| Sec. 456 Code.....                             | 93                      | Sec. 1713-d Code.....                                  | 151, 152      |
| Sec. 492 Code.....                             | 86, 87                  | Sec. 1765-a Code.....                                  | 208           |
| Sec. 508 Code.....                             | 86, 87, 292             | Sec. 1766-a Code.....                                  | 208           |
| Sec. 567 Code.....                             | 277                     | Sec. 2070-a Code,<br>108, 110, 135, 136, 147, 148, 149 |               |
| Sec. 568 Code.....                             | 277                     | Sec. 2070-b Code.....                                  | 143           |
| Sec. 589 Code.....                             | 294, 295                | Sec. 2071 Code.....                                    | 133           |
| Sec. 627 Code.....                             | 292, 293                | Sec. 2086 Code.....                                    | 111, 112, 113 |
| Sec. 738 Code.....                             | 225                     | Sec. 2105 Code.....                                    | 114, 115, 116 |

## CODE OF VIRGINIA, 1904—Concluded.

|                                    | PAGE                    |                     | PAGE           |
|------------------------------------|-------------------------|---------------------|----------------|
| Sec. 2108 Code,                    |                         | Sec. 3531 Code..... | 94, 95         |
| 104, 105, 106, 107, 108, 109, 111, |                         | Sec. 3532 Code..... | 94, 95, 185    |
| 112, 113, 116, 117, 118, 119, 120  |                         | Sec. 3533 Code..... | 94, 95, 96, 97 |
| Sec. 2109 Code.....                | 107                     | Sec. 3534 Code..... | 94, 95         |
| Sec. 2281 Code.....                | 287                     | Sec. 3535 Code..... | 94, 95         |
| Sec. 2942 Code.....                | 118, 119, 190, 194, 195 | Sec. 3536 Code..... | 94, 95         |
| Sec. 3049 Code.....                | 220                     | Sec. 3537 Code..... | 94, 95         |
| Sec. 3102 Code.....                | 201, 202, 203           | Sec. 3559 Code..... | 245            |
| Sec. 3182 Code.....                | 245                     | Sec. 3560 Code..... | 245            |
| Sec. 3203 Code.....                | 140                     | Sec. 3702 Code..... | 101            |
| Sec. 3326-a Code.....              | 83, 84                  | Sec. 3729 Code..... | 103, 104       |
| Sec. 3326-b Code.....              | 84                      | Sec. 3815 Code..... | 91             |
| Sec. 3498 Code.....                | 94, 95                  | Sec. 3816 Code..... | 91             |
| Sec. 3499 Code.....                | 94, 95                  | Sec. 3817 Code..... | 91             |
| Sec. 3500 Code.....                | 94, 95                  | Sec. 3818 Code..... | 91             |
| Sec. 3501 Code.....                | 94, 95                  | Sec. 3819 Code..... | 91             |
| Sec. 3502 Code.....                | 94, 95                  | Sec. 3820 Code..... | 91             |
| Sec. 3503 Code.....                | 94, 95                  | Sec. 3821 Code..... | 91             |
| Sec. 3504 Code.....                | 94, 95                  | Sec. 3822 Code..... | 91             |
| Sec. 3505 Code.....                | 93, 94, 95, 177         | Sec. 3823 Code..... | 91             |
| Sec. 3506 Code.....                | 94, 95                  | Sec. 3824 Code..... | 91             |
| Sec. 3507 Code.....                | 94, 95                  | Sec. 3825 Code..... | 91             |
| Sec. 3508 Code.....                | 94, 95                  | Sec. 3826 Code..... | 91             |
| Sec. 3509 Code.....                | 94, 95                  | Sec. 3827 Code..... | 91             |
| Sec. 3510 Code.....                | 94, 95                  | Sec. 3828 Code..... | 91             |
| Sec. 3511 Code.....                | 94, 95                  | Sec. 3829 Code..... | 91             |
| Sec. 3512 Code.....                | 94, 95                  | Sec. 3830 Code..... | 91             |
| Sec. 3513 Code.....                | 94, 95                  | Sec. 3031 Code..... | 91             |
| Sec. 3514 Code.....                | 94, 95                  | Sec. 3032 Code..... | 91             |
| Sec. 3515 Code.....                | 94, 95                  | Sec. 3033 Code..... | 91             |
| Sec. 3516 Code.....                | 94, 95                  | Sec. 3879 Code..... | 107, 108       |
| Sec. 3517 Code.....                | 94, 95                  | Sec. 3924 Code..... | 185            |
| Sec. 3518 Code.....                | 94, 95                  | Sec. 3925 Code..... | 185            |
| Sec. 3519 Code.....                | 94, 95                  | Sec. 3932 Code..... | 185, 186       |
| Sec. 3520 Code.....                | 94, 95                  | Sec. 3933 Code..... | 185, 186       |
| Sec. 3521 Code.....                | 94, 95                  | Sec. 3936 Code..... | 185            |
| Sec. 3522 Code.....                | 94, 95                  | Sec. 3956 Code..... | 188            |
| Sec. 3523 Code.....                | 94, 95                  | Sec. 3957 Code..... | 144            |
| Sec. 3524 Code.....                | 94, 95                  | Sec. 3958 Code..... | 188, 189       |
| Sec. 3525 Code.....                | 94, 95                  | Sec. 3972 Code..... | 194, 195, 196  |
| Sec. 3526 Code.....                | 94, 95                  | Sec. 4071 Code..... | 91, 92         |
| Sec. 3527 Code.....                | 94, 95                  | Sec. 4074 Code..... | 91, 92         |
| Sec. 3528 Code.....                | 90, 91, 94, 95          | Sec. 4095 Code..... | 187            |
| Sec. 3529 Code.....                | 94, 95                  | Sec. 4106 Code..... | 188            |
| Sec. 3530 Code.....                | 94, 95, 196, 197        |                     |                |

## CODE OF VIRGINIA, 1904—TAX BILL.

|                   |               |                                    |    |
|-------------------|---------------|------------------------------------|----|
| Sec. 5 Code.....  | 283           | Sec. 128 Code.....                 | 82 |
| Sec. 48 Code..... | 198, 199, 200 | Va. Tax Laws, 1916, Secs. 128, 129 | 79 |
| Sec. 49 Code..... | 198, 199, 200 | Va. Tax Laws, 1916, Sec. 140.....  | 81 |
| Sec. 89 Code..... | 200           |                                    |    |

## ACTS OF ASSEMBLY.

|                              |          |                                    |     |
|------------------------------|----------|------------------------------------|-----|
| Chap. 345, Acts 1855-56..... | 279      | Chap. 74, Acts 1906.....           | 186 |
| Chap. 135, Acts 1881-82..... | 115, 116 | Chap. 112, Acts 1906,              |     |
| Chap. 432, Acts 1887-88..... | 271, 273 | 165, 166, 167, 168, 170, 171, 172, |     |
| Chap. 845, Acts 1893-94..... | 160      | 300, 301, 302                      |     |
| Chap. 769, Acts 1895-96..... | 163      | Chap. 211, Acts 1906.....          | 264 |
| Chap. 34, Acts 1906.....     | 265      | Chap. 252, Acts 1906.....          | 265 |

## ACTS OF ASSEMBLY—Concluded.

|                             | PAGE           |                                    | PAGE             |
|-----------------------------|----------------|------------------------------------|------------------|
| Chap. 62, Acts 1908         | 74, 75         | Chap. 84, Acts 1916,               |                  |
| Chap. 73, Acts 1908         | 71             | 227, 228, 229, 230, 231, 232, 233, |                  |
| Chap. 313, Acts 1908        | 267            | 234, 235, 236, 237                 |                  |
| Chap. 401, Acts 1908        | 161            | Chap. 92, Acts 1916                | 103, 109, 110    |
| Chap. 179, Acts 1910,       |                | Chap. 132, Acts 1916               | 91               |
| 154, 155, 156, 157, 158     |                | Chap. 145, Acts 1916               | 127, 128         |
| Chap. 58, Acts 1912         | 185            | Chap. 146, Acts 1916,              |                  |
| Chap. 181, Acts 1912        | 241            | 172, 173, 174, 175, 176, 177, 178, |                  |
| Chap. 183, Acts 1912        | 221            | 179, 180, 181, 183, 184, 247       |                  |
| Chap. 237, Acts 1912        | 233, 234       | Chap. 148, Acts 1916               | 237, 238         |
| Chap. 255, Acts 1912        | 254            | Chap. 152, Acts 1916               | 248              |
| Chap. 307, Acts 1912        | 65, 66, 67, 70 | Chap. 152, Acts 1916,              |                  |
| Chap. 329, Acts 1912        | 267            | 94, 123, 124, 125, 126, 127, 128,  |                  |
| Chap. 341, Acts 1912        | 101, 105, 106  | 129, 131, 132, 133, 134, 137, 138, |                  |
| Chap. 56, Acts 1914         | 190            | 139, 140, 141, 142, 143, 144, 145, |                  |
| Chap. 57, Acts 1914,        |                | 146, 147, 148, 149                 |                  |
| 190, 191, 192, 193          |                | Chap. 160, Acts 1916               | 158, 159         |
| Chap. 129, Acts 1914        | 136            | Chap. 168, Acts 1916               | 78, 79, 82       |
| Chap. 228, Acts 1914        | 172, 191       | Chap. 191, Acts 1916               | 110, 135         |
| Chap. 229, Acts 1914        | 170, 171       | Chap. 215, Acts 1916               | 274, 275, 84, 85 |
| Chap. 252, Acts 1914        | 87             | Chap. 276, Acts 1916               | 249              |
| Chap. 311, Acts 1914        | 239, 240       | Chap. 278, Acts 1916               | 158, 159         |
| Chap. 332, Acts 1914        | 98             | Chap. 285, Acts 1916               | 96               |
| Chap. 352, Acts 1914,       |                | Chap. 300, Acts 1916               | 212, 213         |
| 83, 86, 88, 89, 97, 99, 100 |                | Chap. 305, Acts 1916,              |                  |
| Chap. 2, Acts 1915          | 172            | 101, 102, 103, 104                 |                  |
| Chap. 69, Acts 1915         | 86             | Chap. 356, Acts 1916               | 100, 137, 182    |
| Chap. 44, Acts 1916         | 91             | Chap. 483, Acts 1916               | 250, 252         |
| Chap. 52, Acts 1916         | 110, 135       | Chap. 488, Acts 1916               | 283, 285         |
| Chap. 75, Acts 1916         | 89, 90         | Chap. 490, Acts 1916               | 85, 86           |
| Chap. 77, Acts 1916         | 198            | Chap. 496, Acts 1916               | 89, 90           |
| Chap. 80, Acts 1916         | 289            | Chap. 501, Acts 1916               | 113, 114, 115    |
|                             |                | Chap. 520, Acts 1916               | 263, 264         |

## Table of Cases Cited.

|   | PAGE     |
|---|----------|
| <i>Alderson v. Commissioners</i> , 32 W. Va., 454                   | 240      |
| <i>Armory v. Gloucester Justices</i> , 2 Va. Cas., 523              | 213      |
| <i>Attorney General v. Wood</i> , 108 Mass., 436, 439               | 115      |
| <i>Board of Trustees v. Atlanta</i> , 113 Ga. 883                   | 118      |
| <i>Bottom v. Moore, Auditor</i> , 119 Va., 372                      | 220      |
| <i>Burch v. Hardwicke</i> , 71 Va. 33                               | 210, 219 |
| <i>Burger v. State Female Normal School</i> , 114 Va. 491           | 253      |
| <i>Builer County v. James</i> , 116 Ky. 575, 578                    | 222      |
| <i>Childrey v. Rady</i> , 77 Va. 518, 530                           | 211      |
| <i>Commonwealth v. Gilbert</i> , 22 L. R. A. 439                    | 120      |
| <i>Commonwealth v. Gleason</i> , 111 Va. 383                        | 223      |
| <i>Commonwealth v. Hampton Institute</i> , 106 Va., 614             | 281      |
| <i>Commonwealth v. Lynchburg Y. M. C. A.</i> , 115 Va. 745          | 281, 291 |
| <i>Commonwealth v. Olger</i> , 7 Cush. 85                           | 82       |
| <i>Commonwealth v. Vincent</i> , 108 Mass. 441, 442                 | 115      |
| <i>Commonwealth v. Wellford</i> , 114 Va., 372                      | 289, 290 |
| <i>Commonwealth v. Wells</i> , 107 Va. 834                          | 108      |
| <i>Cook v. Freeholders of Middlesex</i> , 26 N. J. L. 326           | 226      |
| <i>Cotton v. Fidelity &amp; Casualty Company</i> , 41 Fed. 501, 511 | 306      |
| <i>Coyle v. McIntyre</i> , 7 Houston (Del.) 44                      | 118      |

## TABLE OF CASES CITED—Concluded.

|   | PAGE     |
|---|----------|
| <i>Draper v. Commissioners of Public Instruction</i> , 66 N. J. L. 54.....      | 269      |
| <i>Elsner Brothers v. Hawkins</i> , 113 Va. 47.....                             | 80       |
| <i>Gibbs v. Morgan</i> , 39 N. J. Eq. 126.....                                  | 213      |
| <i>Harkness v. Hutcherson, et als</i> , 90 Tex. 383, 385.....                   | 269      |
| <i>Hartigan v. Board</i> , 49 W. Va. 14.....                                    | 211      |
| <i>Harvey v. Osborn</i> , 55 Ind. 542.....                                      | 302      |
| <i>Heath v. Johnson</i> , 36 W. Va. 782.....                                    | 211      |
| <i>Hopkins v. Richmond, and Coleman v. Ashland</i> , 117 Va. 692.....           | 80, 81   |
| <i>Indianapolis Water Co. v. American Strawboard Co.</i> , 57 Fed. 1000.....    | 113      |
| <i>Ingles v. Straus</i> , 91 Va. 209.....                                       | 159      |
| <i>Iverson Eron's Case</i> , 91 Va. 762.....                                    | 159      |
| <i>Jeffries v. Harrington</i> , 11 Colo. 191.....                               | 213      |
| <i>Kilpatrick v. Smith</i> , 77 Va. 347, 357.....                               | 211      |
| <i>Kirkpatrick v. Independent School District of Liberty</i> , 53 Iowa 585..... | 269      |
| <i>Long v. Ryan</i> , 71 Va. 718, 720.....                                      | 122      |
| <i>Miller v. Lewis</i> , 4 N. Y., 554, 566.....                                 | 213      |
| <i>Mundy v. VanHoose</i> , 104 Ga. 299.....                                     | 118      |
| <i>McPherson v. Blacker</i> , 146 U. S. 1.....                                  | 78       |
| <i>Owensboro v. Commonwealth</i> , 105 Ky. 344.....                             | 117      |
| <i>People v. Board of Education</i> , N. Y., 27 How. Pr. Rep. 462, 473.....     | 269      |
| <i>Pecahontas Collieries Co. v. Commonwealth</i> , 113 Va. 112.....             | 278      |
| <i>Re Green</i> , 134 U. S. 379.....  | 77       |
| <i>Richmond Hotel Corp. v. Commonwealth</i> , 88 S. C. 174.....                 | 278      |
| <i>Rucker v. Bosworth</i> , 7 J. J. Marsh, 645.....                             | 226      |
| <i>Sands v. Moore</i> , 119 Va. 744.....  | 84       |
| <i>Smith v. Bryan</i> , 100 Va. 199.....  | 210, 219 |
| <i>Somers v. Commonwealth</i> , 97 Va. 759.....                                 | 90, 171  |
| <i>South Carolina v. U. S.</i> , 199 U. S., 437.....                            | 296      |
| <i>State v. Holloway</i> , 64 Mo. 526.....                                      | 272, 274 |
| <i>State v. Kenney</i> , 11 Mont. 553, 29 Pac. 89.....                          | 273      |
| <i>State v. Mallory (Ark.)</i> , 67 L. R. A. 773.....                           | 120      |
| <i>State v. Mitchell</i> , 47 W. Va. 789.....                                   | 113      |
| <i>State v. Regents</i> , 27 Pac. 850, 13 Kan. 220.....                         | 272      |
| <i>State v. Seebert</i> , 99 Mo. 122, 12 S. W. 348.....                         | 273      |
| <i>Sterling v. Jackson</i> , 13 Am. St. Rep. 406, 420.....                      | 119      |
| <i>Todd, Mayor, v. Johnson, County Clerk</i> , 33 L. R. A. 399.....             | 77       |
| <i>VanDyke v. School District No. 77</i> , 43 Wash. St. 235.....                | 269      |
| <i>Virginia Brewing Co. v. Commonwealth</i> , 113 Va. 145.....                  | 278      |
| <i>Walden v. Wigham</i> , 120 Ga. 646.....                                      | 118      |
| <i>Warwick v. State</i> , 25 Ohio St. 24.....                                   | 213      |
| <i>Western Paper Co. v. Pope, et al</i> , 155 Ind. 354.....                     | 113      |
| <i>Whitlock v. Hawkins</i> , 105 Va. 242.....                                   | 159      |
| <i>Willis v. Kalmbach</i> , 109 Va. 475.....                                    | 75, 76   |
| <i>Yancey v. Aetna Life Insurance Co.</i> , 108 Ga. 351.....                    | 307      |