ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

TO THE

GOVERNOR OF VIRGINIA.

FOR THE

YEAR 1895.

RICHMOND:
J. H. O'BANNON, SUPERINTENDENT OF PUBLIC PRINTING.
1895

REPORT.

COMMONWEALTH OF VIRGINIA,
ATTORNEY-GENERAL'S OFFICE,
RICHMOND, *December 3d, 1895.*

To His Excellency CHARLES T. O'FERRALL,
Governor of Virginia:

GOVERNOR:

I have the honor to submit to you my *sixth* annual report.

Since my last report I have tried and disposed of the following cases—viz.:

SUPREME COURT OF APPEALS OF VIRGINIA.

1. Blanton et als. *v.* Commonwealth. From circuit court city of Richmond. Motion against the treasurer of Amelia county and sureties. *Reversed, and sureties discharged.*

2. W. B. F. Mitchell *v.* Commonwealth. From county court of Greene county. Selling liquor without license. *Affirmed.*

3. Hubbard & als. *v.* Commonwealth. From circuit court of city of Richmond. *Dismissed by order of appellants.*

4. Commonwealth *v.* Iverson Brown. From circuit court of Gloucester county. *Reversed*, and *section 5*, Acts 1891-'2, page 601, which amends and re-enacts certain sections of the Code of Virginia 1887, *in relation to oysters*, and adds "independent sections," *held constitutional and valid.*

5. Cash *v.* Commonwealth. From circuit court of King George county. Homicide—manslaughter. *Affirmed.*

6. Campbell *v.* Commonwealth. From circuit court of King George county. Homicide—manslaughter. *Affirmed.*

7. Dulin *v.* Lillard, sheriff, &c. From circuit court of Rappahannock county. *Habeas corpus. Writ denied. Section 4016*, Code of Virginia 1887, as amended Acts 1893-'4, chap. 249, page 270, fixing jurisdiction of county courts in *criminal cases*, construed. *Affirmed.*

8. John Brown *v.* C. H. Epps, jailor of Richmond city. *Habeas corpus. Section 4106*, Code of Virginia 1887, which confers jurisdiction on "*police justices*, &c.," (held to be unconstitutional and void in "*Mary Miller's case*,") upheld, that case reversed, and the law declared constitutional and valid *by an undivided court.*

9. Nicholas *v.* Commonwealth. From circuit court of Henrico county. Murder in the first degree. *Affirmed.* In *this* case I was ably assisted by *Mr.*

Sands, the Commonwealth's attorney of Henrico, and *Mr. Geo. D. Carter*, who prosecuted in the trial court.

10. Brown *v.* Commonwealth. "No. 12" on court's docket. *Dismissed for failure to print record.*

11. Stuart et als. *v.* Commonwealth. From circuit court city of Richmond. Motion against the treasurer of King George county and sureties. *Reversed, and new trial ordered.*

12. Anderson *v.* Commonwealth. "No. 19" on court's docket. *Dismissed for failure to print record.*

13. Taylor *v.* Commonwealth. "No. 13" on court's docket. *Dismissed for failure to print record.*

14. Same *v.* Same. "No. 20" on court's docket. *Dismissed for failure to print record.*

15. William Robinson *v.* Commonwealth. From circuit court of Essex county. Felonious assault. *Affirmed.*

16. Miller *v.* Commonwealth. From circuit court of Gloucester county. Felonious assault. *Affirmed.*

17. D. W. Benton *v.* Commonwealth. From circuit court of Fauquier county. Burglary. *Affirmed.*

18. Thomas, inspector, &c. *v.* I. M. Rowe. From circuit court of Gloucester county. Bill for injunction by I. M. Rowe to restrain sale of property levied upon by Joel Thomas, an oyster inspector, under distress for rent in arrear due the Commonwealth. Injunction perpetuated by the trial court. *Reversed, and bill dismissed.*

19. National Life Association *v.* Morton Marye, auditor, &c. Petition for *mandamus*. *Held:* An "assessment company," under act of May 18, 1887, amended Acts 1889-'90, chap. 106, page 85, *and the writ awarded.*

20. William Ellinger *v.* J. B. Bowdoin, fish commissioner, &c. Petition for writ of *mandamus*. The statute entitled "An act to define and establish, by straight lines, the low-water-mark lines for the riparian owner of the shores of Fox Island, or Fox Islands, in the county of Accomac, in the State of Virginia," construed. *Writ denied.*

21. A. F. Hargrave *v.* Commonwealth. From circuit court of Tazewell county. Violation of local-option law. *Affirmed.*

22. E. B. Pitsnogle *v.* Commonwealth. From hustings court city of Roanoke. Larceny. *Affirmed.*

23. Weatherman *v.* Commonwealth. From circuit court of Carroll county. Decided at Wytheville June term, 1894, *reheard*, and *again affirmed.*

24. Joseph B. Robertson *v.* Commonwealth. From circuit court of Franklin county. Homicide—murder in the second degree. *Affirmed.*

25. A. F. Porterfield *v.* Commonwealth. From hustings court city of Radford. Burglary. *Reversed.*

26. Harvey Austin *v.* Commonwealth. From circuit court of Pulaski county.

27. William M. Young *v.* Commonwealth. From circuit court of Pulaski county.

In these cases I *confessed error*, because each was ruled by Dulin *v.* Lillard, sheriff, *ante*.

28. W. P. Duff *v.* Commonwealth. From corporation court of Buena Vista Prosecuted under section 3712, Code of Virginia 1887, "Removal, &c., of goods distrained," &c. *Reversed.*

29. William P. Gray *v.* Commonwealth. From circuit court of Botetourt county. Homicide—voluntary manslaughter. *Affirmed.*

30. Mills *v.* Commonwealth. From corporation court of city of Danville. Prosecution for seduction under promise of marriage. *Reversed.*

31. Joshua H. Stover *v.* Commonwealth. From hustings court of city of Staunton. Petit larceny. Code of Virginia 1887, section 3906, "When sentenced twice before, how to be sentenced," construed. *Reversed.*

32. Carter Strouther *v.* Commonwealth. From corporation court of city of Winchester. Larceny of horse in West Virginia. Thief captured and tried in Winchester, Va. Plea to jurisdiction overruled by trial court. *Reversed.*

33. Brown Williams *v.* Commonwealth. From circuit court of Highland county. Burglary. *Reversed.*

34. Cardoza, sheriff of Lunenburg, &c. *v.* C. H. Epps, jailor of Richmond, Va., &c. Petition for mandamus. *Writ denied.*

This case has attracted so much and such general attention within the Commonwealth and abroad, I deem it proper to give in detail the pleadings, opinion, and the order, and the court's order enlarging the "writs of error" in the pending cases.

THE PLEADINGS.

A.

SHERIFF CARDOZA'S PETITION.

To the Honorable Judges of the Supreme Court of Appeals of the State of Virginia:

Your petitioner, M. C. Cardoza, respectfully represents to your Honors that he is the sheriff of the county of Lunenburg, duly elected and qualified; that on the 14th day of June, 1895, Mrs. Lucy Jane Pollard, of the county of Lunenburg, was cruelly murdered in her own yard; that shortly thereafter William Henry Marable, commonly called Solomon Marable, Pokey Barnes, and Mary Abernathy were charged with said murder, were duly indicted at the July term of the county court of Lunenburg, and at the same term were duly and legally tried for the said offence; were found guilty by the juries impanelled for their trial of murder in the first degree, and the judgment of said court was pronounced, directing all of said prisoners to be hung on the 20th day of September, 1895. Your petitioner further shows to your Honors that after the said prisoners were duly and legally convicted in the county court of Lunenburg, a court of competent jurisdiction for the trial of said cases, on the 20th day of July, 1895, the following order was made and entered by said court:

"The court, deeming it necessary for the safe-keeping of the prisoners, William Henry Marable, sometimes called Solomon Marable, Mary Abernathy, and Pokey Barnes, who are convicted to be hanged on the 20th of September next, doth adopt the jail of the city of Richmond as the jail of this county. And the sheriff of this county is ordered to convey to the said jail the said William Henry Marable, commonly called Solomon Marable, Mary Abernathy, and Pokey Barnes, *there to be safely kept and treated until brought back by said sheriff to this county for execution.*" That in obedience to said order the said prisoners were carried to the city of Richmond, and placed in the jail thereof, C. H. Epps, the sergeant of the said city, being the keeper of the said jail.

Your petitioner further most respectfully shows to your Honors that on the

11th day of November, 1895, the county court entered an order directing your petitioner to proceed to the city of Richmond, and require of the jailor of said city the bodies of William Henry Marable, commonly called Solomon Marable, Pokey Barnes, and Mary Abernathy; and in said order the keeper of said jail was directed to deliver the bodies of the said prisoners to your petitioner; all of which will more fully and at length appear by reference to a copy of said order, herewith filed, marked Exhibit "Order," and prayed to be taken as a part of this petition.

Your petitioner represents that he proceeded to Richmond, as required by said order, and on the 12th and 13th days of November, 1895, demanded the bodies of the said William Henry Marable, commonly called Solomon Marable, Pokey Barnes, and Mary Abernathy, of and from C. H. Epps, the sergeant of the city of Richmond and the keeper of the jail thereof, who refused to deliver the said prisoners to your petitioner.

In consideration whereof, and inasmuch as your petitioner has no other remedy at law, he respectfully prays that the said C. H. Epps, sergeant of the city of Richmond and the keeper of the jail thereof, be summoned to appear before your Honors, and show cause, if any he can, why a peremptory writ of *mandamus* should not issue, compelling him, the said Epps, to deliver to your petitioner the bodies of the said William Henry Marable, commonly called Solomon Marable, Pokey Barnes, and Mary Abernathy, as required by the order of the county court of Lunenburg county.

And, as in duty bound, your petitioner will ever pray, &c.

M. C. CARDOZA,
Sheriff Lunenburg County, Va.

COMMONWEALTH OF VIRGINIA,
City of Richmond—to-wit:

I, Jackson Guy, a commissioner in chancery of the chancery court of the city of Richmond, Va., do certify that M. C. Cardoza, whose name, as sheriff of Lunenburg county, is signed to the annexed petition, this day made oath before me that the statements therein contained are true to the best of his knowledge and belief.

Given under my hand this 14th day of November, A. D. 1895.

JACKSON GUY,
Commissioner.

B.

SERGEANT C. H. EPPS' ANSWER AND EXHIBIT "A."

IN THE SUPREME COURT OF APPEALS OF VIRGINIA,
AT RICHMOND.

M. C. Cardoza, sheriff, &c.,
v.
Chas. H. Epps, sergeant of the city of Richmond, &c. } *Petition for writ of mandamus.*

The answer of Charles H. Epps, sergeant of the city of Richmond and keeper of the city jail, to the rule issued against him by this honorable court on the 14th day of November, 1895, whereby he is required to show cause why he detains the bodies of William H., sometimes called Solomon Marable, Pokey Barnes, and Mary Abernathy.

Respondent saith that he is the sergeant of the city of Richmond and keeper of its jail; that some months ago the bodies of the aforesaid Marable, Barnes, and Abernathy were placed in his custody by the sheriff of Lunenburg county, the petitioner; that the order under which this was done is recited in the petition; that on the 9th day of November instant respondent received from the Governor of the Commonwealth an order in the words following: "Do not deliver the Lunenburg convicts to M. C. Cardoza, sheriff, &c., as heretofore instructed, but retain them until I can communicate with and hear from Judge Orgain." That on the same day the Governor addressed a letter to Judge Orgain, and dispatched it by a special messenger, which letter is as follows:

RICHMOND, VA., NOVEMBER 9, 1895.

Judge GEORGE C. ORGAIN,
Lunenburg C. H.:

DEAR SIR:

Your sheriff, M. C. Cardoza, is in the city, with your order for the convicts, Marable, Pokey Barnes, and Mary Abernathy. Concerning their return, and the necessity of their presence when the order proposed to be made upon your records is entered, I have consulted the Attorney-General, whose opinion I enclose. After receiving this opinion, I wired Judge W. H. Mann, at Nottoway C. H., who promptly replied, and again wired me to-day and suggested that I send a special messenger to you, and added: "*We do not want the prisoners unless their presence is necessary.*" In the opinion of the Attorney-General their presence is not necessary, and your order made *nunc pro tunc* under the terms of the written agreement will be given by the appellate court the full force and effect as if made in the convicts' presence. As you well know, one of the women is about to be confined; all are in mortal terror, and overwhelmed with fear of being lynched if returned to your county jail. They and their counsel assure me that they verily believe that if returned they must die, and demand at my hands protection. My sense of personal responsibility and public duty, and my obligation to protect the lives of these convicts and see the laws of this Commonwealth enforced, compel me to retain them in the city jail, notwithstanding your order for their return, and I have so instructed the city sergeant.

I have reached this determination after grave deliberation, earnest thought, and full conference with Attorney-General Scott, and act under his advice.

I entrust this letter to Mr. Carter D. Johnston, my private messenger, who in person will deliver it to you. I ask that you revoke your order, and come down and confer with me as to this matter. Assuring you of my consideration and respect, I am,

Very truly yours,

CHARLES T. O'FERRALL,
Governor of Virginia.

That shortly after respondent received the Governor's order aforesaid, an order of the judge of the circuit court of the city of Richmond was served upon him, whereby he was commanded to produce the bodies of the aforesaid convicts before said judge, at the city hall, in this city, on the day and at the time therein named; that respondent obeyed Judge Wellford's order, and now holds said convicts subject to his commands, and all the proceedings had

before said judge will in full appear by the transcript of the record and Exhibit "B" therewith, styled "Abernathy, Mary, & als. *v.* Chas. H. Epps, sergeant city of Richmond, and M. C. Cardoza, sheriff Lunenburg county—transcript of the record," marked *Exhibit "A,"* and made a part of this return, as fully as if herein written.

For further return to said rule, this respondent saith that he is informed, advised, and believes that the purpose for which the petitioner demands said convicts is stated in the process served upon Superintendent B. W. Lynn, of the State penitentiary, who holds the body of Mary Barnes, which process is in the words and figures following:

THE COMMONWEALTH OF VIRGINIA,
To the Sup't of the Virginia State Penitentiary—Greeting:

We command you that the body of Mary Barnes, detained by you, and under your custody, as it is said, by whatsoever name she may be called, you have before the judge of our county court of the county of Lunenburg, at the court-house thereof, on the 13th day of November, 1895, to do, submit to, and receive all and singular those things which shall then and there be considered of her in this behalf, *and to make defence* to a motion then and there to be made on that day to correct the records of Lunenburg county court upon her trial for murder of *M.* J. Pollard. And have then and there this writ.

Witness Jno. L. Yates, clerk of our said court, at the court-house, the 11th day of November, 1895, in the 120th year of the Commonwealth.

JNO. L. YATES, *Clerk.*

Respondent is further advised that the effect, purport, and meaning of the writs of error awarded by this honorable court to Pokey Barnes, Mary Abernathy, and Solomon Marable, whose several cases are now on the docket of this court, and set down for trial on the 26th instant, is to transfer said cases, and each of them, from the county court of Lunenburg to this court, and to take from said court the power to enter any order therein whereby the rights and persons of the appellants are in any manner affected, or to change their condition, status, or custody from that which existed *at the time* when the writs aforesaid were awarded.

Respondent is further advised that the petitioner, who is the sheriff of Lunenburg county, by the very terms of the writ, is forbidden to do anything in the execution of the judgment or order of the county court of Lunenburg, or to exercise authority, control, or power over their bodies, until the matters in issue between them and the Commonwealth shall be determined and adjudged by *this* court.

And now, having fully answered to the rule, respondent humbly submits himself to the judgment of this honorable court.

CHAS. H. EPPS,
Sergeant City of Richmond.

STATE OF VIRGINIA,
City of Richmond—to-wit:

This day personally appeared before me, George K. Taylor, clerk of the Supreme Court of Appeals of Virginia, at Richmond, ———, whose name is signed to the return hereto annexed, and made oath that the statements

therein contained, so far as made of his own knowledge, are true, and, so far as made upon information received from others, affiant verily believes them to be true.

Given under my hand this 15th day of November, 1895.

GEO. K. TAYLOR, *Clerk.*

Exhibit "A."

VIRGINIA:

In the Circuit Court of the City of Richmond.

NOVEMBER 9TH, 1895.

This day came Mary Abernathy, Pokey Barnes, and Solomon Marable, by their attorneys, and filed their petition, praying for a writ of *habeas corpus* to Charles H. Epps, sergeant of the city of Richmond, and M. C. Cardoza, sheriff of Lunenburg county, directed. And thereupon it is ordered that a writ of *habeas corpus* be awarded said petitioners to the said sergeant of the city of Richmond and M. C. Cardoza, sheriff of Lunenburg county, as aforesaid, directed, commanding them to produce the bodies of the said petitioners, together with the day and cause of their being taken and detained, before this court on November 12th, 1895, at ten o'clock A. M.

PETITION.

To the Hon. B. R. Wellford, Jr., Judge of the Circuit Court of the City of Richmond:

Your petitioners, Mary Abernathy, Pokey Barnes, and Solomon Marable, humbly represent unto your Honor that in the month of June, 1895, they were arrested in the county of Lunenburg, charged with the murder of one Lucy Jane Pollard; that they were tried at the July term of said Lunenburg county court, and convicted of said murder, and sentenced to death by hanging, and the day for their execution fixed for Friday, September 20th, 1895; that they applied for and obtained from the Supreme Court of Appeals of Virginia a writ of error and *supersedeas*, suspending said judgment of condemnation, and their cases are now pending in said court to be heard upon their application for a new trial. A copy of the printed record in each of these cases is herewith filed, and prayed to be taken and considered as a part of this petition. It appears upon the face of said record that after they were condemned to be hanged that they were taken by the sheriff of Lunenburg county, and conveyed to the jail of the city of Richmond for safe-keeping until the day fixed for their executions. So that it appears by said record that at the time the Supreme Court of Appeals of Virginia granted its writ of error and *supersedeas* in *her* behalf they were in the custody of the sergeant of the city of Richmond, and confined in the jail of said city, where they are now waiting the determination of their cases by the aforesaid Supreme Court of Appeals of Virginia. It will appear by a further inspection of said records that their confinement aforesaid in the said jail of the city of Richmond was for the purpose of protecting them from apprehended mob violence in the county of Lunenburg. By an order entered on or about the 19th day of October, 1895, the sheriff of Lunenburg county was ordered to take the bodies of your petitioners, and convey them to the county court of Lunenburg on or before the 11th day of November, 1895.

Your petitioner- represents that said sheriff is now in the city of Richmond, and has expressed his purpose, in the execution of said last-mentioned order, to take your petitioners from the jail of the city of Richmond at an early hour to-morrow morning, and convey them to the said county court of Lunenburg. And your petitioners *is* apprehensive that the said sergeant of the city of Richmond will deliver *her* into the hands of the said sheriff of Lunenburg county. They humbly submit that the prime object of the Supreme Court of Appeals aforesaid in granting its writ of error and *supersedeas* was to protect and have them safely kept until, by its judgment, the question should be decided involving their right to a new trial. And when said writ of error and *supersedeas* was granted said court took into consideration for their safety the fact that they were confined in the jail of the said city of Richmond. And your petitioners further submit that a just interpretation of the said order requires them to remain confined in the said jail of the city of Richmond until the further order of the said Supreme Court of Appeals.

Your petitioners further submit that the order of the county court of Lunenburg, directing the said sheriff of the county of Lunenburg to take them out of the custody of the said sergeant of the city of Richmond, and away from their present place of confinement in the jail of the said city of Richmond, is illegal, and without lawful authority.

Your petitioners further represent that the Supreme Court of Appeals of Virginia is not now in session, but that said court will sit on the 12th day of this month. Wherefore your petitioners pray that your Honor will grant a writ of *habeas corpus*, and direct the same to Charles H. Epps, sergeant of the city of Richmond, and as such the jailor of said city, and to the said M. C. Cardoza, sheriff of the said county of Lunenburg, directing either of them in whose custody they may be found at the time of the service of said writ to bring the body of your petitioner before your Honor, to be disposed of as your Honor shall deem lawful.

In support of the facts, set out in this petition, your Honor is humbly referred to the record, which has hereinbefore made a part of this petition.

And, as in duty bound, your petitioners will ever pray, &c.

POKEY BARNES,
SOLOMON MARABLE,
MARY ABERNATHY.

By Counsel,

WISE & WISE,
A. B. GUIGON,
H. W. FLOURNOY.

W. M. JUSTIS, *for* SOLOMON MARABLE.

WRIT OF HABEAS CORPUS TO SERGEANT CITY OF RICHMOND.

THE COMMONWEALTH OF VIRGINIA,

To Chas. H. Epps, Sergeant City of Richmond, Va.—Greeting:

We command you that the bodies of Mary Abernathy, Pokey Barnes, and Solomon Marable, detained by you, and under your custody, as it is said, together with the day and cause of their being taken and detained, by whatsoever name they may be called, you have before the judge of our circuit court of the city of Richmond, at the court-room of said court, in the said city, on the 12th day of November, 1895, at 10 o'clock A. M., to do, submit to, and

receive all and singular those things which shall then and there be considered of them in this behalf. And have then there this writ.

Witness E. M. Rowelle, clerk of our said court, at Richmond, the 9th day of November, 1895, and in the 120th year of our foundation.

E. M. ROWELLE, *Clerk.*

RETURN OF SHERIFF.

Executed in the city of Richmond, November 10th, 1895, by delivering a copy of the within writ to Charles H. Epps, sergeant of the city of Richmond.

F. MEREDITH, *Deputy,*
for J. T. HUGHES,
Sheriff of the City of Richmond.

WRIT OF HABEAS CORPUS TO SHERIFF OF LUNENBURG COUNTY.

THE COMMONWEALTH OF VIRGINIA,

To M. C. Cardoza, Sheriff of Lunenburg County, Va.—Greeting:

We command you that the bodies of Mary Abernathy, Pokey Barnes, and Solomon Marable, detained by you, and under your custody, as it is said, together with the day and cause of their being taken and detained, by whatsoever name they may be called, you have before the judge of our circuit court of the city of Richmond, at the court-room of said court, in the said city, on the 12th day of November, 1895, at 10 o'clock A. M., to do, submit to, and receive all and singular those things which shall then and there be considered of them in this behalf. And have then there this writ.

Witness E. M. Rowelle, clerk of our said court, at Richmond, the 9th day of November, 1895, and in the 120th year of our foundation.

E. M. ROWELLE, *Clerk.*

SHERIFF'S RETURN.

Executed in the city of Richmond, November 10th, 1895, by delivering a copy of the within writ to M. C. Cardoza, sheriff of Lunenburg county, Va.

F. MEREDITH, *Deputy,*
for J. T. HUGHES,
Sheriff of the City of Richmond.

And at another day—to-wit: At a circuit court of the city of Richmond, held at the court-room thereof, in said city, on Tuesday, November 12th, 1895.

Mary Abernathy, Pokey Barnes, and Solomon Marable,	Petitioners,
against	
Charles H. Epps, sergeant of the city of Richmond, and M. C. Cardoza, sheriff of Lunenburg county,	Defendants.

It appearing to the court that the writ of *habeas corpus* heretofore granted to the petitioners has been returned executed as to both of the defendants, on motion of the petitioners, the order for the production of the bodies of said petitioners is enlarged until one o'clock P. M. on Wednesday, November 13th, 1895.

And at another day—to-wit: At a circuit court of the city of Richmond, held at the court-room thereof, in said city, on Wednesday, November 13th, 1895.

Mary Abernathy, Pokey Barnes, and Solomon Marable, Petitioners,
against
Charles H. Epps, sergeant of the city of Richmond, and M. C. Cardoza, sheriff of Lunenburg county, Va.,

This day came Charles H. Epps, sergeant of the city of Richmond, made his return, and produced in court the bodies of the petitioners, Mary Abernathy, Pokey Barnes, and Solomon Marable, in obedience to the writ heretofore awarded herein. And came also M. C. Cardoza, sheriff of Lunenburg county, and, by leave of the court, filed his answer to the said writ. And thereupon the said petitioners moved the court to enlarge the said writ; and the court, after maturely considering the said motion, doth enlarge the said writ until Wednesday, November 20th, 1895, at one o'clock P. M. And thereupon the court doth remand the said prisoners, Mary Abernathy, Pokey Barnes, and Solomon Marable, to the custody of the said Charles H. Epps, sergeant as aforesaid of the city of Richmond, and doth direct that he keep the bodies of the said prisoners in his custody, in the jail of the city of Richmond, until the further order of this court, and that he produce the bodies of the prisoners aforesaid before this court on Wednesday, November 20th, 1895, at one o'clock P. M., there to be further dealt with according to law.

RETURN OF SERGEANT.

RICHMOND, VA., NOVEMBER 13TH, 1895.

To the Hon. B. R. Wellford, Jr.:

In obedience to the within writ, I here produce the bodies of Mary Abernathy, Pokey Barnes, and Solomon Marable, together with the cause of their detention (which will appear in a paper herewith filed).

E. S. FERNEYHOUGH, *D. S.*,
for CHARLES H. EPPS, *Sergeant.*

PAPER REFERRED TO IN SERGEANT'S RETURN.

VIRGINIA:

In Lunenburg County Court, July 20, 1895.

The court, deeming it necessary for the safe-keeping of the prisoners, William Henry Marable, sometimes called Solomon Marable, Mary Abernathy, and Pokey Barnes, who were convicted to be hanged on September 20th next, doth adopt the jail of the city of Richmond, Va., as the jail of this county, and the sheriff of this county is ordered to convey to the said jail the said William Henry Marable, sometimes called Solomon Marable, Mary Abernathy, and Pokey Barnes, there to be safely kept and treated until brought back by said sheriff to this county for execution.

A copy.—Teste:

JNO. L. YATES, *Clerk.*

ANSWER OF M. C. CARDOZA, SHERIFF OF LUNENBURG COUNTY, REFERRED TO IN THE FOREGOING ORDER.

M. C. Cardoza, sheriff of the county of Lunenburg, Va., for return upon the writ of *habeas corpus* issued on the 9th day of November, 1895, by order of circuit court of the city of Richmond, says that the petitioners are in the jail of

the city of Richmond, which was adopted by the judge of the county court of Lunenburg as the jail of that county; and the jail of the city of Richmond is, for the confinement of said petitioners, the jail of the county of Lunenburg; and C. H. Epps, sergeant of the city of Richmond, and, as such, the keeper of the said jail, is, so far as the said petitioners are concerned, the jailor of the county of Lunenburg. And the said M. C. Cardoza says that the said petitioners are legally and properly in his custody, as the sheriff of the county of Lunenburg, under the verdict of the jury of the said county, and the judgment of the court of said county. That so far as he knows there is no danger to their lives by their being carried back to the county of Lunenburg, and certainly, as the sheriff of his county and the legal custodian of the said petitioners, he will do everything in his power for their protection. But he says that he is obliged to obey the order of the county court of Lunenburg, and that order requires him to bring the said petitioners to the court-house of the county of Lunenburg, and deliver them to the said court. And he respectfully asks that the writ of *habeas corpus* be dismissed and discharged.

M. C. CARDOZA,
Sheriff of Lunenburg County, Va.

November 18, 1895.

A transcript from the records.
Teste:

E. M. ROWELLE, *Clerk.*

Fee, $2.25.

C.

COURT'S ORDER.

VIRGINIA:

In the Supreme Court of Appeals, held at the State Library Building, in the City of Richmond, on Thursday, the 21st day of November, 1895.

M. C. Cardoza, sheriff of Lunenburg county, Plaintiff,
against
C. H. Epps, sergeant of the city of Richmond, Defendant.
} *Upon a petition for a writ of mandamus.*

This day came again as well the plaintiff, by his counsel, as the Attorney-General, on behalf of the defendant; and the court, having maturely considered the petition of the plaintiff, the answer of the defendant, with the exhibits filed therewith, is of opinion, for reasons stated in writing and filed with the record, that the *mandamus* prayed for should be denied.

It is therefore considered by the court that the *mandamus* be denied, and the petition of the plaintiff be dismissed.

A copy.—Teste:

GEO. K. TAYLOR, *C. C.*

D.

OPINION BY JUDGE JOHN A. BUCHANAN.

RICHMOND, VA., NOVEMBER 21, 1895.

M. C. Cardoza, sheriff, &c., }
v. }
C. H. Epps, sergeant, &c. }

This is an application of the sheriff of Lunenburg county to this court for a

mandamus to compel the sergeant of the city of Richmond, and the keeper of its jail, to deliver to him the bodies of William Henry Marable, Pokey Barnes, and Mary Abernathy, now confined in such jail.

It appears from the record that the prisoners named were convicted in the county court of Lunenburg county, at its July term last, of murder, and that at the same term the court, for the safe-keeping of these prisoners, adopted the jail of the city of Richmond as the jail of that county, and ordered the sheriff to convey them to such jail, there to be safely kept and treated until brought back by the sheriff for execution.

On the 11th day of this month the county court of Lunenburg county directed the sheriff of that county to proceed at once to Richmond, and require of such jailor the bodies of said Marable, Barnes, and Abernathy, and in the same order directed the keeper of the jail to deliver the bodies of the prisoners to the sheriff. The sheriff, in obedience to that order, demanded the bodies of the prisoners of the respondent, the keeper of the jail, who refused to deliver them to him.

The respondent, in his answer to the rule to show cause why the *mandamus* prayed for shall not be awarded against him, places his refusal to obey the order of the county court and the demand of the sheriff upon three grounds:

The first of these grounds is, that the Governor of the Commonwealth ordered him not to deliver the prisoners to the sheriff, as directed by the county court.

The functions of the various parts of our government are thoroughly separated, and distinctly assigned to the principal branches of it—viz., the legislative, the executive, and the judiciary—which, within their respective departments, are equal and co-ordinate.

If anything is self-evident in the structure and organization of our government, it is that the executive has no power to interfere with the judiciary in the performance of its duties.

If the county court of Lunenburg county, or its judge, committed error in making the order in question, the remedy was in the courts.

We find nothing in the Constitution or laws of the State which authorized the Governor to direct the keeper of the jail to disobey the order of the county court, and his act, being without authority, furnishes no legal answer to the rule, and shows no cause why the *mandamus* prayed for should not be awarded.

The respondent assigns as a further reason for his action in refusing to obey the order of the county court the fact that a writ of error and *supersedeas* had been awarded each of the prisoners by this court, the effect of which was to transfer each of the cases from the county court to this court, and to take from that court the power to enter any order therein whereby the rights and persons of the prisoners were in any way affected, or to change their condition, status, or custody from what it was when the writs of error and *supersedeas* were awarded; and that he was advised that the petitioner had been forbidden by this court to do anything in the execution of the judgment or order of that court, or to exercise authority, control, or power over their bodies, until the matters involved in the said writs of error shall have been determined by this court.

It is unnecessary to go into the question of what was the effect of the writs of error and *supersedeas* awarded by this court upon the rights and duties of the county court and the sheriff of Lunenburg county, further than to say that their effect was not to deprive that court of the power and the duty of

entering such orders as might be necessary for the safe-keeping of the prisoners; and, having the right to make orders, under certain circumstances, it was not within the province of the respondent, the keeper of the jail of that county, to question the power of that court to make such orders as it might deem proper in the premises in the discharge of its duties. It was his duty to obey its orders, and to deliver the prisoners to the sheriff of the county, as directed. If the prisoners themselves questioned the power of the county court to make the order that was made, and wished to prevent its execution, they had the right to have that question determined by the courts by resorting to the appropriate proceedings in such cases.

Another ground upon which the respondent bases his refusal to obey the order of the county court is, that, after the Governor had ordered him not to deliver the prisoners to the sheriff of Lunenburg county, he was required by the judge of the circuit court of the city of Richmond to produce the bodies of the prisoners before him, and that he now holds them subject to his order, and files with his answer a copy of the proceedings before the judge of that court in the *habeas corpus* case.

The petition of the prisoners in that case, upon which the writ of *habeas corpus* was issued, does not allege facts which show that they were detained without lawful authority, nor does it allege that they are so detained. On the contrary, they allege in their petition that they were at that time in the lawful custody of the keeper of the jail of the city of Richmond, but express grave apprehension that the keeper of the jail would deliver them to the sheriff of Lunenburg county, in obedience to the order of the county court. The fear that their custodian might deliver them to the sheriff of Lunenburg county, and thus, in their view, place them in illegal custody, furnished no sufficient ground for awarding the writ. (2 Spilling's Extra. Relief, secs. 1191 and 1192.)

The writ of *habeas corpus* does not issue as of course to every one imprisoned or detained who imagines himself or another entitled to its benefits. Though the writ is a writ of right, it should not be granted except upon probable cause shown, and the party asking for it must make out a *prima facie* case. (2 Spilling on Extraordinary Relief, sec. 1194; Sims' Case, 7 Cush. 285, 291; Church on *Habeas Corpus*, sec. 92; Hurd on *Habeas Corpus*, pages 222 to 224.)

The facts in this case not showing probable cause, it is insisted that the action of the judge of the circuit court was without jurisdiction, and therefore void, and shows no cause why the *mandamus* prayed for should not be awarded.

Whilst the allegations of the petition did not warrant the judge of the circuit court in granting the writ of *habeas corpus*, yet, having done so, his act was not void.

Where a court has general jurisdiction over cases of that class to which the one in controversy belongs, although the facts in the case may not have been sufficient to authorize the court to take jurisdiction, yet, if it did so, the question of jurisdiction having been thus decided by its judgment, cannot be raised again, except by a proceeding in error. (Fisher *v.* Bassett, 9 Leigh 119, 131; Cox *v.* Thomas, 9 Gratt. 323, 328; Gibson *v.* Bokhan, 16 Gratt. 321 and 326.)

And it appearing from the respondent's answer, and the order of the judge of the circuit court, that the prisoners are now held under that order, good cause is shown why the *mandamus* prayed for should not be awarded.

It is hardly necessary to say that we have no doubt that the Governor and all the other officials connected with or involved in this most unfortunate and unseemly controversy have been governed by the utmost good faith in the performance of their duties and in the assertion of their rights as they understood them.

An order will be entered refusing the *mandamus* and dismissing the petition.

A copy.—Teste:

GEO. K. TAYLOR, *C. C.*

OPINION BY JUDGE JAMES KEITH.

RICHMOND, VA., NOVEMBER 21, 1895.

M. C. Cardoza, sheriff, &c., }
v.
C. H. Epps, sergeant, &c. }

I concur in the opinion just delivered by *Judge Buchanan*, except that it is by no means clear to me that the judge of Lunenburg, or the county court of that county, had any jurisdiction in this matter after final judgment was pronounced upon the prisoners, except a special jurisdiction under the statute for the safe-keeping of the prisoners. If this be so, the facts upon which the special jurisdiction was exercised should have appeared upon the face of the order. Secondly: The opinion of the court concedes the jurisdiction of *Judge Wellford* over the prisoners under the *habeas corpus* proceedings. That being true, the propriety of its exercise can only be reviewed, or properly animadverted upon here on appeal or writ of error.

In the judgment rendered I fully concur.

E.

ORDER OF COURT ENLARGING THE WRITS OF ERROR.

VIRGINIA:

In the Supreme Court of Appeals, held at the State Library Building, in the City of Richmond, on Friday, the 22d day of November, 1895.

Pokey Barnes, Plaintiff, }
against
The Commonwealth of Virginia. }

Upon a writ of error and supersedeas to a judgment rendered by the county court of Lunenburg county on the 20th day of July, 1895.

It is ordered that the writ of error awarded in this cause be so enlarged as to require the plaintiff in error, who is now in the custody of the sergeant of the city of Richmond, to be retained in such custody until the further order of this court; or, if already delivered to the sheriff of the county of Lunenburg, said sheriff is directed to restore her to the custody of said sergeant.

A copy.—Teste:

GEO. K. TAYLOR, *C. C.*

F.

PRELIMINARY ORDER MADE, ON MOTION OF THE ATTORNEY-GENERAL, WHEN THE CASE OF "POKEY BARNES v. COMMONWEALTH" WAS ARGUED.

VIRGINIA:

In the Supreme Court of Appeals, held at the State Court-House, in the City of Richmond, on Tuesday, the 26th day of November, 1895.

Pokey Barnes, Plaintiff,
against
The Commonwealth of Virginia.

Upon a writ of error and supersedeas to a judgment rendered by the county court of Lunenburg county on the 20th day of July, 1895.

This day came as well the plaintiff in error, by his counsel, as the Attorney-General, in behalf of the Commonwealth, and thereupon the Attorney-General moved the court to postpone the hearing of this case for the purpose of procuring from the county court of Lunenburg county *nunc pro tunc* orders correcting the record in this case in the following particulars:

1. That sixteen jurors, free from exception, were selected.

2. That at every adjournment of the court the jury then trying the case at bar was put in the custody of the sheriff, who was duly sworn as required by law, and that the said jury were each morning returned into court in the custody of the sheriff, according to the order of adjournment.

3. That whenever the said jurors went to their room to consider of their verdict they were put in the custody of the sheriff, who carried them to their room, and returned them in his custody into court.

4. That before delivering their verdict the said jurors were duly polled, as required by law.

5. That these amendments to be made to the record are based on the personal knowledge of the judge, and the records of the court as they now stand.

6. That all of these orders were made during the trial, and the clerk then directed to enter said orders on the order-book, and that, by mistake, he failed to make said entries.

And thereupon the court declined to postpone the hearing, but would hear argument upon the power of the court to make such *nunc pro tunc* orders, and whether or not they are essential to the justice of this case, and that the court would take such action in the premises as will protect the rights of the prisoner and the Commonwealth. And thereupon the case was heard upon the transcript of the record of the judgment aforesaid and arguments of counsel, and continued until to-morrow.

A copy.—Teste:

GEO. K. TAYLOR, *C. C.*

G.

On the *12th instant*, while my report was in the hands of the printer, the Court of Appeals decided the case of Pokey Barnes v. Commonwealth, the test case of "the Lunenburg appeals," and gave to Solomon Marable, Mary Abernathy, and Pokey Barnes *new trials*.

The text of the opinion, delivered by *Judge John A. Buchanan*, concurred in by all the judges *except Judge Riely*, is as follows:

OPINION BY JUDGE BUCHANAN.

RICHMOND, VA., DECEMBER 12, 1895.

Pokey Barnes
v.
Commonwealth.

The first question to be disposed of is the motion of the Attorney-General and his associate, in behalf of the Commonwealth, to have the decision of this case upon the merits postponed until the county court shall have amended the record of this case in that court so as to make it show:

1st. That sixteen jurors, free from exception, were selected for the trial of the accused.

2d. That at every adjournment of the court the jury trying the case at bar were put in the custody of the sheriff, who was duly sworn as required by law, and that they were each morning returned into court in the custody of the sheriff, according to the order of adjournment.

3d. That whenever the jurors went to their room to consider of their verdict they were put in the custody of the sheriff, who carried them to their room and returned them in his custody into court.

4th. That before delivering their verdict the jurors were polled, as required by law.

The amendments which the Attorney-General desires to have made in the record, it is claimed, are based on the personal knowledge of the judge and the records of the court as they now stand, and that all the orders which it is sought to have entered to amend the record in the particulars named were made during the trial of the case, and that the clerk was then directed to enter them on the order books of the court, but by mistake failed to do so.

The rule at common law is that during the term wherein any judicial act is done, the record remains in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during the term as the judges shall direct; but when the term is past, then the record is in the roll, and admits of no alteration, averment, or proof to the contrary. (3 Thos. Coke Lit. 323, as quoted in 1 Rob. Pr. [Old Ed.] 638; Bunting *v.* Willis, 27 Gratt., at pages 158–'9; Winston *v.* Giles, Id., at page 534; Cawood's Case, 2 Va. Cases 527, 545).

It has been correctly observed that the judge, during the term, is a living record, and therefore, during that period of time, he may alter and supply from his own memory any order, judgment, or decree which has been pronounced, and this because, having made them himself, he is presumed to retain them in his recollection. But at common law, after the term has elapsed, the judge has no such power, because it is supposed there will be a period at which a judge will cease to retain in his memory the things which have been ordered and adjudged, and that period, it is well conceived, may be the end of the term, as he will then be apt to dismiss from his thoughts the things which have been previously passing in them. It is indeed a very delicate power, and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined and properly checked by law. (Note to 1 Arch. Cr. Pl. & Pr., p. 502, Pomeroy's 8th Ed.)

At an early day in this State statutes were enacted for the purpose of com-

pelling the courts to keep their records accurately, and to provide how records in certain cases might be amended. The statute now in force upon the subject of keeping such records provides that "the proceedings of every court shall be entered in a book and read in open court by the clerk thereof. The proceedings of each day shall be drawn up at large and read during that term, except those of the last day of the term, which shall be drawn up and read the same day. After being corrected, where it is necessary, the records shall be signed by the presiding judge." Sec. 3114, Code of 1887.

This statute and those which preceded it upon the same subject were intended to provide for keeping the records of the proceedings of every court correctly by making it the duty of the clerk to enter them in a book, and to read them in open court to the judge in the presence of the bar, so that any errors in or omissions from them might be corrected.

Recognizing the fact, however, that notwithstanding these wise and salutary provisions, that errors and omissions might still occur, other statutes were enacted, which authorized the courts, after the end of the term, to make amendments and corrections in certain cases. Section 3451 of the present Code, among other things, provides that "the court in which is rendered a judgment or decree in a cause wherein there is in a declaration or pleading, or in the record of the judgment or decree, any mistake, miscalculation, or misrecital of any name, sum, quantity, or time, when the same is right in any part of the record, or proceedings, or where there is any verdict, report of a commissioner, bond, or other writing whereby such judgment or decree may be safely amended, * * * may amend such judgment or decree according to the truth and justice of the case."

These are the regulations established by the Legislature for keeping and amending judicial records, and the few cases which we have in our reports upon the subject show how effective they have been in preventing litigation, and the slight changes that have been made in them during the long period they have been in force show how successfully they have accomplished the purpose for which they were enacted.

In Cawood's Case, reported in 2 Va. Cases 527, decided by the General Court in 1826, six questions were adjourned by the superior court of Wythe county to the General Court, on account of their novelty and difficulty, for its opinion. Among them were the following:

1st. What is the legal effect of an omission, on the part of the clerk of the circuit court of Washington county, to enter on the order book that the grand jury, at the last April term of that court, had found an indictment against Benjamin Cawood and others "a true bill"?

2d. Can such an omission be supplied by resorting to the paper purporting to be an indictment, copied into the record by the clerk, and the endorsement thereon purporting to have been made by the grand jury, finding it to be "a true bill"?

The case was very fully and ably argued. In answer to the first question the court held that it was necessary to record the finding of the grand jury in order to perfect the indictment.

In answer to the second question—and the one which is important in considering the case at bar—the General Court said, at page 545: "The next question is, whether the omission of the grand jury can now be supplied, and

whether the record can be amended in this particular. A view of the decision, of this country and in England, and referred to by the counsel, leads us to the conclusion that during the term the records are in the breast of the court, and that amendments may be made in the proceedings of the court; but that after the term has passed, no amendment can be made, except mere *clerical misprisions;* that this is not a misprision of that kind; that the term having passed, there is nothing to amend by except the memory of the judge, of the clerk, of the grand jurors, and others, and that it cannot be amended."

In the case of Burch *v.* White, 3 Rand. 104, at the next term after the judgment was entered, an order was made stating that at the previous term of the court an appeal had been allowed from the judgment, but that the clerk had omitted to enter it, and therefore the appeal was allowed *nunc pro tunc.* This court said whether an appeal would lie from a judgment was a question of law to be decided by the court; and the only evidence of what the court had done was the record. It was not a case in which there was anything in the record to amend by. For, though an appeal bond had been filed in the office, that furnished no proof that the bond had been received by the court, or that an appeal had been allowed.

In Powell's Case, 11 Gratt. 822, the accused was indicted for forgery, tried and convicted. After the expiration of the term at which he was convicted, he applied to the judge of the circuit court, in vacation, to amend the record; and the judge made an order directing that the record should be amended so as to show that, upon the arraignment of the prisoner for the offence of which he was convicted, he moved the court, through his counsel, to quash the indictment, and each count thereof; that his motion was overruled, but was omitted to be entered upon the record. Judge Lee, in delivering the unanimous opinion of the court, said:

"Waiving the question whether the provision in the Code, ch. 181, sec. 5, p. 681, authorizing amendments in judgments or decrees of a court in certain cases by the judge in vacation, after the adjournment of the term, can apply to a case of felony, in which all the proceedings should regularly be had in presence of the accused, or to any criminal case, I am yet of opinion that no such amendment of the record as that attempted to be made in this case by the action of the judge, in vacation, on the 11th of May, 1854, is within the scope of that provision. It was intended to authorize amendments in support of a judgment in cases in which there was something in the record by which they could safely be made. It could not have been intended to authorize an amendment to be made upon the individual recollection of the judge, or upon proofs *aliunde.* Nor was the application in this case to amend the judgments nor was it designed to aid the judgment when made. It was an application to introduce something into the record as part thereof not before found therein, depending on the recollection of the judge, or upon proofs to be submitted to him; and its object was to provide a means of reversing the judgment, not of sustaining it.

"The construction given by the English courts to the statutes of amendment required that there should be something to amend by. (Tidd's Prac. 246, 247; Com. *v.* Winstons, 5 Rand. 546, opinion of Judge Green.) And such is, I think, the plain meaning of the provision in question in our statute. And if no amendment can be made in the record of a judgment after the term, except under the statute, or in the few cases allowed by the common law, of

which this is not one, the amendment attempted to be made in this case must be disregarded."

Whether the authority of the courts in this State to amend its records after the term at which a final judgment has been entered be derived solely from our statute, or from both the common law and the statute, it is clear that under our statutes, decisions, and practices, whatever may be the rule in other jurisdictions, they can only make amendments in cases in which there is something in the record by which they can be safely made, and that amendments cannot be made upon the individual recollection of the judge, or upon proofs *aliunde*.

There is nothing in the record in this case, as certified by the clerk of the county court, by which the court of that county could amend it in any of the particulars in which it is sought to have it amended, and, if the court attempted to amend it, it would be upon the judge's own personal recollection, or upon proofs *aliunde*. This, we have seen, cannot be done.

The motion of the Attorney-General to postpone the case until such amendments can be made must, therefore, be overruled, and the case disposed of on the record as it is.

It is assigned as error that the jury which tried the accused was not selected in the manner provided by law, in this: That section 4023 of the Code requires that a panel of sixteen persons, free from exception, shall be selected, from which the accused may strike four, and the remaining twelve shall constitute the jury for his trial; whilst the record shows that sixteen persons were selected, but fails to show that they were free from exception.

Section 3156 of the Code, as amended by an act approved February 27, 1894, (Acts of Assembly 1893–'4, ch. 43, p. 494,) provides that "no irregularity in any writ of *venire facias*, or in drawing, summoning, returning, or empanelling of jurors, shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the swearing of the jury."

No objection was made in the trial court at any time to this irregularity, nor does it appear that the accused was injured by it. This assignment of error cannot be sustained.

The accused was indicted jointly with two other persons, but tried separately. The record does not show upon whose motion she was tried, and this is assigned as error. Each and every person indicted jointly for a felony may elect, as a matter of right, to be tried separately, under section 4029 of the Code, and the attorney for the Commonwealth has the right to try them separately, subject to the control of the court; but persons jointly indicted cannot be tried jointly, without the concurrent election of themselves on the one hand, and the attorney for the Commonwealth or the court on the other. But, if it were true that the accused had the right to be tried separately or jointly at her election, there is nothing in the record to show that she made her election to be tried jointly, and the right (if she had such right) was denied her. Such fact, not appearing in the record by bill of exceptions, or in any other manner, cannot be presumed to have existed. (Curran's Case, 7 Gratt. 619, 626–'7; Lewis and Denny's Case, 25 Gratt. 938.)

The accused insists that the trial court erred in not removing her case to another county for trial, and that its instructions to the jury were erroneous.

There is nothing in the record to show that she was entitled to a change of

venue, or that a motion was made for that purpose; neither does the record show that the court gave any instructions to the jury.

This court considers, and can only consider, a case brought here by a writ of error or appeal upon the record of the case as made in the court below. If the record fails to show the errors of which they complain, no relief can be had in this court, however erroneous the action of the trial court may have been.

It is also assigned as error by the accused that she was tried and convicted without the assistance of counsel in making her defence.

The record does not show whether she had counsel or not; but, if it showed that she did not have counsel, unless it appeared that she was denied that right, it would not be ground for reversing the judgment. Every person convicted of crime has a constitutional right to have counsel to aid him in making his defence, but no one is compelled to have counsel. If a person accused of crime is able to employ counsel, but declines to do so, and goes to trial without counsel, and is convicted, that is no ground for reversing the judgment.

If a prisoner is unable to employ counsel, the court may appoint some one to defend him, and it is a duty which counsel owes to his profession, to the court engaged in the trial, to the administration of justice, and to humanity, not to withhold his aid nor spare his best efforts in the defence of one "who has the double misfortune to be stricken with poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so." (Cooley's Const. Lim. 406.) But we cannot presume that the trial court denied the prisoner her constitutional right to have counsel, or failed, if she were unable to employ counsel, to assign some one to aid her in her defence.

It is also assigned as error that the jury who tried the accused were not, when the court adjourned from day to day during the trial, committed to the custody of the sheriff, with instructions from the court not to speak to them himself, nor to suffer any other person to speak to them, touching the trial.

In a prosecution for a felony in this State, where the punishment may be death or confinement in the penitentiary for more than ten years, the jury must be kept in the custody of the sheriff, or other proper officer, when not in the presence of the court, and their separation out of his custody and control is *prima facie* sufficient to vitiate the verdict. (Phillips' Case, 19 Gratt. 485, 540, and cases there cited.)

To sustain this assignment of error the accused relies upon the orders of the court in the cause, among which are the following:

"At a county court, continued and held in and for the said county, at the court-house thereof, on Tuesday, the 18th day of July, 1895.

"Pokey Barney, who stands indicted for murder, was again led to the bar in custody of the sheriff of this court, and the jury sworn on Tuesday to try this case appeared in court, according to their adjournment on yesterday, and, having partly heard the evidence, were again adjourned till to-morrow morning at 9 o'clock, and the prisoners remanded to jail."

"At a county court, continued and held in and for said county, at the court-house thereof, on Friday, the 19th day of July, 1895.

"Pokey Barnes, who stands indicted for murder, was again led to the bar in custody of the sheriff of this court, and the jury sworn on Tuesday last to try this case appeared in court, in accordance with their adjournment on

yesterday, and, after partly hearing the evidence, were again adjourned till to-morrow morning at 9 o'clock. And the prisoner is remanded to jail."

The question raised by this assignment of error is one which, so far as we can ascertain, has never been decided by this court. In Bennett's Case, 8 Leigh 745, the record showed that on each day the jurors were committed to the custody of the sheriff, who was directed to attend and keep them together in one of the jury rooms, without communication with any other person, and to cause them to appear in court the next day, but it did not show that the sheriff was sworn to perform that duty. The majority of the court held in that case that it was *ex officio* the duty of the sheriff to keep the jury, and that it was not indispensably necessary that he should be sworn, though it was generally done out of abundant caution.

The form of a record of the proceedings in court in a felony case at common law is given by Chitty, in his work on Criminal Law, at page 720, and it is also given in the appendix to Vol. II. of Chitty's Blackstone. Some of the proceedings which are noticed in that form are no longer required, whilst others not contained therein are now made essential.

It will be observed in the form given by Chitty that there is no notice taken of the jury during the progress of the trial. The reason, no doubt, was that, after the jury were sworn, the court proceeded with the trial, without adjournment, until it was ended.

In the case of King v. Stone, reported in 6 Term Rep. 527-'31, it is stated that "the court, having set on the first day of the trial from 9 o'clock in the morning till 10 o'clock at night, without any interruption or refreshment, and the Attorney-General stating that his evidence would occupy four hours more, and some of the jury being very much exhausted, and incapable, as they declared, of keeping up their attention much longer, the court adjourned until nine o'clock the next morning." Lord Kenyon observing that necessity justified what it compelled, and that though it was left to modern times to bring forward cases of such extraordinary length, yet no rule could compel the court to continue longer sitting than their natural powers would enable them to do the business of it, he allowed the jury to retire, and entered the following order:

"Forasmuch as it appears to the court here, from the length of time which has been already occupied by the trial of the issue joined upon the indictment, and the further time which will be necessarily occupied by the same, that justice cannot be done if this court proceed without intermission upon the said trial, it is ordered that the jury impanelled and sworn to try the said issue have leave to withdraw from the bar of this court, being well and truly kept by six bailiffs, duly sworn not to permit any person to speak to them touching any matter relative to the trial of this issue, and that the same jury shall again come to the bar of this court on to-morrow at nine o'clock in the forenoon."

Since that time this seems to have been the practice in England, and it has been the practice in this State from an early day.

Mr. Robinson, in his Old Practice, Vol. III., p. 246, published in 1839, says:

"When the jury, in a case of felony, cannot fully hear the evidence and the arguments of counsel on the day that they are empanelled, the practice in Virginia is to commit them to the custody of the sheriff, or other officer, who is directed to keep them together, without communication with any other

person, and to cause them to appear before the court at the hour to which it adjourns. At the time of so committing the jury to the custody of the officer it is usual to administer an oath to the officer to the following effect: 'You shall well and truly, to the best of your ability, keep this jury, and neither speak to them yourself, nor suffer any other person to speak to them, touching any matter relative to this trial, until they return into court.' "

The record in Kennedy's Case, 2 Va. Cases 510, decided in 1826, and in Mendum's Case, 6 Rand. 704, as is stated in Bennett's Case, 8 Leigh 745, decided in 1837, showed this to be the practice, except that the record in those cases failed to show that the sheriff in whose custody the jury were placed was sworn.

We have examined records in capital cases of recent date, now on file in the clerk's office of this court, and find that they show that the jury, at each adjournment of the court, was placed in the custody of the sheriff, or other proper officer, with instructions not to speak to them himself, nor to allow any one else to speak to them, touching the trial. We think this may therefore be regarded as the settled practice in this State.

This practice is based upon that principle of the common law that the accused in every felony case was not only entitled to a jury free from exception when empanelled to try his case, but that he had the right to have them remain so until their verdict was rendered, by keeping them free, as far as possible, from all extraneous influences.

We think it may be safely said that any practice, so salutary and wise, and so admirably calculated to protect and insure the rights and interests of both the accused and the Commonwealth in felony cases, and which has been uniformly pursued for a great length of time, ought to be regarded as showing what the law is on the subject.

We are of opinion, therefore, that where the record in a capital case shows that the jury were adjourned from one day to another, it ought also to show that upon such adjournment they were committed to the custody of the proper officer, with instructions not to speak to them himself, nor to allow any one else to speak to them, touching the trial of the case in which they are engaged.

As the record in this case fails to show this, the judgment of the trial court must be reversed, the verdict set aside, and a new trial awarded.

In the cases of Mary Abernathy *v.* The Commonwealth, and of Solomon Marable *v.* The Commonwealth, the judgments will be reversed, the verdicts set aside, and new trials awarded in each case, for the reasons given in the case of Pokey Barnes *v.* The Commonwealth.

DISSENTING OPINION OF JUDGE JOHN W. RIELY.

RICHMOND, VA., DECEMBER 12, 1895.

Pokey Barnes
v.
Commonwealth.

I concur in all of the opinion except that part which holds that where, upon the trial of a capital case, the jury are adjourned from one day to another, the record should show that the jury, upon such adjournment, were placed in the custody of the proper officer, with instructions not to speak to them himself, nor allow any one else to speak to them, touching the trial of the case. From that I

am constrained to dissent. It is a proper and well-established practice that the jury, upon an adjournment, should be placed in the custody of the proper officer and kept together, free from all extraneous influences, but it is not a necessary part of the record to sustain the judgment. It is, in my opinion, not one of the essentials of the record which should affirmatively appear, but is one of the incidents of the trial that this court should presume was regular unless the contrary appears. It should be presumed that the court in the conduct of the trial proceeded orderly and in the usual way, unless the contrary appears by the record, or was made so to appear by some appropriate proceeding.

OPINION OF JUDGE JOHN W. RIELY.

Marable
v.
The Commonwealth.

In addition to what I have said in the case of Pokey Barnes, I desire to add that in this case the order of the trial court recites that "the jury sworn on yesterday to try this case appeared in court, according to their adjournment, *in custody of the sheriff of this court*. I think that it is a fair and reasonable presumption from this that the jury were duly placed by the court, at the adjournment on the evening before, in the custody of the sheriff. How else would they or could they be the next morning in his custody?

I call your Excellency's attention to the "preliminary order" made at the trial of Pokey Barnes' case. You will see, although Judge Orgain refused to make the "*nunc pro tunc* order," and correct his trial records, in the absence of the convicts, the Commonwealth has secured full benefit of such orders, provided the court shall hold it was in the judge's power to make them. This result would have been attained in the outset, had the conference requested by you been granted. As you have said, "All's well that ends well," yet a *sting* remains. Sergeant C. H. Epps, a faithful, honest, efficient, and brave officer, has been punished for contempt, and fined by a Virginia judge, because, *as was his duty*, he obeyed the order of the judge of the circuit court of Richmond city, and held the convicts in his jail.

With the opinion of "the majority judges" of the Court of Appeals before me, and the experience of the past in this matter, I am the better satisfied I advised you properly, as I all you have done was lawful, and within the powers conferred by the Constitution upon the "executive department" of the State government, and did no violence to the "judiciary department," and I know that none was intended.

MARY BARNES' CASE.

"Process" from the county court of Lunenburg was served upon B. W. Lynn, superintendent of the penitentiary, in the words and figures following:

THE COMMONWEALTH OF VIRGINIA,

To the Sup't of the Virginia State Penitentiary—Greeting:

We command you that the body of Mary Barnes, detained by you, and under

your custody, as it is said, by whatsoever name she may be called, you have before the judge of our county court of the county of Lunenburg, at the court-house thereof, on the 13th day of November, 1895, to do, submit to, and receive all and singular those things which shall then and there be considered of her in this behalf, and to make defence to a motion then and there to be made on that day to correct the records of Lunenburg county court upon her trial for murder of *M.* J. Pollard. And have then there this writ.

Witness Jno. L. Yates, clerk of our said court, at the court-house, the 11th day of November, 1895, in the 120th year of the Commonwealth.

JNO. L. YATES, *Clerk.*

I addressed to Judge Orgain the letter that follows:

ATTORNEY-GENERAL'S OFFICE,
RICHMOND, VA., *November 13th, 1895.*

Hon. GEORGE C. ORGAIN,
Judge of Lunenburg County Court:

DEAR SIR:

Mr. B. W. Lynn, superintendent of the State penitentiary, has handed to me the process of your court, dated the 11th instant, which process commands him to produce before you this day the body of Mary Barnes, in his custody—in the words of the process, "to do, submit to, and receive all and singular those things which shall then and there be considered of her in this behalf, and to make defence to a motion then and there to be made on that day to correct the records of Lunenburg county court upon her trial for murder of *M.* J. Pollard." Who applied for this writ, I know not, but suppose it was upon the petition or motion of the attorney for the Commonwealth.

The papers delivered to Superintendent Lynn with the body of Mary Barnes are attested as the record of her trial in your court, and show that Mary Barnes was found guilty of the murder of Mrs. Lucy Pollard, and her punishment ascertained by a jury—ten years imprisonment in the penitentiary; and this term of servitude she is now rendering in that prison-house. It therefore must follow that Mary Barnes is *civiliter mortuus*, and over her the county court of Lunenburg has no jurisdiction or power.

Without meaning or intending any or the least disrespect to your court, by my advice and by my direction, Superintendent Lynn respectfully declines to obey the process served upon him. I have advised Judge Mann and Mr. Southall, with whom I had a satisfactory conference to-day, of my action.

Without the petition upon which the process of your court is based, it is impossible for me to prepare Superintendent Lynn's return thereto. Oblige me, therefore, by sending me a copy. As soon after I receive it as is possible I will prepare his return upon the lines indicated in this letter; and, should the return prove insufficient and unsatisfactory, then make your order and punish the contempt. From this order I will appeal, give proper bond, and the Court of Appeals decide the issue thus raised.

This is a matter too far-reaching in its consequences to let it stop short of the judicial tribunal of last resort. If such power as you propose to exercise after conviction, sentence, and incarceration in the State's prison-house be in the courts, then the penitentiary is no longer under the control of the superintendent and board—the Commonwealth's selected and entrusted agents.

Before concluding this letter, I take the liberty to say that I regret your action in awarding the rule for contempt against Sergeant Epps, the jailor of this city. If wrong was done, and the dignity of your court or yourself trespassed upon, the Governor and myself, and not Sergeant Epps, were the offenders. I know of my own knowledge and connection with this matter that no indignity was intended, and, as I think, none was done to you or to your court.

Very respectfully yours,

R. TAYLOR SCOTT,
Attorney-General.

To which he replied:

LUNENBURG COURTHOUSE, VA.,
NOVEMBER 16TH, 1895.

Hon. R. TAYLOR SCOTT,
Attorney-General of Virginia,
Richmond, Va.:

DEAR SIR:

Your letter of the 13th of November was received by the last mail, and I reply at once.

I enclose, as requested by you, the petition filed by W. E. Neblett, Commonwealth's attorney of Lunenburg county, Va., at this term of the county court of Lunenburg, upon which my order to Superintendent Lynn, of the State penitentiary, is based.

I am of the same opinion now as when I issued the said order.

With the highest consideration and respect, I am, &c.,

GEO. C. ORGAIN,
Judge of the County Court of Lunenburg.

To the Hon. County Court of Lunenburg County:

The undersigned, W. E. Neblett, attorney for the Commonwealth for Lunenbury county, respectfully represents unto your Honor that Mary Barnes, who was, at the July term, 1895, of your Honor's court, upon her trial for the murder of Mrs. *Mary* J. Pollard, convicted of murder in the second degree, and sentenced to imprisonment in the State penitentiary for ten years, is now serving said sentence, and is now in the charge and custody of the superintendent of the Virginia State penitentiary. That the said Mary Barnes has obtained from Court of Appeals of Virginia a writ of error to the said judgment of your Honor's court. That the records of your Honor's court, on the trial of said Mary Barnes, fails to show all that occurred on said trial, and that writ of error as aforesaid was obtained on said record which failed to state all that occurred; and that the undersigned is desirous, at this term of your Honor's court, to make a motion to have a *nunc pro tunc* order entered, showing what really occurred upon the trial of Mary Barnes, and that in his opinion it is absolutely necessary to have Mary Barnes personally present in court; therefore prays that your Honor will issue a writ of *habeas corpus*, directed to the superintendent of the Virginia State penitentiary, requiring him to produce the body of the said Mary Barnes before your Honor's court

at some future day of this term, so that she may be present when said motion is made.

Respectfully submitted,

W. E. NEBLETT,
Att'y for the Commonwealth of Virginia.

Sworn to by W. E. Neblett, attorney for the Commonwealth for the county of Lunenburg, before me, this the 11th day of November, A. D. 1895.

JNO. L. YATES,
Clerk County Court Lunenburg County, Va.

A copy.—Teste:

JNO. L. YATES, *Clerk.*

If authority and precedent be needed to sustain my action in this matter, it will be found in Barker's Case, 2 Va. Cases 122; 3 Rob. (old) Prac. 308, and the Acts 1883-'4, chap. 279, p. 368.

CIRCUIT COURT FOR RICHMOND CITY.

1. Commonwealth of Virginia v. Grange Camp Association of Northern Virginia et als.

The races near the long bridge in Alexandria county, conducted by "The Grange Camp Association of Northern Virginia," under the charter granted by the Legislature, (Acts 1885-'6, p. 256,) were of such character—so much complained of and denounced—that I regarded them "a public nuisance," and sued out an injunction to abate it.

I was kindly and most efficiently assisted in this work by *Judge J. K. M. Norton*, of Alexandria city, who wrote the bill and secured the necessary affidavits to support it.

Judge Wellford granted the injunction January 10th, 1895; then enlarged it to the 23d of that month. On that day, finding before me protracted and uncertain litigation, and knowing the Legislature, with full power over the charter, would assemble in December, with the approval of the judge and *Judge Norton*, my associate counsel, "a compromise" was made, and formulated into "a consent decree." The case remains on the docket, but no further action was to be taken by the Commonwealth so long as the defendants fulfilled and carried out "the agreements" made upon their part, and, so far as I know, this they have done.

The charter of this company has been so misused and perverted that the Legislature should make haste to annul it.

Racing, I think, should be restricted to the spring and fall seasons, limited in duration, and making, writing, or selling books, or pools, or mutuals on the result of any trotting or running race, or race of any kind, forbidden under heavy pains and penalties.

2. Commonwealth v. William Mayo, treasurer of Westmoreland county and sureties. *Judgment* April 16th, 1895, $1,948.11, subject to credit of $65.

3. Same v. Same. *Dismissed by order of auditor.*

4. Commonwealth v. Lewis Jones, treasurer of Middlesex county and sureties. *Judgment* June 1st, 1895, $2,748.86.

5. Commonwealth v. Thomas Newman, treasurer of York county, &c. *Judgment* May 29th, 1895, $1,410.15. *Paid.*

6. Commonwealth *v.* John E. Bland, late treasurer of Gloucester county, &c. *Amount claimed*, $754.49. *Pending.*

7. Commonwealth *v.* H. R. Garland, treasurer of Richmond county and sureties. *Amount claimed*, $114.07. *Paid and dismissed.*

8. Commonwealth *v.* Charles W. Woolfolk, treasurer of Orange county, &c. $7,932.13. *Dismissed by auditor* November 15, 1895.

9. Commonwealth *v.* I. L. Sanders, treasurer of Henry county, &c. *Judgment* November 15, 1895, $7,185.20.

10. Commonwealth *v.* R. S. Ryland, treasurer of King William county, &c. $7,971.61.

11. Commonwealth *v.* Hiram R. Stowers, treasurer of Bland county, &c. $2,371.29. *Pending.*

12. Commonwealth *v.* John M. Dawson, treasurer of James City county and city of Williamsburg. $719.29; due as late treasurer of James City county. *Pending.*

13. Same *v.* Same. $2,189.92; due as late treasurer of city of Williamsburg. *Pending.*

14. Commonwealth *v.* William Mayo, late treasurer of Westmoreland county, &c. $2,859.92. *Pending.*

15. Coffee Stemming Machine Co. *v.* Marye, auditor. Petition for *mandamus* to refund charter tax. *Dismissed.*

16. Commonwealth *v.* A. A. Chapman. Attachment in equity. *Pending.*

17. Roanoke Trust, Loan and Safe Deposit Co. *v.* Marye, auditor. Injunction to restrain collection of tax on holders of the stock of complainant company. *Injunction refused* by Judge Wellford, and *again refused* by the Court of Appeals at Wytheville.

N. B.—I have been unable to do anything with the following cases, which stand as received from *Mr. Ayers:*

Robinson *v.* Greenhow.

Brown, Davis & Co. *v.* Greenhow.

Saunders & Son *v.* Greenhow.

Chaffin & Co. *v.* Greenhow.

These are coupon suits, matured and ready for trial.

Commonwealth *v.* Huffman et als. This was a suit to subject certain property of the defendants to the payment of a judgment.

Commonwealth *v.* Page, escheator. This was a suit to recover certain property which came into defendant's hand by virtue of his office.

Commonwealth *v.* Grantham. The object of this suit was to subject property of defendant to satisfy a judgment.

Commonwealth *v.* Millan. The object of this suit was to clear the title and subject certain land of the defendant to the payment of a judgment.

The above are all old cases.

CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

The Oleomargarine Law.

In March last I was informed by *Mr. E. M. Baum*, Commonwealth's attorney for Norfolk city, that *Judge Hughes*, on writ of *habeas corpus*, declared the statute entitled "An act to prevent the adulteration of butter and cheese, and

the sale of the same, and to preserve the public health," (Acts 1891–'2, p. 840,) unconstitutional and void, because repugnant to the Constitution of the United States, and *Mr. Baum* asked my authority to take an appeal to the United States Supreme Court. I answered:

ATTORNEY-GENERAL'S OFFICE,
RICHMOND, VA., *March 9th, 1895.*

Mr. BAUM, *Commonwealth's Attorney, &c.,*
Norfolk, Va.:

MY DEAR SIR:

After conference with the Governor, and reading *Judge Hughes'* opinion in the oleomargarine cases, recently decided by him, I do not think appeal should be taken.

You will therefore submit to the adjudication and decision.

Governor O'Ferrall will bring the matter before the General Assembly when it meets in December next, and, in the light of this case, they can best apply a remedy to the wrong complained of, by enacting a law free from the faults the present statute has been adjudged to contain.

Very respectfully yours,

R. TAYLOR SCOTT,
Attorney-General of Virginia.

In his decision *Judge Hughes* followed Voigt *v.* Wright, 141 U. S. 62, and Brimmer *v.* Rebman, 138 U. S. 78, in which Virginia's flour and meat inspection laws, so called, were declared void.

The following cases in this court, *at Richmond*, are unchanged since my last report, and stand as received from *Mr. Ayers:*

Commonwealth *v.* Baltimore and Ohio Railroad Company.

This is a suit originally brought in the circuit court of the city of Richmond to recover judgment against the company for taxes due the State, the company having tendered coupons in payment. The defendant company, being a non-resident, removed the case to this court. The case would have been tried ere now, but the death of *Judge Sheffey* and other incident causes have prevented it.

Gatewood *v.* The State of Virginia.

Parsons *v.* Marye, auditor.

These cases were fully argued and submitted to the court for decision in 1886, and the court has been *deliberating* upon them ever since.

In Equity.

James P. Cooper *v.* Lewis P. Winston, sheriff.

D. K. Stewart *v.* J. W. Southward, sheriff.

These are injunction suits to restrain the sheriffs from levying executions upon judgments rendered under the act of May 12, 1887.

Temporary restraining orders were issued, to which Winston, sheriff, paid no attention. The principles were settled against plaintiffs by the decision in cases cited, but they remain on the docket.

CIRCUIT COURT OF THE UNITED STATES FOR WESTERN DISTRICT OF VIRGINIA.

1. The American Harrow Co. *v.* Shafer, com'r, & als. was decided in favor of

the Commonwealth, and appealed to the United States Supreme Court, where it is now pending.

2. Commonwealth of Virginia *v.* R. C. Taylor.

3. Same *v.* I. W. Wilson.

These last two cases have not been tried, and are upon the docket at Abingdon.

Lynchburg Docket.

There has been no change in the Lynchburg docket. It stands as given on pages 24 and 25 of my last report (1894).

SUPREME COURT OF THE UNITED STATES.

In this court the following cases are pending and undetermined:

1. Dillard *v.* Moorman, treasurer. *No. 96.*
2. McCullough *v.* Virginia. *No. 733.*
3. The American Harrow Co. *v.* Shafer & als.

BOARD OF PUBLIC WORKS.

For this board I have prepared deeds for the following public property sold by them—namely: To Edward C. and Samuel Woodson Venable, a deed to the property known as "the penitentiary spring lot," the title to which came from Mrs. Virginia C. Southall's heirs; to E. H. Bissell, a deed for the property known as the "cattle pens."

VIRGINIA'S DEBT TO THE UNITED STATES.

In my last report (1894), pages 36 to 138, I gave in detail Virginia's claim for advances made from 1813 to 1828 to the Federal Government, aggregating $1,792,371, and collected reports and documents bearing upon it.

I gave the text of *Treasurer Harman's* letter, dated May 28, 1894, to *Mr. Morgan*, and copy of a paper dated April 12, 1870, made for *Hon. John W. Johnston*, senator from Virginia, by *Hon. George S. Boutwell*, then Secretary of the Treasury, in which this claim is stated, showing that on January 1st, 1833, there was due Virginia $342,392, *with interest from that date.* This debt should be collected. Deduct the *half million of dollars* due to the United States, and a handsome balance remains, long withheld, but justly due—money loaned when Virginia was rich—and, now that she is poor and in distress, greatly needed. The fire of October past destroyed the rotunda and other buildings at the University of Virginia. This university was Thomas Jefferson's "*chef d'ouvre,*" and the pride of his life—equal in honor to being author of the bill which secured religious liberty to a new-born nation and of the Declaration of Independence—the confederated States' Bill of Rights.

The General Assembly, by proper legislation, should devote this balance to rebuild and endow the University of Virginia, and her senators and representatives in Congress should bend their every energy and endeavor to have it paid. With it she can make the University's waste places again to bloom and blossom as the rose, and, like the "Phœnix," she will arise from her ashes grander and more beautiful than ever before—better equipped for the work the great Virginian designed her, which, in the past, she has done so well and so nobly. *Alma mater clarissima esto perpetua!*

THE BOUNDARY LINE BETWEEN VIRGINIA AND TENNESSEE.

By decree made in Virginia v. Tennessee, (148 U. S. 503,) "the compromise line of 1803" was declared to be the true boundary line between said States, but the court did not order that this line be marked. In the county of Washington the location of the line is not marked, and this uncertainty is the fruitful cause of dissension, differences, and trouble—*a real Pandora's box*. Land titles are in sad plight. What the Virginia courts decide is reversed by the courts of Tennessee, and Virginia's criminal laws time and again have been set at naught and openly defied.

I have *twice* tried, but without success, to amend the decree and have the boundary line marked, and am now making an effort to accomplish this by "amended bill" and "consent decree." How it will result remains to be seen. *Judge William F. Rhea*, who, with *Hon. Rufus A. Ayers*, was associated with me in this case, has the matter in charge, and will, I am sure, do all that can be done.

I think it would be well, and suggest and advise, that the Legislature appoint "a commission" to take the boundary-line business in charge, and that Tennessee be asked to appoint a like commission, with power to survey and distinctly mark "the boundary line of 1802," and that proper appropriation be made for this work. I take the liberty, further, to suggest that the following persons be the Virginia commissioners—viz.: *James L. White*, of Abingdon; *Judge William F. Rhea*, of Bristol, and *Rufus A. Ayers*, of Scott. I know that each of these gentlemen are well equipped for the work, and familiar with the history and details of this long-pending controversy.

SURETY COMPANIES AND OFFICIAL BONDS.

I desire to call the attention of the General Assembly to the act approved March 5th, 1894, entitled "An act to regulate, &c., guaranty, trust, indemnity, fidelity, and other like companies," and that entitled "An act to facilitate the giving of bonds required by law," (Acts 1893–'4, p. 758; *Id.*, p. 764,) and ask what is the meaning of "section 2" of the latter statute. Are the Commonwealth's officers, who are required to give bonds in the settlement of their accounts, to be allowed the cost incurred in obtaining trust or indemnity companies as their surety, provided the sum thus paid is reasonable? What measure must be applied to determine what sum thus expended *is reasonable*? This matter was presented to me by *Judge R. H. Beale*, in a letter dated May 30th, 1895, and to him I replied:

ATTORNEY-GENERAL'S OFFICE,
RICHMOND, VA., *July 11th, 1895*.

Judge R. H. BEALE,
Hague, Va.:

DEAR SIR:

In the pressure of my work your letter of 30th May past has been overlooked, and apparently I have been guilty of gross neglect and want of courtesy, but the intent or purpose wholly wanting, I do assure you. I have examined the statutes referred to—viz., that formulated in chap. 661, pp. 758 to 764, and chap 662, pp. 764–765, Acts 1893–'4—the latter entitled "An act to facilitate the giving of bonds required by law." The true meaning of the act, as stated in section 1, is "to enable corporations created for that purpose to

become surety on bonds required by law, subject to all the rights and liabilities of private parties." When the company offered as surety shows, to the satisfaction of the court or judge, or other officer authorized to approve the bond, that it is of the class designated and described in section 1 of the last-mentioned statute, it stands before "the court, judge, or other officer" as any individual would who is offered as surety.

The language of section 2, "any court or officer whose duty it is to pass upon the account of any person or corporation required by law to give a bond may, whenever such person or corporation has given any such surety company *as* (?) surety upon said bond, *allow in the settlement of such account* a reasonable sum for the expense of such surety," is so ambiguous that I cannot specify nor classify the persons, court, or officers to whom this section applies; and I have advised Auditor Marye to decline to allow such credit to State officials whose accounts are adjusted by him.

I will not make the venture, but await the action of the Legislature, or the Supreme Court of Appeals' interpretation of this law.

Yours very respectfully,

R. TAYLOR SCOTT.

THE VIRGINIA AGRICULTURAL AND MECHANICAL COLLEGE.

It was asked by *Hon. C. E. Vawter*, rector of the Virginia Agricultural and Mechanical College, to construe sections 162 and 163, Code of Virginia 1887, which forbids holding *at the same time* State and Federal offices, as applicable to *President McBride*, who had been tendered by the Department at Washington, D. C., the appointment of "statistician" for the division comprising the States of Virginia and West Virginia. I replied:

WARRENTON, VA., JULY 25TH, 1895.

Hon. C. E. VAWTER,
Rector Virginia A. & M. College,
Crozet, Va.:

MY DEAR SIR:

Your letter of the 16th instant, forwarded to me from Richmond, came several days ago.

You state that Dr. J. W. McBride, president of the Virginia Agricultural and Mechanical College, has been appointed, by the Department of Agriculture, at Washington, D. C., statistician for the division comprising the States of Virginia and West Virginia, and ask, if Dr. McBride accepts this office and its emoluments, does he vacate his position as president of the college?

To make answer, I must construe sections 162 and 163, Code of Virginia 1887. The latter section enacts, "That no person shall be capable of holding any office or post mentioned in the preceding section [that is, "any office of honor, profit, or trust under the Constitution of Virginia"] 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." What, then, is President McBride's status under the Constitution and laws of this Commonwealth?

The State Constitution, Art. VIII., is devoted to "*Education.*" Section 5 of this article commands the General Assembly to establish, as soon as possible, "normal schools," and empowers that body to establish "agricultural schools," and such grades of schools as shall be for the public good. "The land scrip" donated Virginia by Congress was invested in bonds of the Commonwealth, (Acts 1871–'2, p. 48,) and the income from these bonds appropriated in part (2-3) to the Preston and Olin Institute, in the county of Montgomery, whose name was changed to the Virginia Agricultural and Mechanical College. (Acts 1871–'2, p. 312.)

The Board of Visitors of this College is appointed by the Governor, by and with the consent and advice of the Senate, selected, as far as is practicable, two from each of the four grand divisions of the State, is a body corporate known as "The Board of Visitors of the Virginia Agricultural and Mechanical College," and required to appoint a president. (Code of Virginia, 1887, chapter 70.)

The Virginia Agricultural and Mechanical College, therefore, was established under and pursuant to the State Constitution, is governed by State laws, and its president is a State officer, prohibited from holding any office or post of profit, trust, or emolument under the Federal Government, or to be in its employment or in any way receive from it emolument.

The acceptance by President McBride of the post of statistician for Virginia and West Virginia, tendered him by the United States Department of Agriculture, as I construe the Constitution and laws of this State, *ipso facto* will vacate the office he now holds.

After careful examination of the reply made by two judges of the Supreme Court of Maine to the Governor of that Commonwealth, reported in 3d Greenleaf's Reports, appendix No. 2, 481; Respublica *v.* Alexander James Dallas, 3d Yeats (Penna.), p. 300, and Dickson *v.* People, 17th Ill., p. 191, in which similar laws have been construed, and United States *v.* Hartwell, 6th Wall., p. 385, keeping before me the *differentiæ* between "office" and "employment," I have reached my conclusion, and am satisfied that it is in accord with the legislative will first formulated in the statute passed December 8th, 1788, (12th Hen. Stat., chapter 43, page 694,) and from that day to this re-enacted, stripped of verbiage, but the enunciation of a principle and truth as old as the Christian dispensation: "No man can serve two masters."

Very respectfully yours,

R. TAYLOR SCOTT,
Attorney-General of Virginia.

THE NEW BALLOT OR WALTON LAW.

(*Acts 1893–'4, chap. 746, p. 862, approved March 6th, 1894.*)

During the past and present years (1894 and 1895) I have been repeatedly called upon to construe the new ballot law. My letters to the Secretary of the Commonwealth and *Mr. J. T. B. Thornton*, to be found on pages 145 to 147 of my last report, express my views upon the several points discussed—namely, the form of oath required by section 6, the order in which the names of candidates shall appear upon the ticket, how the vote upon the proposed constitu-

tional amendment to be cast, what candidates must do that their names may be put upon "the ballot" prepared by "electoral boards," and the duty of the "special constable."

Those to *Mr. James M. Cumming*, *Mr. J. P. H. Crismond*, and *Mr. F. W. Richardson*, giving my views as to how ballots are to be printed for county elections, and how candidates give notice of their candidacy, are as follows:

COMMONWEALTH OF VIRGINIA,
ATTORNEY-GENERAL'S OFFICE,
RICHMOND, VA., *March 9, 1895.*

Mr. JAMES M. CUMMING,
Hampton, Va.:

DEAR SIR:

In your letter of the 2d instant you propound this question:

"In printing the tickets for the county election, do the four election precincts use the same ticket without any change being made?

"By 'change' I mean should that part of the ticket containing the candidates for Wythe District be on the ticket used in Hampton District, and *vice versa*. I refer to the supervisor, magistrate, &c., that each district elects for itself, and who are not voted for except in this particular district."

Ballots for your county elections must be prepared and distributed by the electoral board, and should contain the names of the candidates for county and district officers; the latter so arranged and ordered that these candidates shall be voted for *only* by the qualified voters of the district they will serve.

For Wythe District the tickets will contain the names of the candidates for county officers and the names of the candidates for magistrate, supervisor, &c., in this district.

The tickets for Hampton District should contain the names of the candidates for county officers, and the names of the candidates for magistrate, supervisor &c., in this district. And so as to other districts.

Very respectfully yours,

R. TAYLOR SCOTT.

COMMONWEALTH OF VIRGINIA,
ATTORNEY-GENERAL'S OFFICE,
RICHMOND, VA., *May 2, 1895.*

Mr. J. P. H. CRISMOND, *Clerk, &c.,*
Spotsylvania Courthouse, Va.:

MY DEAR SIR:

I have never, that I am aware of, given any such opinion as I am credited with in your open letter in to-day's *Dispatch*. My opinion must have been misconstrued, and I thank you for giving me an opportunity to correct any error that may have arisen.

My construction of the law is this: Candidates that can write need only sign their notice.

Candidates that cannot write must adopt "some mark," append this to their notice, and properly acknowledge it.

This opinion I gave to Mr. F. W. Richardson, clerk, &c., Fairfax Courthouse in a letter of April 18th, 1895. Copy enclosed.

I am, sir,

Very respectfully yours,

R. TAYLOR SCOTT.

LETTER TO MR. RICHARDSON.

This is the letter to Mr. Richardson, referred to in the above:

ATTORNEY-GENERAL'S OFFICE,
RICHMOND, VA., *April 18, 1895.*

F. W. RICHARDSON, *Clerk, &c.,*
Fairfax Courthouse, Va.:

DEAR SIR:

Your letter of the 16th instant is before me. Candidates for county offices are required by the new ballot law to notify the clerk in writing of their purpose at least twenty days before the election. "Such written notice shall be signed by the candidate, but if he be incapable of writing his proper signature, then some mark, adopted by him as his signature, shall be acknowledged before a justice of the peace or other officer authorized to take acknowledgments to deeds, and in the same manner." (Acts 1893-'4, section 4, page 862.)

It follows, I think, when the candidate can write, he must sign the notice, and, when not able to write, adopt "some mark," append this to the notice, and acknowledge the notice as deeds are acknowledged.

These notices should be kept by the clerk and filed in his office, and the names of the candidates reported to the county electoral board. This duty however, is not imposed by section 4, but necessarily to be inferred.

Yours very truly,

R. TAYLOR SCOTT.

In "Pearson *v.* Supervisors of Brunswick County," reported in "Law Register," No. 3, July, 1895, page 176, this law has been upheld, and declared to be constitutional and valid by the Court of Appeals.

From what I have said it is manifest the law needs careful and critical revision.

HUSTINGS COURT OF CITY OF PETERSBURG.

In the suit pending styled "McGuire Mfg. Co. and Farmers' Loan and Trust Co. *v.* Petersburg Street Railway Co." I have filed petition to collect taxes due the Commonwealth for 1893, in amount $157.24, by the defendant company; and in the suit styled "Farmers' Loan and Trust Co. *v.* Petersburg and Asylum Railway Co.," have filed petition to collect taxes due the Commonwealth for 1893, in amount $110.81, by the defendant company.

COUNTY TREASURERS AND THEIR BONDS.

In *three* cases, two of which were decided in the Supreme Court of Appeals, bonds given by treasurers and accepted by the county judge have been held fatally defective, and the sureties discharged. That the Commonwealth, *in the future*, may be better cared for and more safely guarded, I call the attention of the judges to these cases, and give the orders, opinion, and judgment in each case.

Blanton v. Commonwealth.

KEITH, P.—The Commonwealth of Virginia, through its Attorney-General, gave notice to P. B. Crowder, principal, and R. W. Blanton, M. A. Blanton, Jacob Schlegel, R. E. Bridgeforth, J. A. Wallace, W. L. Scott, and Samuel D.

Vaughan, sureties on his official bond as treasurer of Amelia county, bearing date 23d of June, 1887, that on the 16th day of May, 1892, the circuit court of the city of Richmond, then in session, would be asked to render judgment against them for $4,386.93, due the Commonwealth for taxes, with interest on the several sums constituting that aggregate from the dates set out in said notice. The notice was returned duly executed by the sheriff of Amelia county, and the parties thereto appeared, through their attorneys, and moved the court to quash the notice, and also demurred; which motion and demurrer the circuit court overruled. At another day the defendants filed a special demurrer in writing to the notice of the motion, in which demurrer the Commonwealth joined, and that demurrer was also overruled by the circuit court. These rulings constitute the subject of the defendants' first bill of exceptions. The defendants subsequently presented to the court three special pleas in writing, numbered 1, 2, and 3, to the filing of which the Commonwealth, by counsel, objected, and the objection was sustained; and this action of the court constitutes the subject of the defendants' bills of exceptions Nos. 2, 3, and 4. Upon plea No. 4, which is the plea of *nul tiel* record, the Commonwealth joined issue.

There can be no doubt as to the correctness of the court in overruling the motion to quash the notice, and also in overruling the several demurrers. The notice is in the usual form, is sufficiently accurate and full, and gives the defendants all needful information as to the grounds of the Commonwealth's complaint against them. (See Board v. Dunn, reported in 27 Grat. 608.) Upon the ruling of the circuit court rejecting the special pleas offered by the defendants, this court expresses no opinion, deeming it unnecessary, in the view that is taken of this case, to do so. The circuit court doubtless proceeded upon the idea that the qualification of the treasurer under the laws of the Commonwealth of Virginia, including the execution of his bond as such, constitutes a record which can only be impeached by a plea alleging fraud in its procurement. But, as before observed, this court at this time expresses no opinion as to the correctness of the ruling upon this point. The only plea presented in the circuit court upon which issue was joined is that of *nul tiel* record. Upon the trial of this issue the defendants offered to prove certain facts by E. H. Coleman, clerk of the county court of Amelia county, and by Jacob Schlegel, one of the parties defendant, but, upon motion of the Commonwealth, through her Attorney-General, Jacob Schlegel was rejected as a witness, and this action of the court in excluding the evidence of Jacob Schlegel, and refusing to allow him to testify, is the subject of the defendants' sixth bill of exceptions. The clerk, Mr. E. H. Coleman, went upon the stand, and stated that the records mentioned were the original records of the qualification of P. B. Crowder, treasurer of Amelia county, and that the blank seal left with no signature opposite thereto, and between the signatures of J. A. Wallace and Samuel D. Vaughan, was so made and left blank for the signature of A. C. Tucker, who never signed the same; and that the certificate at the end or foot of said supposed official bond, in these words—namely: "In Amelia County Court, June 23d, 1887. This bond was executed and acknowledged in open court by the obligors to the same, and ordered to be recorded. Teste: E. H. Coleman, C. C."—was not written, or the blanks thereof filled up, until some time thereafter, and he thought it was after May, 1892; and that the interlineations of the names of R. W. Blanton and M. A. Blanton were written in the said order of Amelia county court before the judge thereof signed it. The only plea, then, being that of *nul tiel* record,

and the only evidence in support of that plea being the testimony of E. H. Coleman, just referred to, and the record of the county court of Amelia county of June 23, 1887, together with the bond produced with said record, the circuit court decided against the defendants upon the plea, and held that there was such a record as the Commonwealth had declared upon, and, neither party demanding a jury, proceeded to ascertain the amount claimed to be due to the Commonwealth.

It is insisted here that this judgment is erroneous, and that there is a material variance between the record relied upon by the Commonwealth in its notice and that produced upon the trial, and that the plea of *nul tiel* record should have been sustained. We will therefore inquire—first, was there a variance? and, secondly, was it material? It will be observed that the notice filed by the Attorney-General at the institution of this proceeding in the circuit court is given to P. B. Crowder, principal, and R. W. Blanton and six others as sureties on his official bond as treasurer of Amelia county, bearing date the 23d of June, 1887, and that the name of A. C. Tucker nowhere appears in this notice. The record which is produced in support of the plea sets out that "in Amelia county court, June 23, 1887, Peter B. Crowder, who was, on the fourth Thursday in May, 1887, duly elected, by the qualified voters of the county of Amelia, treasurer for said county for the term of four years, commencing on the 1st day of July, 1887, this day appeared in open court, entered into and acknowledged a bond in the penalty of $40,000, conditioned according to law, with R. W. Blanton, M. A. Blanton, R. E. Bridgeforth, Jacob Schlegel, W. L. Scott, A. C. Tucker, J. A. Wallace, and Samuel D. Vaughan as his sureties, who waived the benefit of their homestead exemption, and made oath as to their sufficiency, and thereupon the said Peter B. Crowder appeared in court, and qualified by taking the several oaths prescribed by law." That is the record. It is contended by the defendant in error that it imports absolute verity, and from that record it appears that the bond of the treasurer, executed by the principal and his sureties, and accepted for the Commonwealth by the county court of Amelia, without which acceptance it could not be a complete instrument, contained the name of A. C. Tucker as one of the sureties. Upon the bond which accompanies the record, vouched by the Commonwealth in support of its contention, the name of A. C. Tucker does not appear. That there is a variance cannot be denied, nor is there in this record one word of explanation with respect to it, save the statement by the clerk of the court, and that is that the vacant place opposite the signature immediately following that of J. A. Wallace was left blank in order that it might be executed by A. C. Tucker; but, if this be a record, the evidence of E. H. Coleman cannot be considered, and, if it is to be considered, its tendency is to show that it was an uncompleted transaction, and would have the effect rather to discredit than to establish the bond.

In the case of Fletcher *v.* Leight, reported in 4 Bush. 303—a case very similar to this in many of its features—it appeared that one W. N. Peterson, who had been elected sheriff of Marshall county, Ky., appeared in the county court with a certificate of election, and was thereupon duly sworn into office, and, with Fletcher, Palmer, Stone, Harrell, Thompson, W. B. Ely, Johnson, and Mathis as his sureties, executed covenant as required by law. He entered upon the discharge of his office, and had in his hands an execution in favor of the appellees, which he failed to return as required by law, and for that delin-

quency the appellees brought suit. The sureties made defence substantially on the pleas of *non est factum* and *nul tiel* record, and the circuit court found against them on the plea of *nul tiel* record, and the proceedings on the other plea are not necessary to be here noticed. It appears that in Kentucky the sheriff had to give three bonds—a county levy bond, a State revenue bond, and a general official bond. Ely, supposing that he had signed them all—all that were to be executed by the sheriff—left the court without executing the general official bond, upon which suit was afterwards instituted, and the court says: "As he did not sign the bond sued on, and there is no county court order approving this bond without Ely's name, we are called on to determine whether it was obligatory on the other securities. The county court, being a court of record, can only speak by its record, especially in the absence of any issue by the pleadings of mistake or fraud. The approval, therefore, by the county court, of an officer's securities, must appear of record. However numerous and solvent the proposed securities may be, this does not make the bond obligatory until the court has passed its judgment of approval. Indeed, until this is done, it is not delivered to the Commonwealth, nor can be. It is this approval by the tribunal designated by law which completes its execution and delivery, and makes it obligatory." This language is as applicable to the case at bar as to that in which it was used. The duty of the county court of Amelia county is essentially the same as that of the county court of Marshall county, Ky.; and, if the name of W. B. Ely is substituted for that of A. C. Tucker, we have a substantially identical state of facts. There, as here, the county court was charged with the duty of superintending the execution of official bonds. The county court here, as in Kentucky, speaks only by its record, and its approval is with us as necessary as it appears to have been in that case; and it may be said here, as it was declared there, that "it is the approval of the bond by the tribunal designated by law to superintend its execution which completes its execution and delivery, and makes it obligatory." The court goes on to say: "When the county court, therefore, approves the proposed names and individuals as sureties in a bond, and directs its clerk to prepare the bond, he has no more authority to witness and accept it, until all the named sureties sign it, than he has to accept it without the principal's signature. If he may waive the signature of one surety, he may waive all. When the court has designated certain persons, and approved them as sureties, no alteration can be made by leaving off a name or substituting another therefor. The bond must be prepared and executed in conformity to the judgment of approval, else it is not the bond approved and accepted by the court; and every alteration by the clerk, either in admitting a designated party or substituting another, is wholly unauthorized, and his attestation to such a bond of no validity." There would, then, appear to be a variance. It remains to be considered whether that variance is material. In the case just quoted in 4 Bush, 303 the court says: "When the principal has proposed certain names as his sureties, and these have been approved by the court, each of the sureties, as he signs, has both the legal and moral right to expect and rely upon the officers to see that each approved party shall sign it, and not to regard it as executed and delivered until so perfected." Now, here the bond, as prepared, contains the names of eight sureties. The burden and responsibility which they assumed was to be distributed among eight, whereas the bond sought here to be enforced distributes that liability among seven.

Surely this most seriously affects the rights of the sureties in respect to contribution among themselves in the event of the default of their principal.

In conclusion, I will say that it must always be borne in mind that there is no evidence to fix any liability upon the plaintiffs in error save the record of Amelia county, and that issue was joined upon no plea save that of *nul tiel* record. All other pleas, and all other evidence which might have thrown light upon this transaction, were excluded at the instance of the Commonwealth. Upon the record adduced the parties must stand or fall, and that record shows the acceptance by the court charged with the duty of seeing to its execution of the bond with the signatures of eight sureties thereto, while the bond produced presents signatures of but seven. On principle and authority, those sureties had a right to expect and require that every name presented and accepted should appear upon the bond. The Commonwealth, through its officers, had notice, as appears on the face of the record, of the names agreed to be taken. It was the duty of her officers to see to it that the bond agreed to by the parties should be executed, and none other; and these defendants had a right to rely—as was said in 4 Bush. 303, a right in morals and law to rely—upon the due performance by the agents and officers of the State of the duties of which they were charged by law. By inadvertence, doubtless, innocently and without any wrongful intent, that duty was neglected. Who shall bear the consequences—innocent parties, or the Commonwealth, by whose agents and officers the mistake was committed? Sureties stand upon the letter of their contract. Their liability is always *strictissimi juris*, as was said in McClusky *v.* Cromwell, 11 N. Y. 598, and cannot be extended by construction. To the same effect, see Smith *v.* U. S., 2 Wall. 235. The correct rule, says the Supreme Court of the United States in the case just cited, is that "any variance in the agreement to which the surety has subscribed, which was made without the surety's knowledge or consent, and which may prejudice him, or which may amount to the substitution of a new agreement for the one subscribed, will discharge the surety." Here, we have seen, the sureties subscribed to a bond duly accepted by the county court of Amelia county, in which their liability was divided among eight. The attempt here is to enforce a liability upon a bond in which there are but seven obligors. There is no evidence in this case which suggests the idea, or creates a suspicion, that the sureties, or either of them, consented or assented to the material change thus made in the contract by which they had agreed to be bound, or that they had any knowledge thereof, or were in possession of any fact which should have put them upon inquiry. For these reasons, we are of opinion that the judgment of the circuit court should be reversed; and this court, proceeding to render such judgment as the circuit court should have rendered, will direct that the notice by which the proceedings in the circuit court was commenced shall be dismissed.

Stuart v. Commonwealth.

KEITH, P.—The Commonwealth of Virginia, through her Attorney-General, served a notice in the circuit court of the city of Richmond upon F. C. S. Hunter, treasurer of King George county, and George Turner, R. H. Stuart, Henry H. Hunter, and F. W. Payne, that on June 25th, 1892, judgment would be asked for against them for the sum of $3,119.42, with interest. The parties defendant appeared by counsel, and tendered twenty-one special pleas, all of

which the court rejected. These pleas may be grouped: (1) Varying forms of the plea *non est factum;* (2) pleas which may be treated as averring fraud in the transaction upon which the supposed liability of the defendants rests; and (3) a plea averring that R. H. Stuart had constituted C. H. Ashton his attorney in fact to sign his name as one of the sureties upon the treasurer's bond; that C. H. Ashton was judge of the county court of King George; that as such judge he presided in the court before which the bond was executed, and in which the treasurer qualified; and that he had acted on the occasion of the execution of the bond and the qualification of the treasurer in the dual capacity of attorney in fact for one of the parties and as judge for the court. The contention of the Attorney-General, representing the Commonwealth, is that the qualification of the treasurer, including the execution of his bond, is, by virtue of section 812 of the Code of 1887, made matter of record in the county court, and that this record and memorial of the judge imports "such uncontrollable credit and verity as they admit no averment, plea, or proof to the contrary"; and in support of this proposition cites a number of cases, among them Vaughn v. Commonwealth, 17 Gratt. 386, and Calwell v. Commonwealth, Id. 391. This presents a point which was left undisposed of by this court in the recent case of Blanton v. Commonwealth (decided at the January term), 20 S. E. 884, the court in that case not finding it necessary to pass upon it. We are of opinion, however, that this contention of the Commonwealth is sustained by the decisions just cited, and by the statute law. (See section 812, Code of Va., 1887.) Being a record, it follows that *non est factum* cannot be pleaded; the only plea putting a record in issue being that of *nul tiel* record, which is tried by the production of the record itself. Where the record appears to be regular and complete, it must be assailed, if at all, upon the ground of fraud; and the fraud relied on must be clearly and distinctly charged, and established by satisfactory proof. We are therefore of opinion that the circuit court did not err in rejecting the various pleas of *non est factum* offered by the several defendants.

The case arose out of the following state of facts: F. C. S. Hunter had qualified as treasurer of King George county, and one of the sureties upon his official bond, E. J. Smith, having moved for counter security, the court directed Hunter to execute a new bond, or have his power as treasurer revoked. Thereupon Hunter, with George Turner, F. W. Payne, H. H. Hunter, E. L. Hunter, W. A. Rose, and R. H. Stuart, by C. H. Ashton, his attorney in fact, acting upon a power of attorney under the hand and seal of Stuart, entered into and acknowledged a bond in the penalty of $22,000, conditioned according to law It seems that the bond thus executed omitted to provide that any default of which the treasurer might be guilty, or any money for which he might become responsible upon the said bond, was to be paid in lawful money of the United States, as directed by statute, and not in coupons; and the matter having been brought to the attention of the court by its commissioner of accounts, the treasurer, and George Turner, R. H. Stuart, by C. H. Ashton, his attorney in fact, Henry Hunter, and F. W. Payne, appeared in court at the November term, 1888, of the county court of King George, and re-acknowledged the said bond in due form of law as their act and deed. Comparing the order entered at the November term, 1888, with that entered at the September term, 1888, it appears that the bond was not re-acknowledged by two of the obligors named therein, William A. Rose and

E. L. Hunter. The power of attorney under which C. H. Ashton acted is not in the printed record, nor does it appear in the original record brought to this court from the county of King George, in obedience to the *subpœna duces tecum* heretofore issued. It is to be presumed that it was a naked power of attorney, authorizing C. H. Ashton to sign the name of R. H. Stuart to the bond of F. C. S. Hunter as treasurer of King George county. It may also fairly be presumed that, as is usual in such cases, the bond had been made up before the term of the court at which it was to be executed; that the sureties knew with whom their responsibility was to be shared, and that they consented to be bound as parties to a bond which contained the names of those who, when the bond came to be executed in point of fact, signed it. In other words, that R. H. Stuart, in constituting C. H. Ashton his attorney in fact, contemplated assuming a liability which was to be shared with F. W. Payne, George Turner, H. H. Hunter, W. A. Rose, and E. L. Hunter. It nowhere appears that Stuart had any knowledge of what took place at the November term of the county court, or that he knew, or had any means of knowing, that two of the names which appeared upon the bond as executed at the September term had been stricken from it, and the number of the sureties reduced from six to four. Now, these facts place Judge Ashton in a position which it was impossible for him with propriety to occupy. We do not for a moment suppose that he was guilty of any intentional wrong, or that he would, under any circumstances, purposely do anything unbecoming a judicial officer; but we conceive it to be necessary that the administration of justice shall be free from the slightest appearance or suspicion of impropriety, and we can but think that, to act as attorney in fact with respect to a transaction pending before his own court, in which he was called upon to pass judicially upon the sufficiency of his own credentials as attorney, and to execute an instrument, by virtue of his position as attorney, which he was then to establish as a memorial, and a record importing absolute verity as to all parties concerned, in his capacity as judge, was the attempt upon his part to discharge functions absolutely antagonistic and wholly irreconcilable. It is not enough that in the particular transaction there is no suggestion, and can be none, of any improper motive or act. We cannot sanction a practice which could by possibility be drawn into a precedent, and which might or could render the judiciary of the State the objects of suspicion and of criticism, and tend to impair public confidence in their utter and complete personal dissociation from the subject matter of their official action. Not only was he called upon as judge to pass upon his authority to act at the September term, when he accepted the original bond with six names upon it—which is presumably the only bond his principal had ever contemplated signing—but, continuing to act upon the authority of that power, he appears before himself at the November term, and re-acknowledges that bond, and thus increases the liability of his principal, without his knowledge or consent, interpreting, as judge, his power as attorney, greatly to the injury and disadvantage of his principal. The whole force and effect of this record rests upon what was done at that November term. Strike that out, and the case of the Commonwealth falls with it. There is no suggestion of more than one power of attorney, and that a naked power to sign a name to a bond already agreed upon by the parties; and there is no intimation that Stuart had the slightest suspicion, or reason to suspect, that anything was to be done at the November term altering his liability,

or in any way affecting his interest. It seems to be just here that the Commonwealth is in a dilemma. If Judge Ashton was acting in a merely ministerial capacity, as is contended by the defendants, then the plea of *non est factum* could be made to the bond; if acting in a judicial capacity, his action would be obnoxious to the objection just pointed out. It is not a question as to who may be an agent or attorney in fact. Without doubt, Judge Ashton was under no disqualification to act as agent for the defendant, but, having accepted the agency, he was thereby rendered incompetent to act as judge. Having accepted that agency, was he competent to sit in judgment upon the sufficiency of his credentials as agent, and upon the extent and scope of the powers with which he had been clothed as agent? We think he could not, and we do not doubt that, though this ruling may eventuate in the loss of this debt to the Commonwealth, it is far better that such a loss should be suffered than that any of the rules and principles established in order to secure absolute purity in the administration of justice should suffer any impairment.

The Attorney-General contends that Stuart knew that C. H. Ashton was judge of the county court of King George, and is therefore to be considered as having waived his objection to him on that account.

The answers seem to be twofold:

First. There is no such express or implied waiver to be inferred from the circumstances. Stuart had, on the contrary, every reason to expect that the action of his attorney would conform to all the requirements of the law, and transcend it in no particular. The waiver or estoppel claimed by the Commonwealth must rest upon the idea that Stuart selected his agent knowing that he was judge of the county court, and, as such, charged by law with the duty of presiding in the court before which the treasurer would give bond and qualify; and must, therefore, be held to have assented in advance to his acting in the dual capacity of agent and judge. Grant this to be true, for the sake of argument; can it be held to extend beyond the act of signing the bond at the September term of the court, when a bond with six sureties was executed and received and accepted by the Commonwealth? Can it be that a naked power of attorney to perform a single act could be construed as creating a continuing agency, by which the agent could assent to the most material alteration in the instrument as theretofore executed by him, reducing the number of sureties from six to four, and by his re-acknowledgment bind his principal without his knowledge or consent to the instrument in its changed condition? Such a power as we are considering is to be strictly construed. The agent can do nothing which he is not expressly authorized to do by the instrument, which is the exclusive source of his authority to act at all. If this be true in every case, even though the constituent who creates the agency may be the beneficial party to the transaction with respect to which he is to become bound, how much more strictness should be observed by an agent acting for one who is to be bound as surety only, and who is to reap no profit or advantage from the obligation which he assumes. As the occasion then demands the utmost strictness in the exercise of the power conferred by Stuart, and as he could not, by possibility, have contemplated, when he gave the power of attorney in August, that the bond which he authorized his agent to sign in September would be materially altered and re-acknowledged in November, he cannot be deemed to have conferred the authority upon his agent to make such re-ac-

knowledgment or alteration, or be held to have waived or to be estopped from making any lawful objection thereto. Therefore, to repeat myself on this point, even though the waiver or estoppel might apply to the execution of the bond in September, on the ground that he must have contemplated what then occurred (which I by no means admit), it does not apply to what took place in November, for nothing short of prophetic vision could have enabled Stuart to foresee the situation which then existed. Without knowledge, there can in this case be no waiver or estoppel; and in this instance knowledge was impossible.

Second. We do not place our decision wholly or chiefly upon any ground of objection which the parties could have waived, but rest it broadly and firmly upon the proposition that it would be contrary to public policy to sanction what we have here condemned.

In conclusion, we are of opinion that the circuit court did not err in rejecting the several pleas of *non est factum*. As to the pleas in which it is averred that a fraud was practiced on the defendants, we are of opinion that, should the defendants at any future trial rely upon that defence, it can be better presented in more carefully prepared pleas. And, lastly, we are of opinion that the plea of R. H. Stuart, marked "Y," should have been admitted. The case must therefore be reversed, and remanded for a new trial, with leave to the defendants, or any of them, to file such additional pleas as may be consistent with the views herein expressed.

Commonwealth v. Ryland.

VIRGINIA:

In the Circuit Court of the City of Richmond, December 4th, 1895.

The Commonwealth of Virginia
against
R. S. Ryland, principal, and A T. Mooklar, James McKenzie, Harvey Terry, Brooking Chenault, J. L. Stevens M. H. Ryland, L. C. Burke, J. C. Johnson, Ariana Burke, M. C. Lipscomb, Mary W. Lewis, Emma R. Spencer, W. H. Burke, and George H. Burke, sureties upon his official bond, bearing date the 23d day of June, 1891, as treasurer of King William county, Va., Defendants. } *Motion.*

This day came again as well the Attorney-General, on behalf of the Commonwealth of Virginia, as the defendants, by their attorneys; and the defendants, W. H. Burke, Ariana Burke, Mary W. Lewis, Emma R. Spencer, James McKenzie, Harvey Terry, J. L. Stevens, L. C. Burke, J. C. Johnson, George H. Burke, A. T. Mooklar, Brooking Chenault, and M. C. Lipscomb, severally pleaded *nul tiel* record, and filed their several pleas, and the Commonwealth replied generally to each of said pleas, and thereupon issue was joined and the matter submitted to the judgment of the court; and the court, being of opinion that the several powers of attorney in the said pleas set out are part and parcel of the alleged bond of the defendants, and the proceedings of said court, as set out upon its order-book, being produced in open court and read, from the inspection whereof it appearing that the bond produced in support of the Commonwealth's order does not conform to the bond described in said order-book, doth sustain the defendants' plea; and it is therefore ordered that the defendants, A. T. Mooklar, James McKenzie, Harvey Terry, Brooking

Chenault, J. L. Stevens, M. H. Ryland, L. C. Burke, J. C. Johnson, Ariana Burke, M. C. Lipscomb, Mary W. Lewis, Emma R. Spencer, W. H. Burke, and George H. Burke, be discharged from all liability to the Commonwealth of Virginia as sureties upon the alleged official bond executed by R. S. Ryland as treasurer of King William county, bearing date 23d day of June, 1891; and, the evidence being heard, it is therefore considered by the court that the Commonwealth of Virginia recover against the defendant, R. S. Ryland, the sum of seven thousand nine hundred and seventy-one dollars and sixty-one cents, with interest, to be computed after the rate of fifteen per centum per annum, on six thousand three hundred and thirty-four dollars and forty-four cents, part thereof, from the 15th day of June, 1895, and on one thousand six hundred and thirty-seven dollars and seventeen cents, the residue thereof, from the 1st day of July, 1895, until paid, and the costs of this motion, subject to a credit of one thousand two hundred and four dollars and four cents, as of November 26th, 1895.

A copy.—Teste:

E. M. ROWELLE, *Clerk.*

Costs, $20.93.

Very respectfully,

R. TAYLOR SCOTT,
Attorney-General of Virginia.