

ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE YEAR 1899.

RICHMOND:
J. H. O'BANNOX, SUPERINTENDENT OF PUBLIC PRINTING.
1899.

REPORT.

COMMONWEALTH OF VIRGINIA,

OFFICE OF ATTORNEY-GENERAL OF VIRGINIA,

RICHMOND, November 1, 1899.

To His Excellency, J. HOGE TYLER,
Governor of Virginia.

SIR:

I have the honor to make the following report of the work of this office for the year ending this day:

UNITED STATES SUPREME COURT.

1. McCullough v. Virginia.

My last report shows that this case had been duly argued and submitted, and was then under advisement. A decision was reached December 5, 1898, wherein the contention of the Commonwealth was denied.

The validity of the coupon feature of our State debt contract was the question involved. In this same case the Supreme Court of this State had held that inasmuch as the Constitution of Virginia compels payment of certain taxes in cash, and in that the coupon contract could not be enforced against such cash taxes, the whole contract must fall, the partial failure being a vice which enters into and destroys the entire contract. In other words, that the contract being void in part, and such void part being inseparable from the whole, the whole must fall with the part. Our court, however, was reversed by the United States Supreme Court, and Virginia's contention as to the invalidity of the coupon contract seems now to be finally settled against her. So that no remedy seems to be left the State save to refuse to pay the principal of the bonds at maturity, upon such terms as she may demand; for when the maturity of these bonds is reached, the matter will then be entirely within the control of the State as to the principal.

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

From the United States Circuit Court for the Western district of Virginia.

Reference is made to my former report, wherein it will be perceived that Virginia has really no interest in this case. The case has since been decided, and the decision in no way affects the Commonwealth.

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

Reference to my former report, on page 4, is made in order that the commencement and progress of this case may be thoroughly understood.

It will be recalled that this proceeding exhibited the power of the Federal Court in awarding injunctions against the State of Virginia to restrain the prosecution of the said H. G. Wadley for a felony. The power thus exercised on the part of the Federal Court was unprecedented in our system of jurisprudence, and no apprehension was experienced as to the final outcome of the case, could the same be heard in the United States Supreme Court upon its merits. Sundry technical impediments were interposed to prevent the exercise of this supreme appellate jurisdiction. However, that court, on December 5, 1898, rendered a unanimous opinion in favor of the Commonwealth, sustaining her every contention in the most comprehensive and definitive way.

It was thought that this remarkable proceeding, after being thus disposed of by the United States Supreme Court, would have reached its end, and Virginia would have been enabled to resume this prosecution. However, between the 25th and 31st of December last motion was made before Hon. John Paul, sitting as United States circuit judge for the Western district of Virginia, at Harrisonburg, to amend the record in this case in order that a rehearing might be obtained in the United States Supreme Court. This learned judge promptly denied the motion. But this decisive action did not end the matter, for upon the dissolution by Judge Paul of the injunctions prohibiting the prosecution, an appeal was perfected therefrom to the United States Circuit Court of Appeals, at Richmond, in which appeal, however, the same learned judge denied a *supersedeas*. This denial, therefore, practically rendered the appeal useless. So, to circumvent this just action of Judge Paul, a motion was successfully made before Judge Goff for a *supersedeas* in the case, and for additional time within which to perfect the appeal. This last action was amply sufficient to impede again the prosecution. The record was not printed in time for the case to go upon the argument docket, so that of necessity an argument could not be reached before February, 1900. In view of this delay it was determined to submit a motion to dismiss the case on the ground that the appeal was taken for delay, and only delay. Consequently, notice of such motion has been given, and the same will be argued sometime about the 21st or 24th of this month. Every confidence is felt that the motion will prevail.

This extraordinary litigation, it is therefore hoped, will soon terminate, when the Commonwealth will be enabled to resume her jurisdiction in the case wherein her powers have been suppressed by a plain violation of the law on the part of the Federal Court.

Mention should be made, however, of the very judicial and just conduct of the Hon. John Paul, who has sustained every contention of the Commonwealth, and whose action, in turn, has been abundantly upheld by the United States Supreme Court.

SUPREME COURT OF APPEALS OF VIRGINIA.

1. *Hite v. The Commonwealth.*

From Mecklenburg county.

This case involved the question of the legality of a verdict of murder in the first degree, when one of the jurors was under twenty-one years of age.

The contention of the Commonwealth was that inasmuch as the verdict was just, no exception of the character in question could be taken after the verdict. This view was concurred in by the Supreme Court, and the unfortunate man was duly hanged.

2. *Trimble v. The Commonwealth.*

From the corporation court of Lynchburg.

This was a case of contempt on the part of a defendant in *habeas corpus* proceedings, in removing a child beyond the jurisdiction of the court and State. It was held that this action, under the particular circumstances, did not constitute contempt.

3. *Carter v. The Commonwealth.*

From the circuit court of Lynchburg.

This case was of profound interest, in that it involved the constitutionality of the act of February 28, 1898. This act empowered juries in certain cases to pass upon the contempts of litigants. It became my duty to maintain the unconstitutionality of said act, and it was so declared by the unanimous decision of the court, ably expressed by President Keith on March 18, 1899.

4. *Cannon v. The Commonwealth.*

From the corporation court of Norfolk.

This is a decision which declared void a recognizance given by the accused and his father in the sum of \$5,000. The opinion of the court holds that the conditions in the recognizance did not comply with the requirements of section 4083 of the Code, in that they did not state the offence with which the accused was charged and for which he must appear to answer. It will therefore be perceived that the opinion rested upon narrow grounds, and it is respectfully submitted that legislative action should be asked to cure such errors and to prevent future loss to the Commonwealth upon similar grounds.

In that recognizances are often taken in a great hurry and by some not learned in the law, it is thought that the Legislature should intervene to perfect the validity of bonds of such inartificial character, the defects in which are mainly technical.

5. *Sutton v. The Commonwealth.*

From Lee county. Conviction of murder in the first degree.

In this case the opinion reverses the lower court upon the ground that the instructions given erroneously set forth necessary elements required to be proven to establish the crime.

6. *Norfolk and Western Railway Company v. Board of Public Works.*

From the circuit court of the city of Richmond.

This was a case involving the *situs* of certain barges and tugs of the Norfolk and Western Railway Company for the purpose of taxation. The court sustained the Commonwealth's contention that the place of enrollment or registration of such vessels is not conclusive in establishing the place of taxation, and thus maintained the State's tax upon such barges and tugs.

This case is one of importance, as floating property of this character is likely to come more and more within our jurisdiction for the purposes of taxation.

7. *Commonwealth v. Johnson.*8. *Commonwealth v. Davis.*

These two cases are from Norfolk city and involve the validity of the coupon feature of our debt contract. The decision in the case of *Virginia v. McCulough* by the United States Supreme Court controls these two cases; consequently it will be my duty to dismiss them upon the assembling of the Supreme Court in November, as to retain them upon the docket would be a mere work of cost with no compensatory advantages.

9. *Marye, Auditor, v. Board of Agriculture.*

From the circuit court of the city of Richmond.

This was a *mandamus* proceeding on the part of the Board of Agriculture to compel the payment of certain moneys, claimed as salary and due to the late Commissioner of Agriculture and other officials of that department. The lower court awarded the *mandamus*, and from its action the Commonwealth perfected a writ of error. The Commonwealth contended that the act approved March 3, 1898, changed the salary and fees, as well as the source of the same, of the Commissioner and other officials of the Agricultural Department. The Commonwealth's construction was sustained, and the lower court reversed.

10. *Main's Admr. v. Eastern State Hospital.*

Reference to case No. 18, on page 5 of my former report is made in connection with this case.

The whole question involved was the right to recover damages from the hospital for death of an inmate occurring through the alleged negligence of its employes. This, it must be perceived, is a question of profound interest to the State, and while perhaps it was not in the strict sense within my official duty to appear for the hospital, yet inasmuch as my predecessor had done so in the lower court, I undertook to follow the litigation through. The case was argued on the 30th and 31st days of January, 1899, and on the 9th day of March, 1899, an opinion was rendered reversing the lower court. This opinion appeared to me unsupported by law, and I promptly filed a petition for a rehearing, which petition, to my great gratification, was favorably acted upon September 27, 1899; and the case will therefore come up for a re-argument at the November term.

11. *Hairston v. The Commonwealth.*

From the county court of Henry. Conviction of an attempt to commit rape.

The lower court was reversed upon the ground that the evidence was insufficient to sustain the charge.

12. *Somers v. The Commonwealth.*

From Accomack county.

The question decided in this case was whether it is a criminal offence to take or catch oysters with dredges on private oyster grounds.

The lower court was reversed upon the ground that while there was a prohibition upon such dredging, yet the statute was so inaptly drawn as not to contain any penalty for a violation thereof.

This case is one of moment, for it overthrows what was popularly accepted as the long-established penal law in connection with prohibitions upon dredging, and if this policy of the Commonwealth is to be adhered to, the statute should be amended by a clear insertion of the penalty.

13. *Jackson v. The Commonwealth.*

From Pulaski county.

This was a conviction of murder in the second degree, but a reversal of the case was asked for upon the ground that in certain instructions the definition of manslaughter and murder in the second degree was erroneous. The case was reversed upon this ground.

14. *Mullins v. The Commonwealth.*

From Dickenson county. Decided at Wytheville.

This was a charge of rape, and the action of the lower court was reversed on the ground that certain erroneous testimony was admitted, and that the whole evidence was plainly insufficient to maintain the verdict.

15. *The Douglas Company v. The Commonwealth.*

From the circuit court of Smyth county. Argued at Wytheville and decided at Staunton.

The lower court was sustained, and important principles in connection with the assessment of taxes upon lands was decided favorably to the Commonwealth.

16. *Flick v. The Commonwealth.*

From Augusta county. Decided at Staunton September 21, 1899.

This was a prosecution for the felonious seduction of an unmarried female of previous chaste character by a married man.

So far as I am advised this is the first offence of this particular character which has reached our appellate court. The accused was convicted in the lower court and sentenced to the penitentiary for five years. This judgment was sustained in the appellate court in a very able opinion, wherein the law has been laid down in the most wholesome manner. It is hoped that after this decision the ways of the seducer in Virginia will not be made easy.

17. *Wise v. The Commonwealth.*

From the county court of Henrico.

This is a question of contempt, and relates to the power of the court to fine a practising attorney for contempt in the event of his failure to appear to represent his clients under certain circumstances.

Now pending.

18. *Willis's Exor's v. The Commonwealth.*

From the hustings court of the city of Richmond.

This case presents a matter of taxation, and involves the question whether or not the Commonwealth can tax what may be commonly called "ground rents." Mr. Willis, in his lifetime, loaned a good deal of money by a system of ground rents. It is alleged that they are not loans in fact, but purchases of ground rents.

The contention of the Commonwealth is that (1) such purchases of land and the conveyances thereof, are really mortgages to secure the payment of money, and in no sense "ground rents"; and (2) if "ground rents," they are taxable under our laws.

This case is likely to be heard the first week of the coming term of the court, and, should an adverse decision be reached, it may not be inappropriate for me to suggest that inasmuch as very large sums of money are now thus placed, it would be advisable for the Legislature to take action, if it think such loans should be taxable.

19. *Robert Bundick v. The Commonwealth.*

20. *Catherine Bundick v. The Commonwealth.*

From the county of Northampton.

While these cases were separately tried and separately appealed, yet the plaintiffs in error were jointly indicted, and therefore a joint report of the cases will be here made.

This is a case of burglary, and the chief question to be passed upon by the court is as to the sufficiency or insufficiency of the evidence to sustain the ver-

dict. The cases are now pending, and will be called the first week of the ensuing term.

21. *Jennings v. The Commonwealth.*

22. *Allen v. The Commonwealth.*

These two cases are from the corporation court of Lynchburg, and are likely to be heard together. They involve a question of taxation, namely, the validity of a tax upon shares of stock. The cases are now pending.

23. *Morgan v. The Commonwealth.*

From the county court of Mathews.

This case involves the construction of the fishery laws and the constitutionality of the same. The case is not likely to be heard before the first week in January next.

24. *Tabb and others v. The Commonwealth.*

From the circuit court of Henrico county.

This case presents a case of taxation, and is now pending.

25. *Florence, Trustee, v. Morien, et als.*

From Henrico county.

This case likewise involves a question of taxation. It is not now upon the Commonwealth's docket, but a motion will be submitted for its advancement upon the same as soon as the court assembles, and the case is likely to be heard in January next.

26. *Brown v. The Commonwealth.*

From the circuit court of Henrico county.

This is a case charging the accused with feloniously obstructing a railway, with intent to derail a car upon the same and to imperil or kill the passengers therein.

The record has not yet been printed, and therefore it is not expected that the case will be heard before January.

Thus it will be seen that the Supreme Court docket for the current year is quite a large one, and that the questions involved in some of the cases are of great interest to the Commonwealth.

CIRCUIT COURT OF RICHMOND CITY.

At Law.

1. *Commonwealth v. Bennett Taylor, Clerk Albemarle Co.* Suit instituted June, 1881.

2. *Commonwealth v. Jos. Mayo, Jr., late Treasurer, et als.* Suit instituted April, 1884.

3. *Commonwealth v. Jos. Mayo, Jr., late Treasurer, et als.* Suit instituted April, 1884.

4. *Commonwealth v. Jno. F. Jones, Treasurer Craig Co., et als.* Suit instituted October, 1886.

5. *Commonwealth v. Same.* Suit instituted October, 1886.

6. *Commonwealth v. Bennett Taylor, Clerk Albemarle Co.* Suit instituted October, 1886.

7. *Commonwealth v. G. H. Baughman et als.* Suit instituted Nov'r, 1886.

8. *Commonwealth v. John H. Sears, Treasurer Mathews Co.* Suit instituted April, 1887.

9. Commonwealth v. G. B. Barr, Treasurer Washington Co. Suit instituted April, 1887.

10. Commonwealth v. C. H. Ingles, Treasurer Henry Co., *et als.* Suit instituted October, 1888.

11. Commonwealth v. Same. Suit instituted May, 1887.

12. Commonwealth v. Same. Suit instituted May, 1887.

13. Commonwealth v. O. B. Thomas, Treasurer Fluvanna Co., *et als.* Suit instituted February, 1888.

14. Commonwealth v. W. M. Gray and J. J. Gusler, Washington Co. Suit instituted February, 1889.

15. Commonwealth v. O. D. Foster and R. W. Adams. Suit instituted March, 1892.

16. Commonwealth v. A. K. Phillips, *et als.* Suit instituted March, 1892.

17. Commonwealth v. Mary B. Randolph's Adm'r. Suit instituted March, 1893.

18. Commonwealth v. C. R. Randolph. Suit instituted March, 1893.

19. Commonwealth v. C. H. Ingles, Treasurer Henry Co., *et als.* Suit instituted October, 1893.

20. Commonwealth v. C. I. Reynolds, Admr. of Jno. R. Cabell. Suit instituted July, 1894.

21. Commonwealth v. W. P. Tyree, *et als.* Suit instituted July, 1894.

22. Commonwealth v. John M. Speece, Clerk Circuit Court Bedford Co., principal, and sureties. Suit instituted April, 1899; judgment rendered May, 1899, in the sum of \$728.84, with interest.

23. Commonwealth v. W. T. Thomas, Treas'r of Mathews Co., and sureties. This suit was brought in September, 1899, to recover \$5,852.59. Pending the notice and trial the sum of \$1,547.89 was paid, and upon the calling of the case on October 18, 1899, judgment was obtained for \$4,304.70, with interest upon sundry parts thereof at the rate of 15% until paid. Notice of the suit was promptly docketed in the clerk's office of Mathews, in order to secure to the Commonwealth its lien. It is thought that the property of the sureties is sufficient to satisfy the judgment. Therefore, final settlement of this claim is expected in due time.

24. Commonwealth v. Board of Supervisors of Russell Co. Suit instituted October, 1899.

25. Commonwealth v. Board of Supervisors of Bedford Co. Suit instituted October, 1899.

These two suits are to recover penalties for escaped convicts. The cases are still pending, and final disposition is expected to be made in the course of a short time.

At Equity.

26. Commonwealth v. Saml. M. Page. Suit instituted March, 1872.

27. Commonwealth v. Walter Millan. Suit instituted April, 1872.

28. Commonwealth v. P. H. Huffman, *et als.* Suit instituted April, 1873.

29. Commonwealth v. J. W. Grantham. Suit instituted December, 1874.

30. Commonwealth v. Jas. Hilton's Adm'r. Suit instituted April, 1879.

31. Commonwealth v. Martha Goode, &c. Suit instituted April, 1879.

32. Commonwealth v. Spencer D. Ivey, &c. Suit instituted April, 1879.

33. Commonwealth v. J. T. Young. Suit instituted August, 1884.

34. Commonwealth v. A. A. Chapman. Suit instituted February, 1893.

35. Commonwealth v. Robert S. Ryland and wife, *et als.* Suit instituted July, 1896.

36. Commonwealth v. George Dusner's Curator and Admr. Suit instituted March, 1897.

37. Commonwealth v. B. Vandergrift *et als.* Suit instituted February, 1898.

As will be observed most of these cases are of long standing, and it is hoped that I may be enabled to have many of them finally stricken from the docket during the present term of the court. It would be useless to detail the exact purposes of each suit. Suffice it to say that all relate mainly to suits upon official bonds or supplemental proceedings to procure satisfaction of judgments obtained thereupon. In some instances the proceedings will amount to but little, in that the principal and sureties are insolvent. It is my purpose, however, to make strenuous effort to reduce this docket with all practicable expedition.

UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

1. Commonwealth v. Tyler DeHart.

Removed from the county court of Floyd, pending at Danville.

This case has been argued upon demurrer, the Commonwealth holding that the facts alleged in the petition for removal do not show jurisdiction on the part of the United States. It is expected that a decision will be reached at the December term of the court.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

1. Secretary of the Commonwealth, for, &c. v. George M. West Company.

This is a claim due the Library Department in the sum of \$407.30, and has been filed in the bankruptcy suit of Lea Bros. *et als.* v. George M. West Company. The claim was promptly proved before the referee, but so far no report has been made. It is expected that a report will soon be made, when it is hoped that the case will be disposed of so far as the principal debtor is concerned.

UNITED STATES CIRCUIT COURT FOR THE WESTERN 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. He, however, did not dispose of the cases; consequently, they will have to be reargued and submitted to his successor, Judge Waddill. No trial of the cases has yet been obtained, but very strenuous efforts will be made to have a disposition of them some time during the month of December or January next. These cases 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. 700-728.

Fox Island.

Supplementing my former report in respect to this matter, I beg to report that proceedings have been duly instituted in the circuit court of Accomack to vacate the grant or cession conveying this property, in order that the Com-

monwealth may resume her title and interest therein. The case was postponed for some time by reason of the fact that Judge Blackstone, the judge of that circuit, was disqualified from sitting in the case by reason of being previously professionally interested in the matter, and it was found difficult to find a judge to sit in his stead. However, on September 29, Judge Prentiss very kindly consented to hear the case, on which day it was argued and submitted. No decision has as yet been rendered, though an opinion is expected daily.

OFFICIAL OPINIONS.

A few official opinions are selected and appended. Requests for opinions are growing constantly. The bulk of them, however, are made by those who have no authority to do so. Yet the practice of this office has been such that in some cases it is impracticable to refuse such requests.

Issue of Transfer by Registrar.

NOVEMBER 15, 1898.

Mr. E. A. LEONARD,
Registrar, Lebanon, Va.

DEAR SIR:

Replying to your letter of the 12th instant, I beg to say that a registrar has no right to issue a transfer on the day of an election, nor would another registrar have the right to register the name contained in the transfer on the day of an election.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Vacation of Office by Reason of Enlistment in Volunteer Army.

NOVEMBER 30, 1898.

To His Excellency J. HOGE TYLER,
Governor of Virginia.

SIR:

I have the honor to reply as follows to the inquiries propounded in your letter of the 29th instant:

(1) I am of opinion that the position of notary public is vacated by reason of the enlistment of such official in the volunteer army of the United States, as organized in the late war.

(2) I am further of opinion that the soldiers and officers of this State who enlisted in the volunteer army of the United States in the recent Spanish war thereby vacated their posts and offices in the militia of this State.

Such seems to be the proper construction of the statutes affecting the matter in question. And in this connection I beg to enclose you a copy of a letter to the Commonwealth's attorney of Petersburg, dated May 3, 1898 (see former report, p. 17), wherein is expressed more at length my views upon this subject.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Construction of Act Approved February 2, 1896, Relative to Peddlers' License.

DECEMBER 10, 1898.

Messrs. HATHAWAY & HATHAWAY,
Attorneys at Law, Whitestone, Va.

DEAR SIR:

I regret I have been unable to answer sooner your letter of the 2d instant respecting the construction of the act approved February 2, 1898, relative to peddlers' license.

Upon looking at said act you will perceive that there is a manifest transposition of paragraphs. That section 2 plainly was intended to come after section 32 and prior to section 3, on page 225 of the act. Therefore, section 2, following section 32—and it is meaningless unless it does so follow—plainly provides that a merchant cannot put his goods or wares in the hands of his agent or agents and sell the same throughout the county or corporation in which he is licensed to do business, and that in the very terms of the act such sales constitute peddling.

Such is the general law of this State and is in no way changed by the act in question if said section 2 be omitted in its interpretation. But this proviso found in said section 2 is simply declarative of what the law has heretofore been respecting peddlers, namely, that a man cannot take his goods and place them in wagons and carts and send them throughout his county for sale. Such an act is peddling. Of course, do not understand me to say that a merchant cannot deliver goods "upon orders before given," for, without the statutory words mentioned, the statute cannot be construed to prevent the delivery by a merchant of goods theretofore sold.

Therefore I am constrained to agree with the Auditor in his interpretation of the statute in question.

Very truly yours,

A. J. MONTAGUE,
Attorney-General.

Holding of Certain Offices Prohibited by Section 163 of the Code.

JANUARY 19, 1899.

J. B. IRWIN, ESQ.,
Sun Rise, Va.

DEAR SIR:

Replying to your letter of the 18th instant, I beg to say that I am of opinion that a supervisor of a county cannot be a postmaster; and, also, that a postmaster cannot hold the office of county jailor.

The holding of these offices is prohibited by section 163 of the Code. There was an amendment, however, making certain qualifications of that section, and in the qualifications a fourth-class postmaster is allowed to act as a notary public or school trustee. You will perceive that the section as amended does not, however, allow either supervisors or jailors to be postmasters.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

School Trustee Prohibited from Holding Office of Enumerator of the U. S. Census.

JANUARY 21, 1899.

W. D. FALCONER, ESQ.,
Commerce Street,
Petersburg, Va.

DEAR SIR:

Replying to your letter of the 18th instant, I beg to say that in my opinion a supervisor can serve as a school trustee.

I do not, however, think a school trustee can hold the office of Enumerator of the U. S. Census; that is, if this place is an office under the United States government.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Validity of Claim of Fauquier County.

FEBRUARY 9, 1899.

Col. MORTON MARYE,
Auditor of Public Accounts.

SIR:

I have considered the claim of Fauquier county against the Commonwealth, in the sum of \$2,773.66, presented at your office sometime in October, 1898, and am of opinion that you should issue no warrant upon the Treasurer in payment therefor.

It is contended that this sum was paid by the county for the service of juries in criminal cases from January 18, 1888, to December, 1897; that said sum was not properly payable by the county but by the State; and therefore the former should now be reimbursed by the latter.

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law." (Con. Art. 10, §10). This plainly means that for any given constitutional object or subject there must be an appropriation, and the disbursements thereof must be in strict conformity to statutory directions. No principles of common law or equity apply to such disbursements. They must rigidly conform to statutes and the Constitution.

Has any appropriation ever been made to refund to the county of Fauquier any moneys improperly paid by said county to juries in criminal cases? Manifestly not. Therefore, you have no statutory authority whatever to issue a warrant to said county for said sum.

It is further suggested that, to avoid the difficulties just mentioned, the claim be withdrawn and presented by the treasurer of the county, and not the county itself. And such withdrawal and re-presentation has been actually made.

It is contended that section 765 covers the claim as thus presented, as well as the original presentation by the county. I do not think the section covers other than legal claims, and that it must be construed in connection with all the statutes relative to the pay of juries in criminal cases. These statutes enable you, in a settlement with a county treasurer, to allow for the payment by him of jury service in criminal cases, but such service must be evidenced by an order of the county court. (Sections 3163 and 3164 of the Code, the latter section amended by act of February 27, 1896). Such court is also

required to make similar orders and certification to the county treasurer for the jury service payable by the county. In other words, these orders, and the proper certification thereof, are the statutory vouchers for the issuance of your warrants upon the treasurer. You are powerless to settle with the county treasurer in the absence of such orders and their proper certification.

Upon an examination of these several orders it appears they duly adjudge that the services in question are payable out of the county treasury, and not out of the State treasury. So, in issuing your warrant for the payment of these services you will not comply with the statute, but will override the same. In other words, the State would pay what has heretofore been adjudged the county should pay out of its own levy.

To meet this insuperable objection, it is suggested that the county now make an order amending or setting aside all of the orders which were made in ten years next preceding January 1, 1898. This last order to show that all of the said orders were clearly erroneous, and that the service of the several jurors was in criminal cases and payable by the State. This contemplated order, no doubt, adjudges the real facts. But what authority has the county court, after the ending of the several terms at which the said erroneous orders were entered, to amend and set aside the same? It has no such authority, and such order, if entered, would be a nullity, and not the required record essential to protect your warrant.

I am also of opinion that no appropriation contained in the act of March 3, 1898, for the fiscal years ending 1898 and 1899, respectively, is available for the payment of this claim.

The correctness and good faith of the claim cannot be questioned, and it would be a pleasant duty to advise the issuance of a warrant therefor could I find any statutory authority to sustain my action. But in the present status of the claim it appears to me that the Legislature is the only power that can afford a proper remedy.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Disposition of Property by Will within the Jurisdiction of Commonwealth.

MARCH 11, 1899.

JAMES P. CORBIN, Esq.,
Clerk of Court,
Fredericksburg, Va.

DEAR SIR:

* * * * *

I construe the words "the estate—real, personal or mixed—passing by said will," to mean such estate as is within the Commonwealth. The will is only a will so far as it passes property in this Commonwealth. As to whether this same will, if probated in another State, will pass property there, is in no way material to a construction of the statute. The will may be entirely invalid in another State, yet valid here. For instance, suppose a will, with two attesting witnesses, devises real estate in Virginia worth, say \$25,000, yet in the same will there is devised real property in Georgia of the value of \$100,000, it would be a good will as to Virginia, but no will as to Georgia, because three attesting witnesses are required in that State. So no property passes under this will

but the \$25,000 in Virginia. I make this illustration to show that it is no will at all so far as this State is concerned, save as it affects the disposition of property within the jurisdiction of this Commonwealth. So the tax upon the will in question should be upon the amount of property passing thereunder and within the jurisdiction of this State.

Please show this letter to Judge Wallace, as he was kind enough to write me his views upon this question.

Yours very truly,

A. J. MONTAGUE,
Attorney-General.

Duty of County in the Matter of Employment of Convicts.

MARCH 23, 1899.

Judge J. C. PADGETT,
Independence, Va.

DEAR JUDGE:

I have been unable to reply earlier to your letter of the 6th inst., respecting the construction of section 3933 of the Code, as amended.

In my opinion, if the county undertakes to establish chain-gangs it must provide "for the payment of their expenses and furnish them the necessary clothing"; and I understand this to embrace board of those who may be worked on such chain-gangs.

I am also of opinion that section 3938 contemplates that the twenty-five cents per day therein mentioned should be paid into the State treasury. In other words, the State says to the county, "You can take these prisoners and work them, but you must pay their expenses, board and clothing, and remit to the State twenty-five cents each per day." It is just as if the prisoner himself paid this amount of money on his fine, which, as you know, would then come into the treasury.

Yours very truly,

A. J. MONTAGUE,
Attorney-General.

Member of Board of Visitors Prohibited from Furnishing Supplies to Virginia School for Deaf and Blind.

MARCH 25, 1899.

Mr. W. S. GOOCH,
Secretary and Purchasing Agent,
Staunton, Va.

DEAR SIR:

I am just in receipt of your letter of the 24th inst., asking my opinion as to whether or not a member of the Board of Visitors of the Virginia School for the Deaf and the Blind can furnish, as merchant, supplies to such institution in the ordinary course of trade.

In reply, I beg to say that I think section 1647 of the Code prohibits the furnishing of such supplies by such person.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Seizure of Vessels for Breach of Municipal Laws of the State.

MARCH 30, 1899.

To His Excellency J. HOGE TYLER,
Governor of Virginia.

SIR:

I have considered the question referred to me by you in connection with the capture of the vessels *Water Lily* and *Minnie Estelle*, and the arrests of certain men found thereupon, who were engaged in the felonious dredging of oysters in this Commonwealth.

The facts I understand to be substantially these: The commanders and crews were engaged and using these vessels in taking with dredges oysters in the waters of this Commonwealth, near the Maryland line; that one of the police boats of this Commonwealth endeavored to capture said vessels and men while engaged in such dredging; that the vessels took flight upon seeing the police boat, which, however, continued pursuit and effected a capture of the vessels and men in the waters of Maryland. The vessels and men were then brought back into this Commonwealth where the offence was wholly committed. The vessels are now held in pursuance of said seizure (no forfeiture proceedings having been instituted), and the men are in jail awaiting action of the grand jury.

It is a general principle of law that no seizure for the breach of the municipal laws of a State can be made within the territory of another. (*The Apolton*, 9 Wheat. 362). However, there are circumstances which authorize the authorities of a State to pursue and capture such marauding vessels in the waters of Maryland. (*Rep. Va. Leg. Com.* June 20, 1894, and authorities cited). But that the circumstances are sufficient to legalize the present seizure is not entirely clear. Therefore, in that the vessels are not held in pursuance of any judicial proceedings, I have the honor to advise that you have authority to direct their release.

With respect to the crew which are detained upon the charge of felonious dredging, the legal principles are different from those applicable to the seizure of the vessels in question. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused are brought before it. (*Mahon v. Justice*, 127 U. S. 700). But in any event the proceedings have been instituted in a court of competent jurisdiction, and the questions involved are judicial and not executive. Therefore, you have no constitutional right to interfere with the prosecution in question.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Power of Authorities of Soldiers' Home to Punish Drunkenness.

APRIL 12, 1899.

Major NORMAN V. RANDOLPH,
President Soldiers' Home.

DEAR SIR:

I have considered your inquiry with respect to the power of the authorities of the Home to confine inmates for drunkenness.

From the blank form of application for admission, left by you with me, I

observe that the applicant promises in writing obedience to the rules and regulations of your institution, and avers his distinct understanding that the violation thereof will subject him either to punishment or dismissal.

I am, therefore, of the opinion that the authorities of the Home have the right to make a rule or regulation confining any inmate for drunkenness, and that upon the violation of such rule or regulation the inmate must either submit to confinement or leave the institution. In other words, so long as he remains in the institution the inmate must abide by its rules and regulations, and for the infraction thereof must undergo the prescribed confinement or punishment. He cannot remain in the institution in violation of rules intended for its proper government as well as for the good of the inmates themselves.

I am further of opinion that if the rule or regulation respecting the confinement of drunken inmates be necessary to ensure the peace and order of the institution, then such confinement will not entitle an inmate complaining thereof to the right to maintain an action for damages.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Party Nominations—Construction of Election Laws.

APRIL 19, 1899.

W. D. NEBLETT, Esq.,
Lunenburg, Va.

DEAR SIR:

Upon my return to this office yesterday I found your letter of the 14th inst., asking my construction of certain questions involved in the act amended and approved March 3, 1898. Your inquiries will be answered in the order propounded.

1. Section 20 of said act expressly provides that in "any county or corporation where no political party nominates candidates for county or corporation offices" the provisions of the act respecting ballot, booth, etc. "shall not apply." Therefore, if no political party in your county has made a nomination for any such offices, then the voter shall provide his own ballot, and the booth system is not required.

2. I am further of opinion that, although no such nominations be made for county offices but nominations are made for district offices in certain magisterial districts, yet the provisions of said act respecting the ballot and booth do not apply. While the language of said section is not free from perplexity, yet the whole intent of the act must be that if the offices of the county are excluded from the application of the act in the case mentioned, then the offices of any subdivision of the county are likewise covered by such exemption. To hold otherwise would render the election almost impracticable.

3. My answer to the foregoing seems to include your third inquiry. If I am mistaken in this, however, I will be glad to give your communication further consideration.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Pension upon the Ground of Total Disability.

APRIL 26, 1899.

Judge CALLOWAY BROWN,
Bedford City, Va.

DEAR SIR:

Referring to your postal of the 24th instant, I beg to say that I am of opinion that a soldier who is allowed \$15.00 for partial disability, may, by a renewal of his application, have the same increased to \$30.00 for total disability; provided that the total disability results from the same causes producing the partial disability. I think, however, that a new application would have to be made, asking for a pension upon the ground of total disability.

Very truly yours,

A. J. MONTAGUE,
Attorney-General.

Disbanded Militia.

APRIL 26, 1899.

Adjutant-General WM. NALLE,
Richmond, Va.

SIR:

Replying to your inquiry of the 29th ultimo, I beg to say—

1. That "the status of officers and enlisted men of the Virginia Volunteers who did not volunteer for service in the United States army, or who, having volunteered, did not, for any reason, go into the United States service, in cases where the commands to which they were attached have fallen below the minimum required by law," remains the same as if such commands had not fallen below the minimum until disbanded.

2. While it may be true an officer without a command loses his commission, it does not follow that a command without officers and reduced below the minimum, loses its legal existence. I am of opinion, that should the company fall below the minimum required, it still has a legal status until disbanded, as provided by statute.

3. Should the company be disbanded then, generally speaking, the property should be applied to a similar military organization which may succeed the disbanded company. I make this general statement because it would be impracticable to give a satisfactory opinion upon this point unless the particular facts connected with each company are considered.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Assisting Disabled Elector.

APRIL 27, 1899.

Mr. J. M. VAUGHAN,
Cumberland, Va.

DEAR SIR:

Replying to your letter of the 26th ultimo, respecting the duties of judges to assist electors who are physically and educationally unable to

prepare their ballots, I beg to say that I have given no opinion upon the matter. Indeed, your letter is the first inquiry I have had upon the subject.

In my opinion, it is the duty of the judge designated, at the request of such disabled elector, to render him assistance in preparing his ballot by reading him the names and offices on the ballot and pointing to him the name or names which he may wish to strike out. Or such judge, if the voter desires and directs, shall otherwise aid him in preparing his ballot. Under the clause "otherwise aid him in preparing his ballot," I think the disabled elector has the right to request the judge to mark the ticket for him as he directs, just as if the elector were blind. Indeed, physical disability seems to embrace blindness, yet the statute leaves no doubt on the subject by embracing the special physical disability of blindness.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Appeal from the Action of the Board of School Trustees.

MAY 5, 1899.

Hon. JOSEPH W. SOUTHALL,
Superintendent of Public Instruction.

SIR:

I beg to acknowledge the reference of a letter of L. C. Watkins, Esq., dated May 4, 1899, relative to an appeal from the action of the Board of School Trustees in employing a teacher in the graded public free school at Houston, together with your request for an opinion thereupon.

1. From the facts stated in said letter I am of opinion that the action of the school trustees in employing a teacher for the next session is subject to appellate review by the board of reference, provided for in section 1487 of the Code. The amendment of February 28, 1898, of the second subdivision of section 1465 of the Code, in terms provides for such an appeal.

2. I am further of opinion that it is competent for said board of reference to affirm or reverse the action of the trustees in the matter complained of. But should said board reverse the action of the trustees, then the matter of employment of a teacher would come, *de novo*, before them, with the power on their part to employ any other teacher than the one with respect to whom the original appeal was taken.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Hospital Dispensary.

MAY 6, 1899.

Judge JAMES L. TREDWAY,
Chatham, Va.

DEAR SIR:

I am this day in receipt of your letter of the 6th instant, in behalf of the Western State Hospital, together with a letter from Mr. A. B. Guignon, general counsel of the Board of Pharmacy, suggesting that the dispensary at your hospital is covered by section 1759 of the Code, as amended, and that

the physician in charge thereof is required to be a registered pharmacist.

The facts as stated in your letter appear to be that the said hospital has four physicians, one of whom is detailed to take charge of the dispensary and fill all prescriptions of the other three physicians for patients of the hospital; but that no medicines are sold nor are prescriptions filled for anyone except said patients. In other words, I understand the dispensary is simply a depository for medicines to be used by the patients, and the physicians therefrom supply their patients.

It does not appear to me to be in any sense "a retail drug or chemical store or pharmaceutical department thereof," and therefore no registration of the physician or physicians in charge of said department is required by statute.

The letter of Mr. Guigon is herewith returned.

Yours respectfully,

A. J. MONTAGUE,
Attorney-General.

Authority of Electoral Board to Remove Judge of Election.

MAY 17, 1899.

Mr. G. G. BOTELER,
Member of Electoral Board,
3213 M St., Washington, D. C.

DEAR SIR:

Replying to your inquiry of the 18th instant, as to whether or not an electoral board has the right to remove a judge of election in order to obtain judges "who are known to belong to different political parties," I beg to say that I think the board has no such right. If the judges have been elected and qualified, then they are entitled to hold their office for a term of one year, and I do not think can be removed upon the ground suggested.

Referring to your further inquiry, I am of opinion that a registrar has not the right to go out of the State and there register voters who claim the right to vote within the State.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Commissioner of Revenue and School Trustee.

JUNE 8, 1899.

Mr. B. GATES GARTH,
Ivy Depot, Va.

DEAR SIR:

Replying to your inquiry of the 6th instant, I beg to say that in my opinion the statutes do not prescribe any incompatibility between the office of commissioner of revenue and that of school trustee.

Yours very truly,

A. J. MONTAGUE,
Attorney-General.

Tax upon Will Covers all Property Passing by that Instrument.

JUNE 12, 1899.

Mr. PHIL. H. GOLD,
Clerk Circuit Court,
Winchester, Va.

DEAR SIR:

Replying to your letter of the 9th instant, I beg to say, that I am of opinion that the tax upon the will of the late Governor Holliday should be upon the entire estate passing by such will, regardless of the character of the property so passing. In other words, I do not construe the tax in question to be a tax upon the United States bonds, but it is a tax upon the entire estate, payable for the privilege of using our courts for the administration and settlement of said estate.

Of course the commissioner or treasurer would have no right to tax these bonds, and the estate would not be required to give them in for taxation; but, as I have said, the tax upon the will is not a tax of this nature, but covers all of the property passing by the will.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

No License Required for Fishing with a Pound-Net, Fyke, Weir, or Fixed Device in Water Less than Six Feet.

JUNE 16, 1899.

Mr. S. F. MILLER,
Secretary Board of Fisheries,
Norfolk, Va.

DEAR SIR:

Replying to your letter of the 14th instant, I beg to say that I do not perceive that section 2088 of the Code, as amended by act of March 3, 1898, prescribes any license for fishing with a pound-net, fyke, weir, or fixed device, in water less than six feet deep.

Therefore, as no license is required for fishing by the means aforesaid, in water less than six feet deep, it follows that the inspector is likewise allowed no fee for the issuance of such license.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Guaranty Company Should Attach Seal of the Company to the Official Bond.

JUNE 26, 1899.

C. L. SCOTT, Esq.,
Amherst, Va.

DEAR SIR:

I regret my inability to reply earlier to your letter of the 15th instant.

In my opinion the Guaranty Company should, through its attorney in fact, attach the seal of the company itself to the official bond. This should be done

in open court or before the judge, as prescribed by statute. I do not think it sufficient that the authorization of the attorney in fact should be under seal, as the bond itself must speak by the seal of the company, and the attorney in fact is simply acting for the company as its president or other proper officer would do in executing a sealed instrument for the company.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Fees in Misdemeanor Cases.

JULY 1, 1899.

N. R. GRIFFIN, ESQ.,
Commonwealth's Attorney,
Portsmouth, Va.

DEAR SIR:

I regret I have been unable to give an earlier reply to your letter of the 15th ultimo, respecting your fees in misdemeanor cases.

As I construe the statute, section 3528 of the Code gives a fee of \$5.00 in misdemeanor cases upon conviction, nothing on acquittal. Section 3257, as amended, provides that half fees shall be paid. While this language is not very apt, yet it must mean that you are entitled to \$2.50 in case of conviction where the costs cannot be recovered from the defendant. In other words, the Commonwealth in no event pays more than \$2.50 upon conviction and nothing for acquittal in misdemeanor cases.

I hope that I understand your inquiries and that my answer is sufficiently explicit. However, if I have not made myself understood I would be glad to give you favor further consideration.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Mayor is ex-Officio Justice of the Peace.

JULY 7, 1899.

Mr. E. C. HAAS,
Justice of the Peace,
Woodstock, Va.

DEAR SIR:

Replying to your letter of the 29th ultimo, I beg to say that I am of opinion that the mayor of your town is *ex-officio* a justice of the peace thereof, and as such it is his duty to exercise exclusively the powers of a justice of the peace in criminal matters unless he is absent from his corporation, or in his judgment is too unwell, or so situated as to render it improper for him to act, as prescribed by section 3955 of the Code, as amended by the last session of the General Assembly.

I do not perceive that there is any constitutional question involved; if so, I would not undertake to advise as to the specific question that the statute is in violation thereof.

Trusting that my answer is sufficiently explicit, I am,

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

When Certificate to Practice Medicine is Required.

JULY 12, 1899.

Dr. RAWLEY W. MARTIN,
*President State Board Medical Examiners,
 Lynchburg, Va.*

DEAR SIR:

I regret very much this delay in replying to your letter of the 23d ultimo, asking my opinion as to whether a physician who abandoned practice in this State fifteen years ago can resume the same without the certificate of your examining board.

I am of the opinion that if the physician ever practised "medicine or surgery in this State *continuously* for the period of at least five years prior" to February 22, 1894, he can resume his practice without the certificate. I do not think the long absence mentioned a material factor in reaching a proper construction of the statute. Has the physician at any time prior to February 22, 1894, practised his profession for a continuous period of five years? If so, no certificate is required; otherwise it is.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Compensation Allowed Judges of Election.

JULY 12, 1899.

Mr. G. G. BOTELER,
*Secretary Electoral Board,
 3213 M St., Washington, D. C.*

DEAR SIR:

Replying to your letter of the 8th instant, asking my opinion as to the compensation allowed judges of election in Alexandria county, I beg to say that section 149 of the Code, as amended by act approved January 9, 1898, provides that, "the judges and clerks of any election held under this chapter shall receive as compensation for their services the sum of one dollar each, and the judge carrying the returns from his voting place to the county clerk's office shall receive for such services the sum of one dollar." The statute also provides for extra compensation under certain circumstances in the counties of Accomack and Northampton.

It is apparent from this section that one dollar for each judge is allowed as compensation for all services rendered in connection with any county election. The statute, as you will perceive, does not comprehend an amount *per diem*, but simply compensation for all services rendered at any election.

I appreciate the considerations which you suggest for increased pay where the judges are kept thirty-three hours in continuous service, but I have no authority to change the statutes and regret that any such result may follow from the law, as you suggest in your letter.

Yours very truly,

A. J. MONTAGUE,
Attorney-General.

Oysters Taxed or Assessed October 1st of Each Year.

JULY 14, 1899.

Mr. S. F. MILLER,
Secretary Board of Fisheries, Norfolk, Va.

DEAR SIR:

I regret my inability to consider earlier your request of the 19th ultimo, relative to the time of assessment of oysters for taxation, as provided by section 2140 of the Code, amended by act approved March 4, 1898.

In my opinion the statute seems to prescribe for the assessment of all oysters planted and shells deposited for the propagation of oysters on and as of the 1st day of October of each year. In other words, as of this date such oysters as are then planted and such deposited shells shall be taxed. The act does not seem to contemplate any other assessment than that of the oysters found at the time so planted and deposited. Only the oysters then upon the grounds, and not those which had the preceding year been thereupon, are to be taxed or assessed.

This answer seems to cover your inquiry, but if not sufficiently explicit kindly advise me, when I will be glad to reconsider the same.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Commonwealth's Attorney's Fee in Case of Joint Indictment and Trial.

JULY 20, 1899.

J. M. HOOKER, ESQ.,
Commonwealth's Attorney, Stuart, Va.

DEAR SIR:

Replying to your letter of the 18th instant, requesting my opinion as to what is the proper fee of a commonwealth's attorney in the case of a joint indictment and a joint trial of two or more parties for a felony, I would say that I am of opinion that section 3528 of the Code provides one fee for every case, and not a fee for every party defendant in the case. Therefore, in the case mentioned by you only one fee of \$10.00 should be allowed, and not a several fee for each party defendant in the prosecution, in that there was a joint trial.

Permit me to congratulate you upon the splendid fight you made in these cases. You deserve the thanks of the law-abiding citizens of the State for giving them so encouraging an example in the administration of criminal law.

Very truly yours,

A. J. MONTAGUE,
Attorney-General.

Offices of County Supervisor and Postmaster Incompatible.

JULY 21, 1899.

Mr. A. B. JOHNSON,
Commissioner of Revenue, Warsaw, Va.

DEAR SIR:

Replying to your letter of the 14th instant, I beg to say that, in my opinion, section 183 of the Code prohibits a person holding at the same time

the offices of county supervisor and postmaster. Nor does section 184 qualify the disabilities in this respect, for the latter section permits fourth-class postmasters to act as notaries public or school trustees. Nor does the statute permit a justice of the peace to be at the same time a postmaster.

Yours very truly,

A. J. MONTAGUE,
Attorney-General.

No Incompatibility Between the Offices of Superintendent of Schools and Commonwealth's Attorney of Williamsburg.

JUNE 17, 1890.

Dr. JOS. W. SOUTHALL,
Superintendent of Public Instruction.

SIR:

I beg to acknowledge your reference of the 28th ultimo, advising that Robert Armistead, Esquire, superintendent of schools of Williamsburg, has recently been elected commonwealth's attorney for said city, and asking my opinion as to whether or not there is any incompatibility between the said offices.

Section 518 of the Code, as amended by act of February 25, 1890, while inaptly expressed, seems to prohibit one person from holding two or more *elective* offices in the same county or district. The office of superintendent of schools is appointive and that of commonwealth's attorney is elective. Therefore, there is no conflict under the terms of the statute.

However, an incompatibility of office may arise in the nature of things, and hence this phase of the case should be considered. If Mr. Armistead were superintendent of schools for the county of James City and its commonwealth's attorney, in my judgment, there would be an incompatibility between the two offices. Because the commonwealth's attorney and superintendent of schools of said county are *ex-officio* members of the schools trustee electoral board (the sole powers of which relate to the appointment of school trustees); and one person holding both of said offices would act in a dual, and perhaps conflictive, capacity in said board. But Mr. Armistead is not superintendent of schools of James City county, consequently the incompatibility alluded to does not obtain.

On the other hand, Mr. Armistead is both superintendent of schools and commonwealth's attorney for the city of Williamsburg, but neither of these officials is a member of the board of trustees of said city (there being no school trustee electoral board for cities), and consequently there is no conflict of duty between the offices in question; for the school trustees of the city of Williamsburg are elected by the council of said city, whereas the school trustees of the county of James City are elected by the school trustee electoral board composed of the commonwealth's attorney, county superintendent of schools and judge of said county.

Consequently, I am persuaded there is no incompatibility between the two offices in the particular case in question.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Payment of Costs under Section 3946 of the Code.

JULY 27, 1899.

J. R. SMITH, Esq.,

Commonwealth's Attorney, Martinsville, Va.

DEAR SIR:

Referring to your letter of the 24th instant, you propound the following questions as to the payment of costs under section 3946 of the Code:

(1) A citizen of the county with no estate; (2) a citizen of the county with estate; (3) a stranger with no estate.

(a) In the first case the costs shall be paid by the county or corporation unless the inquest be upon the body of a convict in the penitentiary, in which case the same is to be paid out of the State treasury.

(b) In your second inquiry the costs must be borne by the estate of the deceased.

(c) In this case costs are to be paid out of the State treasury upon proper certification, as required by the statute.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Governor's Authority to Conditionally Pardon Negro Minors.

AUGUST 2, 1899.

His Excellency J. HOGE TYLER, Governor of Virginia.

SIR:

Referring to your request of the 31st ultimo, I beg to advise that I am of opinion that you have authority to pardon negro minors in the State penitentiary upon the condition that such convicts shall serve a given time in the Virginia Manual Labor School.

Without consideration of your general powers of pardon, I think the act approved March 3, 1898, is ample authorization to make the conditional pardons suggested. This act in terms provides that you may "grant a conditional pardon to the convict upon such conditions and with such restrictions and under such limitations" as you may deem proper.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

County Local Boards of Health Have No Existence under Act of March 3, 1896.

SEPTEMBER 12, 1899.

J. BOYD SEARS, Esq.,

Commonwealth's Attorney, Mathews, Va.

DEAR SIR:

I regret this delay in reply to your letter of the 17th ultimo, but it has been unavoidable.

(1) You ask if the county local boards of health have any existence under the act of March 3, 1896. I am of opinion they have not. The act makes no provision for the creation, existence or government of such local boards. As

I understand it the local county boards are mere agents of the State board, in order to enable the former to act more advisedly and promptly.

(2) I do not think the local county board, unless it be the two physicians mentioned in section 1724 of the Code, as amended (which, as you perceive, do not constitute a board), has any legal authority whatever save as derived from the board of health or from the justice of the peace, as provided in said section.

(3) I do not think any special form of authorization from the State board to the two physicians is required. The telegram, or letter, or other paper, which clearly shows the genuineness of the authority and request, is all that is essential.

If I have not sufficiently covered your inquiries please call upon me further.

Yours very truly,

A. J. MONTAGUE,
Attorney-General.

Auditor of Public Accounts Unauthorized to Pay Claim of Battery C, First Battalion Artillery.

SEPTEMBER 14, 1899.

Col. MORTON MARVE,
Auditor Public Accounts.

SIR:

I have been unable to consider earlier your recent reference of the account of Battery C, First Battalion Artillery, in the sum of \$1,364.68, and your request for my opinion as to your authority to pay the same.

The order calling forth the Battery of Artillery is issued by the mayor of Portsmouth to the commandant of the battery, and commands the same "to parade at Ocean View, Va., on the 1st day of August, 1899, then and there to obey such orders as may be given according to law." Thus you will observe that this order commands the battery to aid the civil authorities, not within the territorial jurisdiction of Portsmouth, but some nine miles distant therefrom, at Ocean View, in the county of Norfolk. It further appears that, in pursuance of this order, the battery did very efficiently aid the quarantine patrol at Ocean View in preventing the landing of persons from the infected yellow fever district in and around the National Soldiers' Home, near Hampton.

Whether this is the class of civil authorities competent to receive the military aid provided for in the statute is, from my point of view, needless to consider; for the larger question as to the authority of the mayor to issue any order at all requiring the aid of the military at a place beyond his territorial jurisdiction must first be disposed of. Section 388 of the Code provides, in certain cases, that "it shall be lawful for the sheriff of any county, or the mayor of any city," to call "upon the commandant of any division, brigade, regiment or company," and it shall be the duty of such officer "upon whom such call is made, to order out, in aid of the civil authorities, the military force, or any part thereof, under his command." What civil authorities are here meant? Manifestly the civil authorities of the county of such sheriff or of the city of such mayor. The form of the summons from the sheriff or mayor to the commandant, which is prescribed in said section, in terms requires that the requested aid must be given within the county or city of such sheriff or mayor. Besides, the mayor of Portsmouth is *functus officio*

beyond the territorial jurisdiction of his city. So likewise are the civil authorities of that city without law or authority to perform quarantine patrol at Ocean View, a place clearly beyond the territorial jurisdiction of their city. Such so-called civil authorities had no legal existence at Ocean View, and therefore there were no civil authorities to be aided by the military. The sheriff of Norfolk county, or his deputy, was alone authorized to issue an order for such military aid within his county, and neither of them issued such an order nor united in the order of the mayor of Portsmouth.

From these considerations it seems plain that neither the sheriff of a county nor the mayor of a city has authority under our law to order out troops to perform service in any other county or city within the Commonwealth; and therefore the order in question and the services thereunder performed are wholly without lawful warrant. Consequently, in that both the order and the services are illegal, I am of opinion that there are no present funds in the treasury available to pay the account in question.

As to the merits of the claim I have no official concern. That those officers and men should be paid for their services, performed in good faith, I take it no one will dispute. But this is a matter of legislative concern. I have only to construe the law, and as I understand it the disbursement of public moneys must be in strict conformity to public law.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

Tax Due upon Writs of Error Awarded in Criminal Cases.

SEPTEMBER 15, 1899.

Mr. D. H. LEE MARTZ,
Clerk Circuit Court,
Harrisonburg, Va.

DEAR SIR:

Replying to your letter of the 4th instant, I beg to say that I am of opinion that no writ tax is due upon writs of error awarded in criminal cases, either by the Circuit or Supreme Court.

I am also of opinion that no tax is payable upon the simple filing of a petition for a writ of *mandamus*. The tax is only due in the event the writ issues, and not if the writ is refused.

Very respectfully,

A. J. MONTAGUE,
Attorney-General.

In re the Crossing of the Norfolk and Western Railway by the Norfolk and Atlantic Terminal Company.

This is a reference of the Board of Public Works for my opinion as to its authority to require an overhead crossing of the Norfolk and Western railway by the Norfolk and Atlantic Terminal Company at a point in Norfolk county opposite DeBree street, in Norfolk city.

Upon application of the said railway, under section 1094 of the Code as amended, the Board of Public Works had undertaken "to inquire into the necessity of such crossing and the propriety of the proposed location and all matters pertaining to its construction and operation"; and in the exercise of

this duty the board should—"make a report rejecting, approving or modifying" the plans and specifications of the crossing presented by the road desiring such crossing. Therefore, the precise question submitted for my consideration is, Has the board power (and not the expediency of exercising it) to so modify or reject said plans and specifications as to require an overhead crossing at the point in question?

DeBree street terminates at the right of way of the Norfolk and Western railway. This right of way is eighty feet wide, is covered by five tracks of railroad, and is wholly within the territorial limits of Norfolk county; and it appears that should an overhead crossing be made the approach thereto and therefrom on the side of said street must extend therein by means of a superstructure of some two hundred feet in length before the natural grade is reached.

It was conceded that the board's authority is ample to require overhead crossings if the same be wholly within counties, but it is denied that similar authority exists with respect to crossings in cities; and while a determination of this question may not be essential, yet it should be observed that no reason can be perceived why the statute is not as applicable to cities as to counties, provided the crossing is of one railroad by another. The language of the statute is general, and is confined neither by its terms nor by implication to counties alone. So that the conclusion must be reached that the authority of the board relative to this crossing is in no way affected by the location of the same, either wholly or partially, within or without the city of Norfolk.

The chief contention is that section 1093 of the Code requires consent of a municipality for the occupancy of its streets by railways, and inasmuch as Norfolk city has given no consent for the occupancy of DeBree street by an approach necessary to descend from an elevated crossing, that such crossing would therefore impose conditions which the Terminal Railway Company could not perform, and its continued construction would be arrested. In other words, to require a crossing which would necessitate structures which are incompatible with its rights of way, or perhaps conflictive with its charter powers, is to give no crossing.

This consequence, however, cannot be considered as material in determining the power of the board to require such overhead crossings, for such consequence is in no wise relative to the question of power save as respecting the expediency of its exercise. In other words, the board has jurisdiction to determine the safety of the crossing, and in the exercise of this authority, which is the exercise of police power, the board must determine the nature of the crossing as respects the safety of persons and property thereupon. If this were not true, and the board were persuaded that it had no power to order an overhead crossing, and that such a crossing was essential to safety of life and property, then a dangerous crossing must be permitted in order for the Terminal company to construct its railway in DeBree street. Therefore, the board must then hold that it is powerless to give a safe crossing, although its statutory duty commands it to provide one.

I cannot think the powers of the board are to be controlled by the powers conferred by charter or the rights-of-way to be acquired thereunder. The acquirement or ability to acquire rights of way, or consequential additional servitudes upon the street by reason of an elevated crossing, are all questions needless for the board to consider save as respects the expediency of exercising the power to direct an overhead crossing. Its duty is one of the highest

importance for the welfare of the people and the protection of property, and if in the discharge of its duty its action imposes conditions which would embarrass the company in the further progress of its work, then such company must seek its remedies by an enlargement of its powers.

Consequently, I am of opinion that the board has the power to reject or modify the plans and specifications in question so far as to direct an overhead crossing, if it be of opinion that such crossing is necessary for the safety of the transportation of passengers and property.

A. J. MONTAGUE,
Attorney-General.

OCTOBER 30, 1899.

Supreme Court.

The work of the various courts of the Commonwealth is a matter of profound concern, and if it were practicable great good could be subserved by some concise statement of it. However, I am unable to satisfactorily gain such information save as respects the Supreme Court of Appeals, and the following tabulated statement will show the volume of business done therein for the year covered by this report.

AT RICHMOND.

Cases on the docket.....	107	
Final judgments or decrees.....		93
Cases not ready and continued.....		14
	107	107

AT WYTHEVILLE.

Cases on the docket.....	59	
Final judgments or decrees.....		45
Removed.....		3
Cases not ready and continued.....		11
	59	59

AT STAUNTON.

Cases on the docket.....	39	
Final judgments or decrees.....		28
Not ready and continued.....		11
	39	39

SUMMARY.

Number of cases.....	205	
Number of final judgments or decrees.....		166
Number not ready and continued.....		38
Number of removals.....		3
	205	205

Applications for writs of error and appeals.....	224	
Writs of error and appeals granted.....		150
Writs of error and appeals refused.....		74
	224	224

Applicants examined for admission to bar.....	140	
Applicants who passed examination.....		83
Applicants who failed to pass.....		60
	140	140

This statement shows that a vast deal of work has been done by the court. Indeed, it is difficult to perceive how so much could have been accomplished save by the united and very harmonious action of the five judges. The docket alone is quite large, and in addition the examination of many applicants for admission to the bar entails work not only of the most onerous character, but which comes upon the court while in session and which of necessity consumes a great deal of time. It should be observed that upon this entire docket a final disposition has been made of every case that was ready for hearing, which evinces a progress not heretofore made in a great many years. So that the administration of justice by this court for the period named exhibits all the industry which suitors and public have a right to demand.

Contingent Fund.

The contingent fund of this office is only one hundred dollars. This barely defrays the cost of postage, telegrams and like incidental expenses. It is most desirable that the library of this office should, in a measure, be kept up. The reports of the United States Supreme Court and certain text books by all means should be furnished. It is true these books may be gotten from the State library, yet there are times when they cannot be obtained, and, moreover, the office should have such a library as will enable its work to be done without borrowing books. My predecessors had such fund, but at the last session of the Legislature the finances of the State were thought to be such that the contingent fund of this office was reduced to the sum named. I therefore beg to suggest that this fund be restored to such a sum as obtained for some years prior to my incumbency of this office. The fund can be used only for the needs of the office, and should any be unused it will of course pass into the general fund of the treasury.

Very respectfully,

A. J. MONTAGUE,

Attorney-General.

