

ANNUAL REPORT

OF THE

Attorney-General

TO THE

GOVERNOR OF VIRGINIA,

FOR THE YEAR 1898.

RICHMOND:

J. H. O'BANNON, SUPERINTENDENT OF PUBLIC PRINTING.

1898.

REPORT.

COMMONWEALTH OF VIRGINIA,

OFFICE OF ATTORNEY-GENERAL OF VIRGINIA,

RICHMOND, November 1, 1898.

To His Excellency J. HOGE TYLER,

Governor of Virginia :

SIR :

I have the honor to submit my report of the work of this office for the year ending this day :

UNITED STATES SUPREME COURT.

1. McCullough v. Virginia.

This case was submitted for argument on briefs in November, 1898. Oral argument was required, and subsequently the court fixed January, 1899, for the hearing. Later the case was fixed for February, 1899, and on that day was argued by Hon. H. R. Pollard and myself for the Commonwealth. Mr. Pollard, who had been connected with this case in the Supreme Court of Appeals of this State, was retained by the Commonwealth prior to my incumbency of office. Acknowledgment is here made of his very able and efficient assistance.

The question involved the validity of the coupon feature of our State debt contract, and grows out of the debt litigation which has harassed the Commonwealth for so many years. No decision as yet has been rendered.

2. American Harrow Co. v. Shaffer.

From the circuit court of the Western district of Virginia.

This case involved the Acts of 1889-90, sections 108 and 109, imposing a license tax upon persons selling manufactured articles, except sewing machines. The case was argued by Hon. R. Taylor Scott for the Commonwealth. The decision of the lower court has been affirmed, and thereby the State's contention is sustained.

3. Henry C. King v. M. B. Mullins.

From the circuit court for the Western district of Virginia.

Reference is made to the report of my predecessor with respect to this case. It does not appear that Virginia has any interest in the matter, yet report is here made and will be noted from time until a decision is reached.

4. Harkrader, Sheriff of Wythe County, v. H. G. Wadley.

This is an appeal, perfected by Hon. R. Taylor Scott, from the circuit court of United States for the Western district of Virginia, and involves questions of profound interest to the Commonwealth.

The said Wadley was indicted in the county court of Wythe for the embezzlement of about \$200,000, money and assets of the Wytheville Banking and Insurance Company, with its home office at Wytheville. The offence, therefore, is one entirely against the Commonwealth. Several injunctions were awarded by Hons. Nathan Goff and Chas. H. Simonton, United States circuit judges, restraining the State of Virginia in this prosecution. Supplementary to said injunctions, Judge Simonton discharged the said Wadley from bail upon a writ of *habeas corpus*. The appeal is from the judgment in the *habeas corpus* proceedings, and was argued by me for the Commonwealth about the middle of October. It is hoped that a decision of the court will soon be rendered.

SUPREME COURT OF APPEALS OF VIRGINIA.

1. Board of Supervisors of Alexandria County v. City Council of Alexandria and Governor of Virginia.

Appeal from the circuit court of the city of Richmond relative to the partition of the old court-house and jail in the city of Alexandria, between the county and city of Alexandria.

Dismissed January 20, 1898. The State has no material interest in this litigation, but is a formal party thereto.

2. Sarah F. Pegram v. Marye, Auditor.

Mandamus to compel the payment to Mrs. Pegram of the sum of \$2,932.58, collateral inheritance tax theretofore paid by her. The Auditor refused to pay this sum, which refusal was sustained by the court April 7, 1898.

3. Lawless v. Richardson.

This was a *mandamus* proceeding instituted on the part of the Secretary of the Commonwealth to test the existence of the office of Register of Land Office, a doubt having arisen thereon by virtue of an act of the General Assembly of the 3d day of March, 1898. The court denied the *mandamus*, thus holding that the office of Register of Land Office was not abolished by said act.

4. McBride v. Commonwealth.

From the county court of Patrick. Reversed, and the verdict of murder in the first degree set aside January 9, 1898. The chief ground of reversal was the insufficiency of evidence to convict.

5. Charles Jackson v. The Commonwealth.

From Tazewell county. Conviction of felonious assault, and one year in the penitentiary. Reversed June 23, 1898.

6. Delfos Foster v. The Commonwealth.

From Roanoke county. Conviction of attempted rape, and sentence of eight years in the penitentiary. Reversed September 15, 1898.

This was an interesting case, in that the defendant was under the age of fourteen years, and the question was as to whether his incapacity, by virtue of his age, could be rebutted by proof. The court held that such incapacity could not be so rebutted. Therefore, if the decision, which is manifestly sound in law, is productive of ill effects, the same must be remedied by legislation.

7. Lohr v. State Board of Veterinary Examiners.
From Staunton. Application for *mandamus* to compel the Board to grant the applicant leave to practice veterinary medicine and surgery. Application denied.
8. Hite v. The Commonwealth.
From Mecklenburg county. Conviction of murder in the first degree. Pending.
9. Trimble v. The Commonwealth.
From Lynchburg. Contempt. Pending.
10. Carter v. The Commonwealth.
From Lynchburg. Contempt. Pending.
11. Cannon v. The Commonwealth.
From Norfolk City. Question of validity of bail bond. Pending.
12. Sutton v. The Commonwealth.
From Lee county. Conviction of murder in the first degree. Pending.
13. N. & W. Railway Co. v. Board of Public Works.
14. Same v. Same.
Both of these cases from Norfolk city. They involve the validity of a tax assessment made by the Board of Public Works. Pending.
15. Commonwealth v. Johnson.
16. Commonwealth v. Davis.
Both of these cases from Norfolk city. Coupon cases. Pending, awaiting the debt case in the U. S. supreme court, No. 1, *supra*.
17. Marye, Auditor, v. Board of Agriculture.
Appeal from the circuit court of Richmond. This is a *mandamus* to compel the Auditor to pay the Board certain fees other than those derived from taxes and fees on fertilizers. The lower court sustained the application for *mandamus*, but I felt constrained to apply for a writ of error in the case, which was awarded, and the supreme court now has the case for decision.
18. Maia's Adm'r v. Eastern State Hospital.
From circuit court city of Richmond. This is a suit by the administrator of Maia, who was an inmate of the hospital, to recover damages for his death, which occurred through alleged negligence of the managers and employes of said hospital. The sole question involved is the right to sue the hospital for an injury of this character. The right to maintain such a suit is denied by the State, and was so held in the lower court. Pending.

CIRCUIT COURT OF RICHMOND CITY.

At Law.

1. Commonwealth of Virginia v. Jos. Mayo, Jr., late Treasurer, *et alia*.
2. Commonwealth of Virginia v. Jos. Mayo, Jr., late Treasurer, *et alia*.
3. Commonwealth of Virginia v. O. B. Thomas, Treasurer Fluvanna Co., *et alia*.
4. Commonwealth of Virginia v. C. H. Ingles, Treasurer Henry Co., *et alia*.
5. Commonwealth of Virginia v. Same.
6. Commonwealth of Virginia v. Same.

7. Commonwealth of Virginia v. Jno. F. Jones, Treasurer Craig Co., *et als.*
8. Commonwealth of Virginia v. Same.
9. Commonwealth of Virginia v. Bennett Taylor, Clerk Albemarle Co.
10. Commonwealth of Virginia v. Same.
11. Commonwealth of Virginia v. G. H. Baughman *et als.*
12. Commonwealth of Virginia v. John H. Sears, Treasurer Mathews Co.
13. Commonwealth of Virginia v. G. R. Barr, Treasurer Washington Co.
14. Commonwealth of Virginia v. W. M. Gray and J. J. Gusler, Washington Co.
15. Commonwealth of Virginia v. O. D. Foster and R. W. Adams.
16. Commonwealth of Virginia v. A. K. Phillips *et als.*, sureties of Adams.
17. Commonwealth of Virginia v. Mary B. Randolph's Adm'r.
18. Commonwealth of Virginia v. C. R. Randolph.
19. Commonwealth of Virginia v. C. H. Ingles, Treasurer Henry Co., *et als.*
20. Commonwealth of Virginia v. J. R. Peeples & W. H. Goodwin *et als.*
Dismissed November 15, 1893, the debt due State having been satisfied.
21. Commonwealth of Virginia v. C. I. Reynolds, Adm'r of Jno. R. Cabell.
22. Commonwealth of Virginia v. W. P. Tyree, principal, *et als.*
23. J. T. Angle v. Commonwealth of Virginia.

Writ of *mandamus* to recover the sum of \$550 on claim for back salary. Decided for the State.

24. Maia's Admr. v. Eastern State Hospital.

Action for damages for \$10,000. Demurrer sustained and dismissed. Writ of error awarded. See supreme court docket, No. 18, *supra*.

At Equity.

25. Commonwealth of Virginia v. P. H. Huffman *et als.*
26. Commonwealth of Virginia v. Saml. M. Page.
27. Commonwealth of Virginia v. J. W. Grantham.
28. Commonwealth of Virginia v. Walter Millan.
29. Commonwealth of Virginia v. Jas. Hilton's Admr.
30. Commonwealth of Virginia v. Martha Goode, &c.
31. Commonwealth of Virginia v. Spencer D. Ivey, &c.
32. Commonwealth of Virginia v. J. T. Young.
33. Commonwealth of Virginia v. A. A. Chapman.
34. Commonwealth of Virginia v. Robt. S. Ryland & wife *et als.*
35. Commonwealth of Virginia v. Geo. Dusner's Curator & Admr.
36. Commonwealth of Virginia v. B. Vandergrift *et als.*

UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

1. Peoples National Bank of Lynchburg v. Marye, Auditor.
2. First National Bank of Lynchburg v. Same.
3. Lynchburg National Bank v. Same.
4. National Exchange Bank of Lynchburg v. Same.

These cases were argued by my predecessor and submitted to Judge Hughes, then district judge. That judge, however, did not decide the cases during his term of office; consequently, they will have to be reargued and submitted to his successor, Judge Waddill. It is hoped that an early disposition may be made of

these cases, as they involve the question of tax upon the stockholders of these banks, imposed in pursuance of an act of the General Assembly of 1895-'96, pp. 700-726.

UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

1. Commonwealth v. Tyler DeHart.
Removed from Patrick county. Charge, wilful trespass. *Nol. pros.* May term, 1898.
2. Commonwealth v. J. W. Wilson.
Assault. Removed from magistrate's court of Carroll county. *Nol. pros.* May term, 1898.
3. Commonwealth v. Thos. Biggham.
Removed from magistrate's court, Franklin county. Verdict, not guilty. May term, 1898.
4. Commonwealth v. Geo. S. Fitzwater.
Removed from magistrate's court, Franklin county. Verdict, not guilty. May term, 1898.
5. Commonwealth v. W. B. Addington.
Removed from Dickenson county. Charge, shooting with intent to kill.
6. Commonwealth v. J. M. Carrico.
Same charge. Same court.
7. Commonwealth v. J. W. Dougherty.
Same charge. Same court.
8. Commonwealth v. Jno. E. Moss.
Same charge. Same court.
9. Commonwealth v. Shelby Gibson.
Same charge. Removed from Lee county.
10. Commonwealth v. W. F. Clay.
Same charge. Removed from Lee county.
11. Commonwealth v. Tyler DeHart.
Removed from county court of Floyd. Charge, felonious assault. Pending at Danville.

In all of the above cases, save No. 11, it became improper for me to appear for the Commonwealth for the reason that it was heretofore my duty to be connected with these cases by virtue of my office as United States District Attorney. I therefore requested P. J. Davenport, Esquire, commonwealth's attorney of Washington county, to prosecute the said cases. I am confident he gave the cases diligent and faithful attention, and that his action was the result of conscientious discharge of duty. Respecting the *nolle prosequi* entered, I should state that Mr. Davenport advises me that such action was taken for the reason that he was unable to procure the attendance of witnesses for the Commonwealth, and he was constrained to think they could not be procured. Therefore, inasmuch as the cases had been pending since 1896, he entered the *nolle prosequi*. I do not perceive that his action could have been otherwise.

12. John S. Lupton v. P. C. Gore ;
W. H. Ebert v. same ;
W. L. Brown v. same ;
W. W. Glass v. same ;
Mrs. S. W. Tidbal v. same ;
J. S. Robinson v. same ;
Geo. W. Ward v. same ;
Jas. Ginn, exor., v. same.

The above eight cases were instituted to recover damages for refusal to receive coupons and for levying executions. The cases belonged to the debt litigation of this State, and were received by me from my predecessor. They have all been dismissed, and therefore the judgments are favorable to the State.

Official Bonds.

The General Assembly, by joint resolution, approved December 22, 1897, imposed upon me the onerous burden of examining the bonds of the treasurers and clerks of the several counties and cities of the Commonwealth.

In connection therewith please find copy of my letter of February 10, 1898, to the General Assembly :

To the General Assembly :

In compliance with your joint resolution, approved December 22, 1897, directing my examination of the official bonds of the treasurers and clerks of the several counties and cities of the Commonwealth, I have the honor to report that I have performed the duty assigned me so far as it relates to the bonds of treasurers.

With the pressure of public business now upon me, together with the limited time allowed me for the performance of the responsible and arduous task imposed upon me by your resolution, I must confess that my labor and its results afford me no great satisfaction.

I have, however, thought it advisable to report the progress of my investigation, and to suggest that it is impracticable for me to examine the bonds of the clerks of courts during your present session without great detriment to the public service, as thereby my neglect of other important interests of the State will be necessitated.

I have examined the bonds of one hundred and seventeen treasurers, of an aggregate penalty of \$7,396,000, together with powers of attorney of a very large number of obligors, the resolutions of "guaranty" companies authorizing such powers in cases of corporate suretyships, and court orders relative to the execution and approval of said bonds.

Of the bonds last mentioned, I would advise that twenty-five of the principal obligors therein should be required to execute new bonds. I do not mean to intimate by this action that the said bonds are invalid, but that, out of abundant caution, it is expedient such new bonds be taken.

I do not here report my reasons for the conclusions reached respecting the expediency of requiring such new bonds ; nor do I understand that I am so directed by the joint resolution ; and to do so, might hereafter embarrass me in the performance of my official duties.

Your resolution also directs that I "shall take such immediate steps as may be necessary to protect the interest of the Commonwealth." In this connection I beg to observe that the Attorney-General has no authority to initiate any protective remedy upon these bonds. Section 178 of the Code provides that the courts of their own motion, or upon application of the attorneys for the Commonwealth, may require new or additional bonds of such treasurers. I presume, in view of the resolution, that the judges presiding over these courts, and the Commonwealth's attorneys therewith connected, would not consider impertinent a communication from me calling their attention to the advisability of requiring such new bonds. But other than this persuasive method I am unadvised of any steps to be taken by me for the protection of the State.

I would add that I would be pleased to give, in person, to the appropriate committee of your respective bodies, such further information as they may desire.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

FEBRUARY 10, 1898.

In the continued performance of this duty I communicated with the Commonwealth's attorneys of the cities and counties, the treasurers of which I deemed it advisable should execute new bonds.

I have not yet completed my examination of the bonds of the clerks mentioned in said resolution, but will have my report ready for the next session of the General Assembly.

Referring to the last paragraph of my letter, I would add that no committee or representative thereof asked for any further information. However, I was desirous to appear before the committee, as by practical examination of the matter in question I ventured to think I might make some suggestions with respect to new legislation that might save the Commonwealth future embarrassment touching official bonds.

Fox Island.

Proper proceedings will soon be instituted to recover the property and easement mentioned in a joint resolution of the General Assembly, approved February 9, 1898. These proceedings would have been set on foot sooner, but the duties of this office have been so continuous and onerous as to give no time for the requisite investigation of the questions involved in the contemplated litigation.

Public Schools.

No report is required by me upon this subject in that the Board of Education itself makes a report to the General Assembly. I must observe, however, that my labors in this department have heavily taxed my energies and official responsibility. But I desire to acknowledge that this responsibility has been wisely and patriotically shared by yourself and the Superintendent of Public Instruction.

OFFICIAL OPINIONS.

Requests for official opinions have increased during the past few years, and perhaps at no period in the history of this office have they been so frequent as during this year, and I herewith give copies of a few of such opinions as are deemed to be of public interest.

Extradition of Fugitives from Justice.

JANUARY 7, 1898.

To His EXCELLENCY,

The Governor of Virginia :

SIR :

In the matter of your authority for the extradition of a fugitive from justice, I beg to say that, under the Constitution of the United States and acts of Congress, the right to demand the surrender of fugitives from justice is vested solely and unqualifiedly in the Executive of the State where the crime is committed. See Art. 4, Sec. 2, Const. U. S., and Sec. 5278 U. S. R. S.

But neither the Constitution nor the act referred to declares that it shall be the duty of the Executive of a State, under any circumstances, to demand the surrender of a criminal who may have escaped to another State. And, therefore, in the absence of a statutory provision of the demanding State, prescribing the circumstances under which the demand shall be made, the Executive may, in his discretion, decline to make demand for the fugitive.

The State of Virginia has no law whatever respecting this matter, therefore her Governor has absolute discretion as to whether he will make demand for a fugitive from justice, and the Executive's action is not subject to review, and is final and conclusive.

As to the practice for the extradition of such fugitives, I beg to refer you to the forms which were adopted by a conference of representatives from twenty-four States, a copy of which can be obtained from the Secretary of the Commonwealth.

Respectfully,

A. J. MONTAGUE,
Attorney-General.

Respecting Securities Deposited with the Treasurer by Insurance and Guaranty Companies.

JANUARY 31, 1898.

Mr. A. W. HARMAN, JR.,

*Treasurer of Virginia,**Richmond, Va. :*

SIR :

I have taken under consideration your inquiry respecting the amount of securities to be deposited with you by insurance companies under section 1271 of the Code, and by guaranty companies under the act approved March 5, 1894, as amended by act of February 21, 1896.

It appears from the charter of the Guarantors Finance Company of Philadelphia that it has power to make contracts both of insurance and guaranty and fidelity, and that its authority is ample to do business in both of these capacities.

Section 1271 of the Code requires foreign companies doing business in this State to make certain deposits with you, which you hold in trust to apply to the liabilities of said companies to their policy-holders, under certain restrictions. This fund, therefore, is one of trust, and the conditions and method of its application are clearly stated.

The act relating to foreign guaranty companies (and from the title it seems to apply to such companies, though only *one of its purposes* or powers is to do a guaranty business) likewise requires certain deposits to be made with you to be by you applied, under certain limitations, to the satisfaction of the liabilities of said company to those with whom it may contract.

Under all settled rules of construction these two statutes should be reasonably interpreted to give effect to each. And in my judgment a proper interpretation of the statutes shows that the legislative intent was clear to protect those severally contracted with, and to this end two specific trust funds are originated, one for the indemnity of policy-holders of insurance companies and the other for the protection of the obligees or promisees in guaranty contracts. Neither of these funds can be applied to the liability of the other.

Therefore, it seems plain that if the company in question proposes to do business both of insurance and of guaranty, the law would require two several deposits to meet its dual, contingent liabilities as conditions precedent to the issuance of the two several licenses.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Respecting Rates upon Small Packages, prescribed by Section 1275.

JANUARY 31, 1898.

Gen. J. C. HILL,
Railroad Commissioner :

SIR :

Referring to the enclosed papers and your note in connection therewith, asking my opinion as to whether the charges of twenty-five and fifty cents upon small packages, as prescribed in section 1275 of the Code, should be interpreted as the minimum or maximum rate, I would say unquestionably the latter.

The Legislature was dealing with maximum rates, and could, under no reasonable considerations, have concerned itself with the fixing of minimum rates.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Eligibility of Women for the Office of Notary Public.

FEBRUARY 10, 1898.

HIS EXCELLENCY,
The Governor of Virginia.

SIR :

I am this day in receipt of your letter of the 18th instant requesting my opinion upon the constitutionality of House bill No. 287, "in regard to the appointment of notaries public."

The position of notary public in this State is a public office. (*Royal v. Thomas*, 28 Gratt. 136; Section 923 Code, 1887.) Indeed, it is a public office of ancient origin, of great importance, and known to all civilized nations. *Opinion of Trustees*, 150 Mass. 586.

Are women eligible to this office as prescribed by this bill? The Constitution itself must supply the answer. It says, "all persons entitled to vote shall be eligible to any office within the gift of the people." Art. 3, sec. 2. Is the office of notary "within the gift of the people?" In my opinion it is. Our supreme court has held that the word "office" in this section includes offices both elective and appointive. *Black v. Trower*, 79 Va., 123. If not, a slight reflection will show that our form of government could be almost entirely changed by legislative action. Manifestly, therefore, the word "office" must be interpreted in its generic sense, as all of our public offices are directly or indirectly "within the gift of the people."

This is an office, therefore, the qualification for which is fixed by the Constitution. This qualification is the condition precedent that the appointee must be "entitled to vote." But women are not "entitled to vote" (art. 3, sec. 2), and therefore they are ineligible to the office in question. And to this extent the bill is, in my judgment, unconstitutional.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Oyster Tax and Rent upon Ground of Riparian Owner.

MARCH 3, 1898.

Hon. R. G. WASHINGTON,

Commonwealth's Attorney, Oak Grove, Va.:

DEAR SIR:

Pressure of work has prevented an earlier acknowledgment of your letter of January 5th, respecting interpretation of section 2137 and amendments and 2136 of Code.

In reply, I beg to say that in my opinion the riparian owner of land in Westmoreland county should pay one dollar tax per acre upon all ground, in excess of one-half acre, he may take by assignment. The statutes relative to this question are very involved, and the opinion reached by me is not entirely satisfactory, yet the construction given by me, with the light thrown upon the question by the many oyster statutes, seems to be the proper one.

I do not think the owners of creeks, coves or inlets comprised within the lawful survey, mentioned in section 2136, are required to pay any tax. However, the words "lawful survey" should be accentuated in interpreting this section.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Power of District School Board.

MARCH 9, 1898.

Mr. M. J. MARTZ,

Lacey Spring, Va.

DEAR SIR:

In reply to your letter of the 2d instant, I beg to say that the ruling of the Superintendent of Public Instruction upon the matter suggested in your letter is that the district school board can close the school for lack of funds, or can

continue the same upon reduced funds, at a reduced compensation to teachers. In other words, the matter of closing the school or extending the term of the same is entirely within the control of the local board.

In my judgment the ruling of the Superintendent of Public Instruction is correct. I return contract herein.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Fees of Commonwealth's Attorneys.

MARCH 22, 1898.

HON. R. S. PARKS,

*Commonwealth's Attorney,
Luray, Va.*

DEAR SIR :

I am in receipt of your letter of the 21st instant, stating that you represented the Commonwealth in the trial of a felony, in which there was a verdict of guilty, and judgment of court thereupon, and that subsequently said judgment was set aside by the supreme court of appeals, and new trial awarded; that a second trial is had of the same case in the trial court, and prisoner again convicted, and you ask my opinion as to whether you are allowed one or two fees.

In my opinion this is the case of which the statute in terms says that a fee of \$10 shall "be charged only once in each case." I think the quoted words mean conclusively that no matter how often a case may be tried, or how many mistrials may be had, only a fee of \$10 can be charged therein.

Yours respectfully,

A. J. MONTAGUE,
Attorney-General.

Number of inmates of Soldiers' Home.

MARCH 23, 1898.

Major NORMAN V. RANDOLPH,

President Lee Camp Soldiers' Home, Richmond, Va.

DEAR SIR :

Replying to your inquiry for my construction of the words "the present inmates," in the appropriation bill, passed at the recent session of the General Assembly, Acts 1897-98, p. 722, I would say that the said words include, and only include, the inmates maintained in your institution at the expense of the State.

I cannot perceive any reason for any other construction of this act, as surely the State can only be interested in such inmates as are supported by her appropriation. As I understand the law your institution is required to maintain, and does maintain now, two hundred inmates; but in order to obtain the benefit of the additional appropriation mentioned in the act in question, it would become necessary to maintain at least fifty additional inmates, making a total of two hundred and fifty.

Yours respectfully,

A. J. MONTAGUE,
Attorney-General.

Right to sign a Bill After Adjournment of General Assembly.

MARCH 5, 1898.

TO HIS EXCELLENCY,

The Governor of Virginia :

SIR :

In response to your inquiry, I beg to say that the weight of authority and reason would sustain you in signing the bill enlarging the charter of the Virginia Seaboard and Western Railway Company, after the adjournment of the Legislature and within five days from the presentation of the bill to you.

However strong the weight of reason and authority may be to sustain your right to sign this bill, I would not, in view of the long executive practice of this State, advise you to do so if the bill in question were a mere public act; but inasmuch as the corporation will have to assume all the risks of an invalid charter, I would advise your right of approval, inasmuch as thereby the question of your authority may be judicially tested without cost to the State.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Validity of Reduction of Salaries of State Officials.

APRIL 16, 1898.

Hon. JOHN N. OPIE,

State Senator, Staunton, Va. :

DEAR SIR :

I am in receipt of your letter of the 12th instant, asking my opinion upon the validity of the legislation reducing salaries of superintendents and other officers of the insane hospitals.

The terms of the appropriation act fixing the salaries of these several officers are manifestly in conflict with so much of section 1663 of the Code as empowers the board of visitors to fix such salaries. The latter act, therefore, being clearly repugnant to so much of the provision of said section mentioned, in my judgment, repeals the former. In other words, the Legislature has fixed the salaries, and the power of the board of visitors so to do is, by clear implication, repealed.

But the contention is that this repeal is invalid in that the salaries heretofore fixed by the boards constitute a contract between the parties, and the legislative enactment is an impairment thereof. This view assumes that the appointment of the officer, together with the prescription of his compensation, constitutes a contract. I think, however, the weight of reason and authority does not sustain this view.

"For obvious reasons of public policy it is well settled that the power of the Legislature in respect to changing the compensation of public officers is absolute, except so far only as this power may be limited by the fundamental law of the State."

"The services rendered by public officers do not, in this particular, partake of the nature of contracts, nor have they the remotest affinity thereto."

Loving v. Auditor, 76 Va., 942 ;

Field v. Auditor, 83 Va., 882 ;

Cooley Con. Lim. (6 Ed.), 331 ;

Butler v. Commonwealth, 10 How., 402.

These decisions establish the doctrine that the Constitution of the United States did not intend to restrain the States in the regulation of their several institutions, pertaining to their internal government. Therefore, the State can discontinue offices or change their salaries or compensation without infringement of constitutional inhibition.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Same Subject.

APRIL 22, 1898.

HIS EXCELLENCY,

the Governor of Virginia :

SIR :

I beg to acknowledge receipt of your letter of the 19th instant, together with a letter to you from Mr. C. P. Armistead, Secretary of the Western State Hospital, requesting my opinion as to when the salaries of the officials of the State Hospitals go into effect as prescribed by the Appropriation Act, approved March 3, 1898.

The last section of said Act prescribes that it "shall be in force from its passage, except so far as it relates to salaries of officials and employees of government, as to which it shall go into effect" July 1, 1898.

But are the "superintendents and other officers and employees of the respective hospitals," mentioned upon page 721 and 725 of said Act, "officials and employees of the government" named in last section? If the answer be in the affirmative, then it is plain that the compensation fixed by said Act does not go into effect until July 1, 1898, and if in the negative, then the salaries prescribed are effective from its passage.

I am, however, of the opinion that the salaries mentioned in said sixth section clearly mean the salaries of the direct officials of the government proper. This construction is implied from the language of the section itself, which limits the class of salaries to remain unaffected until the 1st of July to the salaries of those officials and employees of the government enumerated in the Act of March 3, 1896. But the salaries of the superintendents and officials of the State Hospitals are not embraced in this enumeration, and therefore their salaries go into effect from the passage of the Act.

Even were the terms of the Act less explicit, I am fully warranted in saying that the "officials and employees," named in said sixth section, have a distinct technical meaning, derived from long legislative enactment and practice in the Auditor's Department, which meaning limits such officials and employees to those directly employed by the government and directly and severally paid out of the State Treasury. The officers and employees of the State Hospitals have never been so paid, and under this act are not so paid. A lump sum is paid to the several institutions, and from this sum must come the salaries of the officers thereof. The Act in question in no way changes the manner of disbursement or payment of said superintendents and officials, but only fixes the rate of compensation which was theretofore fixed by the several visiting Boards.

So, from every pertinent consideration, I am constrained to say that the salaries for the superintendents and officials of said hospitals went into effect from the passage of the Act in question.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Fees on Charters.

APRIL 9, 1898.

THEODORE L. FROTHINGHAM, Esq.,
No. 44, Pine Street,
New York.

DEAR SIR :

I regret exceedingly my delay in answering your several communications, but work, which of necessity took precedence of your inquiry, has caused the delay.

In my opinion your corporation, in order to do business in Virginia, should pay the fees prescribed in section 2 of the Act approved March 1, 1898.

While the language in section 3 is obscure, yet when consideration is given to the fact that only charters granted under section 1145 of the Code of Virginia, and charters of foreign companies, are required to be recorded by the Secretary of the Commonwealth, then such charters should pay like fees.

Charters obtained from the General Assembly of Virginia, which are classed under section 1 of the Act in question, are not required to be recorded by the Secretary of the Commonwealth, and the mention of the name of the General Assembly in section 3 is superfluous, and of no meaning.

I repeat, in conclusion, charters of foreign companies, and those obtained from the several courts of this State, stand upon the same footing as respects the amount of fees to be paid to the State as a condition precedent to their operation.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Compatibility of Office of Sheriff and Notary Public.

APRIL 14, 1898.

Mr. R. J. WOOLWINE,
Stuart, Va.

DEAR SIR :

Your letter of the 10th instant, asking my opinion upon the compatibility of the office of sheriff and notary public, has been received.

In reply, I beg to say that article vii., section 5, of the Constitution provides that "sheriffs shall hold no other office." The position of notary public is such "other office," and therefore a sheriff cannot perform the duties of both offices.

Yours very truly,

A. J. MONTAGUE,
Attorney-General.

License to Practice Law.

Judge E. W. PENNINGTON,

Pennington Gap, Va.:

DEAR SIR :

I am in receipt of your letter of the 9th instant, respecting the motion under section 3192 of the Code for admission to the bar of this State of a resident of your county, who has heretofore procured a license to practice law in the State of Tennessee.

In reply, I beg to say that from the facts stated in your letter, your construction of said section and of section 3191, as amended, is in my judgment correct. To give it any other construction is to give undue weight to the mere letter of the law, entirely leaving out of sight its object.

In my opinion section 3192 is only entitled to cover resident lawyers practising in such foreign States and Territories. It does not mean that a lawyer from this State can evade the laws of this State relative to admission to the bar by going to another State where the rules of such admissions are very lax, procuring his certificate, and without any residence or practice therein, return to this State and claim protection under such license.

Very respectfully,

A. J. MONTAGUE,

Attorney-General.

Vacation of Office

MAY 3, 1898.

CHARLES T. LASSITER, Esq.,

Attorney for Commonwealth,

Petersburg, Va.

DEAR SIR :

I beg to acknowledge receipt of your letter of the 2d instant, stating that you are a second lieutenant of Virginia volunteers and Commonwealth's Attorney of your city, and requesting my opinion as to whether the latter office would be affected by your enlistment in the army of the United States under the recent proclamation of the President.

Section 163 of the Code plainly provides that a Commonwealth's Attorney shall not hold "any office or post," "civil or military," under the government of the United States; and that the acceptance of such office vacates, *ipso facto*, the State office.

Section 164 of the Code qualifies the copious category of disabilities named in the foregoing section, and expressly excludes therefrom "militia officers or soldiers on account of any recompense they may receive from the United States when called into actual duty."

Therefore, if you have been "called into actual duty," as a militia officer and as a part of the militia of this State by the recent act of Congress and the proclamation of the President in pursuance thereof, then the office of Commonwealth's Attorney is not affected thereby.

But an examination of the act of Congress, the proclamation of the President and the letter of the Secretary of War, the proclamation of the Governor and the orders of Adjutant-General Nalle, respecting the organization of additional troops to meet the present exigencies of war, show that neither the militia nor the officers thereof have been "called into actual duty" within the provision of the Federal Constitution authorizing the "calling forth the militia." The said act seems to relate to three branches of the army—the regular army, volunteer army and militia. So far it seems that the President avails himself of the first two, and that the call made excludes the militia as an organization. It is true that the call suggests a preference for members of the militia, and that when members of the militia shall enlist in the "volunteer army" as a body, then such body preserves its original organization. But I do not understand this to be other than an inducement and reward for volunteer enlistment of trained soldiers.

Therefore, the qualification of disabilities or exception does not obtain under the present call for troops, and for you to enlist with your company in the military service of the United States in pursuance of said call, and receive pay therefor from said government, vacates, in my opinion, the office of Commonwealth's Attorney for your city.

It has been suggested, and the same has had the notoriety of publication, that the qualifications or disabilities for office named in said section 163 are in contravention of Section 2, Article III, of the Virginia Constitution, in that the latter prescribes "all persons entitled to vote shall be eligible to any office" in this State, and that the statute mentioned requires this as well as other qualifications. This contention or construction, however, arises out of a misapprehension of the constitutional provision. This provision relates to the eligibility of a person for an office, and I am persuaded was never intended to inhibit legislation declaring the incompetibility of certain offices.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Term of Imprisonment of a Convict.

MAY 25, 1898.

The Board of Directors of the Penitentiary.

GENTLEMEN :

In response to your request I beg to submit the following :

1. In my opinion the term of imprisonment of a convict is not the exact time contained in the sentence of the court, but such time less the deductions earned by reason of good conduct, as prescribed by Section 4144 of the Code, amended by Act of February 11, 1896. Therefore, the Act of March 3, 1898, providing for conditional pardons, in certain cases, when the convict "shall have served out one-half of his term of imprisonment" does not mean one-half of the term of sentence but one-half of such sentence reduced by operation of law. In other words, the "term of imprisonment" is the period stated in the sentence, together with the statutory contingent qualifications or deductions. Hence, when the portion of the term served, together with the statutory deductions or earnings, equals one-half of the original sentence, then the convict has "legally served out one-half of his time."

The soundness of this construction is apparent from any actual case. For example, a convict has been sentenced to imprisonment for eighteen years. He has not actually served nine years, but his service, together with the legal earnings, forbid, at the maximum, a longer detention than nine years for the residue of his service? He has thus gotten rid of one-half of his term by operation of the statute, and therefore has "served out one-half" of his term of imprisonment.

2. The applicant for pardon is required to aver in his petition "that he has kept the prison rules in every respect." Your Board must ascertain the truth of this averment, and I am advised that you desire my opinion as to the scope of your authority to inquire into the fact as to whether the applicant has so kept the prison rules.

Said amended Section 4144 of the Code requires the Superintendent to keep a record of the conduct of each convict. In my judgment, your Board has only to look to this record to determine whether or not the convict has violated the rules and requirements of the prison. I think this record affords complete evidence upon this point, and must be binding upon the Board unless the entry therein is false or erroneous. The Board could not possibly make a satisfactory investigation as to whether or not the rules have been violated, and they must therefore rely upon the entries in the register, made by the proper officials.

Very respectfully,

A. J. MONTAGUE,

Attorney-General.

*Eligibility of Justice of the Peace, "Road Commissioner," or Clerk of a County Court,
for the Position of School Trustee.*

JUNE 29, 1898.

Hon. JOSEPH W. SOUTHALL,

Superintendent of Public Instruction.

DEAR SIR:

I beg to acknowledge the receipt of your letter of the 18th instant, requesting my opinion as to whether a justice of the peace, a "road commissioner," or a clerk of a county court can hold the office of school trustee.

Section 818 of the Code, as amended by Act approved February 28, 1890, provides that—

"No person shall hold more than one county or district office at the same time; and that if any person shall be *elected* to two or more of *said* offices, his qualification in one of them shall be a bar to his right to qualification in either of the others."

I construe this language to mean that no person shall hold two county *elective* offices or two district *elective* offices. This seems to be the manifest purpose of the act. Therefore, I am of opinion that a justice of the peace, an elective district official, can hold the office of school trustee, an appointive district office; that a "road commissioner" can, if he be the official mentioned in section 991 of the Code, hold the office of school trustee for the same reasons; and that a county clerk, being elective and a county, as distinguished from a district, official, can also be a school trustee.

Referring to the further inquiry contained in your letter, I am of opinion that so much of the act of the General Assembly, approved March 3, 1898, as fixes three school trustees for each school in the county of Craig is void, as being in con-

flict with Article vii., Section 3, of the Constitution of Virginia. Said section limits the number of school trustees to three for each school district of the county, and manifestly the act in question conflicts with this plain provision.

It would be likewise difficult to have a uniform system of public schools if the number of trustees should vary in the several counties or districts thereof.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Fees Upon Amended Charters.

JULY 23, 1898.

Hon. WILLIAM A. LITTLE, JR.,

Fredericksburg, Va.

DEAR SIR:

Replying to your letter of the 21st instant, respecting fees upon amended charters, as provided by Act of March 1, 1898, I beg to say that in my opinion the maximum stock of your Company being increased from \$30,000 to \$50,000, the said increase of \$20,000 is required to pay a fee of \$45.

The Act provides "that a proportionate fee for such increase shall be made as hereinabove provided." I interpret the proviso to cover the rate of charges mentioned in the second paragraph of the second section, and that the \$20,000 increase stands upon the footing of an original charter obtained in this sum.

Very respectfully yours,

A. J. MONTAGUE,
Attorney-General.

Respecting the Contingent Fund of Land Office.

SEPTEMBER 23, 1898.

Col. JOHN W. RICHARDSON,

*Register of Land Office,
Richmond, Va.*

SIR:

Acknowledging the receipt of your letter of the 22nd instant, respecting the Contingent Fund of the Land Office, I beg to give my opinion upon your inquiries as they are numbered:

"1st. What amount does the Appropriation Act of 1897-'98 allow as contingent fund per annum for the Land Office?"

The sum is what was heretofore allowed on account of the Register of Land Office. I construe this to mean the amount contained in the Appropriation Act next preceding that approved March 3, 1898, which is \$300.

"2nd. Can any portion of it be used for any other purpose than that for which it was appropriated?"

I answer in the negative.

"3rd. Can it be drawn by the Register of the Land Office without the endorsement of the Secretary of Commonwealth?"

I likewise answer in the negative.

"4th. If not, and the Secretary withhold such endorsement, can he be compelled to endorse?"

The Secretary could only be compelled to act by a court, and as to whether or not the court would compel him to execute such endorsement I cannot with certainty advise you. In my opinion, I think the Secretary would be safe in endorsing a warrant for the amount stated.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

*Construction of Section 3, Act Approved March 4, 1884, as Applied to Waters of
Milford Haven and Horn Harbor.*

SEPTEMBER 20, 1898.

Mr. S. F. MILLER,
*Superintendent State Board,
Foster, Va.*

DEAR SIR:

I beg to acknowledge receipt of your letter of the 26th instant, asking in behalf of the Board of Fisheries, for my construction of section 3, of Act approved March 4, 1884, as applied to the waters of Milford Haven and Horn Harbor, respectively, in the county of Mathews.

In reply, I would advise that the said Milford Haven is neither a creek, cove nor inlet, contemplated by said Act. It is, in fact, a part of the Piankatank river, a body of water that is geographically called a strait, and clearly distinguished from a creek, cove or inlet, contemplated by said Act. Therefore, the grounds in such waters, save that portion covered by natural oyster rocks, are legally subject to assignment and rental.

I am also of opinion that Horn Harbor is not a creek, cove or inlet running through "the land of any person," and "comprised within the limits of his lawful survey." Therefore, such person, or lawful occupant, has not the exclusive right to use said harbor for sowing and planting oysters therein.

I am, however, of the opinion that owners and occupants of lands on both sides of the said Horn Harbor, above the point or points therein where the same is one hundred yards in breadth or less, should have the exclusive right to use the same for sowing and planting oysters therein, as provided by the said Act, but that the waters of said Horn Harbor below the point where the same is more than one hundred yards in breadth are not amenable for planting and sowing oysters, unless assigned and rented in conformity with law.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Exposure of Ballot.

OCTOBER 18, 1898.

Mr. R. L. GREER,
Chairman Electoral Board, Coeburn, Va.:

DEAR SIR:

Replying to your letter of the 15th instant, I beg to say that in my opinion no voter has the right to expose his ballot to a judge or other person after the said ballot has been prepared and is ready for deposit.

The secrecy of the ballot is vital, and this secrecy should be preserved until the elector's ballot is placed by him in the box, for thereby he is secured from all outside influence.

If the elector, after receiving his ballot, can expose it, then this act destroys that secrecy of the ballot which is one of the chief objects of the law.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Boundaries of School Districts.

OCTOBER 19, 1898.

Mr. E. J. WILKINSON,

Lynch Station, Va.

DEAR SIR:

Replying to your letter of the 15th instant, I beg to say:

(1) That a school district corresponds in boundaries to magisterial districts, except that towns of more than five hundred inhabitants, under certain circumstances, may constitute a separate school district.

(2) A parent or a guardian is required to send his child or ward to the nearest school in his school district, unless otherwise ordered by the School District Board, and unless his school is a graded school; in which case the proximity of the school to the pupil of the district is not applicable.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Loss of Registration Books.

NOVEMBER 4, 1898.

J. H. BRENNAMAN, Esq.,

Woodstock, Va.

DEAR SIR:

I have just wired you that in case the registration books of Strasburg Precinct are lost, stolen or destroyed an election can be held, and the electors should be allowed to vote upon satisfactory proof to the judges of election of proper registration, and that the voter is otherwise qualified to vote.

Such loss or destruction of the books cannot defeat the right to vote of a duly qualified and registered voter.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Respectfully submitted,

A. J. MONTAGUE,
Attorney-General.

