

ANNUAL REPORT

OF THE

ATTORNEY - GENERAL

TO THE

GOVERNOR OF VIRGINIA,

FOR THE

YEAR 1890.

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ANNUAL REPORT OF THE ATTORNEY-GENERAL.

COMMONWEALTH OF VIRGINIA,
ATTORNEY-GENERAL'S OFFICE, *February 7, 1891.*

To His Excellency, PHILIP W. MCKINNEY, Governor of Virginia.

GOVERNOR,—I have the honor to submit to you my annual report :

On the first day of January, 1890, I was inducted by my able, efficient, and patriotic predecessor, HON. RUFUS A. AYERS, and that day entered upon the duties of this office. I found it in the very best condition, and the cases upon the court's docket distinctly showed the Commonwealth's interests committed to Mr. Ayers had been carefully protected and faithfully defended. It is true—

“ Good actions crown themselves with lasting bays,
Who well deserves, needs not another's praise.”

Yet Mr. Ayers' management of the heavy and important “ *Coupon Litigation*,” which will make ever memorable his occupancy of this high office, his chivalrous bearing and personal bravery, can never be forgotten by the good people of the “ Old Dominion.”

The following cases have been decided in the Circuit Court of Richmond City and by the Supreme Court of Appeals of this Commonwealth, viz :

1. *Brown vs. Commonwealth—Homicide.* Trial-court reversed because the jury was improperly instructed.
2. *Lawrence vs. Commonwealth—Lottery.* Trial-court affirmed.
3. *Schonberg vs. Commonwealth—Rape.* For errors in the trial-court new trial was ordered.
4. *Bradley & Coe vs. Commonwealth.* Dismissed by the appellants.
5. *Mallan Bros. vs. Bransford, treasurer—“ Writ of Prohibition,”* etc. Trial-court affirmed.
6. *Wilson vs. Commonwealth,* from the Circuit Court of Henry county—*Homicide.* Trial-court affirmed.
7. *Jones vs. Commonwealth—Highway robbery.* Illegal evidence admitted by the trial-court and new trial ordered.
8. *Wheeler vs. Commonwealth—Highway robbery.* Trial-court affirmed.
9. *Spurgeon vs. Commonwealth—Rape.* For errors in the trial-court new trial was ordered.
10. *Miller Jones vs. Commonwealth—Larceny.* Trial-court affirmed.
11. *Shipp vs. Commonwealth—Homicide.* Trial-court affirmed.
- { 12. *John Howell vs. Commonwealth—Homicide.*
- { 13. *Hundley Howell vs Commonwealth—Homicide.*

In these cases the Court of Appeals held that the trial-court (the County Court of Floyd) had not jurisdiction. In that court the Howells were in-

dicted but elected to be tried *in the Circuit Court*. The cases were removed. When called, *the accused* objected to trial and moved the court to remand their cases to the County Court, and this was done. Again, in the County Court, upon their motion, continuances were granted, and, when called for trial at a subsequent term, *the accused* objected because the cases had been removed to and were then in the Circuit Court.

This objection was overruled, the trial proceeded with, the Howells found "guilty," judgment pronounced, and they appealed.

When the mandate of the Court of Appeals was received the Circuit Court of Floyd county was in the midst of the spring-term, 1890, and the cases were continued.

On adjournment, *this* was found to be "*the third term*" since these cases were placed upon its docket. Thereafter, namely on the — day of June, 1890, the Howells applied for and obtained from the Court of Appeals, in session at Wytheville, "writs of *habeas corpus*." They averred in their petitions that three regular terms of the Circuit Court of Floyd county had passed without trial, therefore they were *illegally* held in custody by the jailer, and demanded their liberty.

The jailer of Floyd made returns to the writs and in detail stated the facts. In support of his returns I cited "Adcock's Case," 8 Gratt. 861, and "Sand's Case," 20 Gratt. 800, and contended that the statute relied upon in the petitions had no application. Manifestly its purpose was to secure to the citizen, accused of crime, "a speedy trial." When that was had no personal right or privilege was violated, and when the delay in trial is caused by no fault of the Commonwealth, but the result of circumstances over which the Commonwealth has no control, as for example: "Mistrial" and "Appeal," *such* cases surely are not within the terms of meaning of "section 4047," Code of Virginia, 1887.

The prosecution was begun almost before the sound of the pistol which caused the death of the unfortunate had ceased to echo among the mountains; it was pressed with energy and vigor in the County Court, the Circuit Court, and the Court of Appeals. Yet the Court of Appeals' construction of "section 4047" has set the Howells free.

"Three terms" of the Circuit Court of Floyd county forsooth "had passed" *without a trial had in that court*. I ask the Legislature's consideration of "section 4047" in the light of "*The Howell Cases*."

14. Commonwealth *vs.* Booker, clerk of Cumberland. Judgment of Richmond City Circuit Court for \$270.99, with interest from December 15, 1887, and costs.

15. Commonwealth *vs.* Hibbetts, clerk of Buchanan county. Judgment of Richmond City Circuit Court for costs—\$——.

16. William Brown *vs.* Commonwealth—*Arson*. Tried at Wytheville, and for errors of the trial-court, new trial ordered; again tried, and found guilty. Appeal allowed, heard in Richmond, and "*second new trial*" was ordered.

17. Nannie Woods *vs.* Commonwealth—*Arson*. *Affirmed*. Death penalty commuted by the Governor to imprisonment for life.

18. Bird Woods *vs.* Commonwealth—*Arson*. Trial-court *affirmed*.

19. George Early *vs.* Commonwealth—*Arson*. Trial-court *affirmed*.

20. Henry B. Houston *vs.* Commonwealth—*Felonious assault*. New trial was ordered.

21. Robert Jones *vs.* Commonwealth—*Shooting with intent to kill.* New trial was ordered.

22. Commonwealth *vs.* Hamilton, treasurer of Augusta county. Judgment of Richmond City Circuit Court, October 21st, 1890, for \$895.52, with interest from November 1st, 1883, and costs.

23. Charlie Jones *vs.* Commonwealth—*Felonious assault.* New trial was ordered.

24. Plunket *vs.* Commonwealth. Indictment for violating statute imposing tax on "*coupon brokers.*" Commonwealth *vs.* Maury [82 Va., p. 83] was overruled by the Supreme Court of the United States in "*Cuthbert vs. the State of Virginia.*"—135 U. S., 671. I confessed error, and the judgment of the trial-court was annulled.

25. Vawter *vs.* Commonwealth—*Felonious assault.* Reversed for errors in the trial-court.

26. Arrington *vs.* Commonwealth—*Selling liquor without license.* Reversed.

27. Wilson *vs.* Commonwealth, from Corporation Court of Alexandria—*Peddling without license.* Reversed.

28. William Muscoe *vs.* Commonwealth—*Homicide.* From Corporation Court of Charlottesville. Affirmed.

- { 29. Litchford *vs.* Day, sergeant, etc.;
- { 30. Lawson and als., *vs.* Bransford, treasurer;
- { 31. Gregory and als., *vs.* same,

Were "*Coupon Cases*" appealed from the Corporation Court of Lynchburg and by the Court of Appeals, dismissed because that court had not jurisdiction over the contentions; then appealed to the Supreme Court of the United States, where they are now pending.

Callan *vs.* Bransford, treasurer.

McCannon *vs.* same.

Martin *vs.* same.

Smith *vs.* same.

Carter *vs.* same.

Gills *vs.* same.

Fraley *vs.* same.

Ludden *vs.* same.

Morrison *vs.* same.

Henley *vs.* same.

Robinson, Tate & Co. *vs.* same.

O'Brien *vs.* same.

Manning *vs.* same.

Breathed *vs.* same.

Jones *vs.* same.

Gregory *vs.* same.

Butler *vs.* same.

Smith *vs.* same.

Kegney *vs.* same.

Tanner *vs.* same.

Langley *vs.* same.

Sneads & Sons *vs.* same.

Cautieri & Co. *vs.* same.

Cautieri *vs.* same.

Dillon *vs.* same.

Roberts & Bro. *vs.* same.

McCarron *vs.* same.

Norvell *vs.* same.

Jackson *vs.* same.

Parsons *vs.* same.

Johnson *vs.* same.

Manning *vs.* same.

Reynolds *vs.* same.

Perrin & Co. *vs.* same.

Mellan & Bro. *vs.* same.

Mellan *vs.* same.

Cheatham *vs.* same.

Collins *vs.* same.

Wall *vs.* same.

Lazarus *vs.* same.

Tazzie *vs.* same.

Berne *vs.* same.

Maghi *vs.* same.

Helbig *vs.* same.

Baughan and Sheffey *vs.* same.

Were "*actions of assumpsit*," brought by the appellants, tax-payers residing in the city of Lynchburg, who "tendered coupons" and at the same time paid their tax *in money* to the treasurer, and then sued him in the Corporation Court *for the money thus paid*. Judgments were for "*The Defendant Treasurer*," appeals taken to the Court of Appeals, and in that court each case dismissed because it had not jurisdiction.

In very many appeals *defective records* are sent up and "costs" fall upon the Commonwealth. "*Criminal expenses*" are a heavy and increasing burden to the tax-payer. I therefore request "*my brothers*" in the cities and counties to be more careful in the preparations of "the record," and especially "the certificate of evidence" and of "*facts proved*," and in "the instructions" they ask for.

CIRCUIT COURT OF RICHMOND CITY.

In this court the following cases stand upon the docket as they were when turned over to me by Mr. Ayers, namely :

Commonwealth *vs.* A. G. Cleek et als.
 Commonwealth *vs.* Burger et als (two cases).
 Commonwealth *vs.* Mayo et als.
 Commonwealth *vs.* Given's sureties.
 Commonwealth *vs.* Sears et als.
 Commonwealth *vs.* Ingles's sureties.
 Commonwealth *vs.* Jones et als.
 Commonwealth *vs.* Austin et als (four cases).
 Commonwealth *vs.* Taylor et als.
 Commonwealth *vs.* Miller et als.
 Commonwealth *vs.* Thomas et als.

The above suits were brought against treasurers and clerks for money due to the State. They are matured and ready for trial.

Commonwealth *vs.* James River Steamboat Company.

This is a coupon case, which has matured and is ready for trial.

Robinson *vs.* Greenhow.

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

Saunders & Son *vs.* Greenhow.

Chaffin & Co. *vs.* Greenhow.

These are coupon suits, matured and ready for trial.

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

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

Farmers Bank *vs.* Alexandria Canal Company. Decree entered in this suit March 3, 1887, on commissioner's report.

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

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

The above are all old cases.

In like condition are the following cases upon the docket of the
CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF
VIRGINIA,
namely :

Commonwealth vs. Baltimore and Ohio Railroad Company.

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

Gatewood vs. The State of Virginia.

Parsons vs. Marye, auditor.

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

IN EQUITY.

James P. Cooper vs. Lewis P. Winston, sheriff.

D. K. Stewart vs. J. W. Southward, sheriff.

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

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

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

The following cases stand as when turned over to me, viz. :

S. Brown Allen et als. vs. Marye et als.

This is an injunction suit brought to restrain levy of an execution in favor of the Commonwealth against the plaintiffs after a tender of coupons. The case arose from a payment made by S. Brown Allen, as late Auditor of Public Accounts, to one Hamilton without authority of law, for which judgment was obtained against him by the State and enjoined as above.

Samuel Moore vs. William H. Wightman, trespass on the case.

Samuel Garber vs. William H. Wightman, trespass on the case.

William Penn vs. William H. Wightman, trespass on the case.

John H. Wine vs. William H. Wightman, trespass on the case.

H. M. Smootz vs. William H. Wightman, trespass on the case.

Cornelius Zirkle vs. William H. Wightman, trespass on the case.

J. W. Wakeman vs. William H. Wightman, trespass on the case.

John S. Lafton vs. P. C. Gore, trespass on the case.

W. H. Ebert vs. P. C. Gore, trespass on the case.

W. L. Brown vs. P. C. Gore, trespass on the case.

W. W. Glass vs. P. C. Gore, trespass on the case.

Mrs. S. W. Tidball vs. P. C. Gore, trespass on the case.

J. S. Robinson *vs.* P. C. Gore, trespass on the case.
 George W. Ward *vs.* P. C. Gore, trespass on the case.
 James Ginn *vs.* P. C. Gore, trespass on the case.
 M. A. Mitchell *vs.* John W. Bransford.
 P. Gregory *vs.* E. S. Moorman.
 W. W. Larkin *vs.* H. C. Joyner.

The above are suits instituted to recover damages for refusal to receive coupons and for levying executions. The cases are matured and ready for trial, but the principles involved have been adjudicated in other cases decided in the *Eastern Circuit*, and they will be dismissed when called for trial.

And the following are new cases, viz :

"WINFREE VS. BRANSFORD, TREASURER."

Injunction to restrain Bransford from obtaining further judgments, where "coupons" had been tendered for taxes, and have those standing upon the lien-docket marked "*satisfied*."

"W. W. LARKIN VS. SAME."

Injunction to restrain Bransford, treasurer, from collecting *executions for costs* issued upon judgments and decrees of courts against sundry judgment debtors, tax-payers, whose assignee Larkin claims to be.

THE SUPREME COURT OF THE UNITED STATES.

The following cases pending upon the docket of this court, viz. :

Abram *vs.* Winston,
 Rose *vs.* same,
 Mills *vs.* same,
 Royall *vs.* Greenhow,
 Royall *vs.* Childrey,

are appeals from the Circuit Court of the United States for the Eastern District of Virginia.

The defendants are proceeded against by tax-payers, who tendered coupons "for trespass," "*as trespassers*," &c.; "the trespass"—*this*: That they served "process" upon the plaintiffs as required by statute approved May 12th, 1887, sometimes called "the coupon-crusher." Demurrers to the declarations were sustained, and appeals taken.

The following cases pending in this court, viz. :

Pat Callan *vs.* Bransford, treasurer,
 William H. Jones *vs.* The Commonwealth of Virginia,
 J. J. Dillard *vs.* E. S. Moorman, treasurer,
 Gregory et als. *vs.* Bransford, treasurer,
 Litchford, surviving partner, etc., *vs.* Day, sergeant,
 Lawson et als. *vs.* Bransford, treasurer,
 Mallan Bros. *vs.* same,

appeals from the "*Supreme Court of this Commonwealth*," have been referred to in a former part of this report.

The "*appellants*" have filed "*motion to advance*," and the "*appellees*" "*motion to dismiss*," which motions will be submitted March 2d, 1891.

"VIRGINIA VS. TENNESSEE."

Answer has been filed by Tennessee, and the issue made up.

Mr. Ayers, who brought this important suit, will be associated with me in its management and continue in the case. Counsel will meet at a time and place to be agreed, arrange to take testimony and other matters, and the case will be argued as soon thereafter as practicable.

CASES DECIDED BY THE UNITED STATES SUPREME COURT.

Fitzgerald, Sergeant of Manchester, vs. Chas. Green—"Habeas corpus."

Charge: Illegal voting at the election for President, Vice-President, and Representatives in Congress for Third District of Virginia, November 6th, 1888. *Held*: United States Court had *not* jurisdiction, and the prisoner was remanded to the custody of the Sergeant.

W. L. Thomas, Police Sergeant of Richmond, vs. Wilson Loney—"Habeas corpus."

Charge: *Perjury* in the evidence given in the contest between Hon. George D. Wise and Edmund Waddill.—*Held*: State Court had *not* jurisdiction, and the prisoner was discharged.

<i>Jos. Bryan vs. State of Virginia.</i>	}	"COUPON CASES."
<i>James P. Cooper vs. same.</i>		
<i>John McGahey vs. same.</i>		

Held in these cases: Virginia's statutes, which require "the bonds" to be produced and excludes "*expert testimony*" in trials had under act of May 12th, 1887, are *not* constitutional.

H. W. Ellett vs. State of Virginia.

In error to the Supreme Court of Appeals of Virginia—*Held*: The costs taxed in motions under the act of Assembly aforesaid can be discharged by "coupons" cut from bonds of the Commonwealth.

C. H. Cuthbert vs. State of Virginia.

In error to the Supreme Court of Appeals of Virginia—*Held*: Statute which imposes a special license tax upon "coupon brokers" is *unconstitutional*.

George S. Vashon vs. Samuel Greenhow, treasurer.

In error to the Supreme Court of Appeals of Virginia—*Held*: Virginia's statute in regard to the school tax constitutional and valid.

Article VIII—sections 7-8 of the Constitution and the Code 1887—"sections 1506-1507" dedicate to the "*Literary Fund*" "all fines collected for offences against the State;" by this decision, as I construe and understand it, "*Fines*," can *not* be discharged in "coupons"

Ex-parte Lewis Brown.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Held: Statute of limitations to coupons ("Section 415"—Code 1887) *unconstitutional*. The ground of this decision that the limit imposed is *unreasonably short*. Should the Legislature consider such law necessary, a statute can be framed *reasonable* in time and the obnoxious feature of the present law thus removed.

"*Thomas Hucless vs. John K. Childrey.*"

In error to the Circuit Court for the Eastern District of Virginia—*Held*: Virginia's statute which requires "*liquor-license tax*" to be paid in gold or silver coin, etc., constitutional and valid.

John A. Brimmer, Jr., sergeant of the city of Norfolk, vs. William Rebman—"*Habeas corpus.*"

Appeal from the United States Circuit Court for the Eastern District of Virginia. *Held*: Virginia's statute, approved February 18, 1890 (Acts 1889-'90, p. 63.), entitled an "*An act to prevent the selling of unwholesome meat,*" unconstitutional and void.

Mr. J. Harlan, speaking for the court, said: "Undoubtedly a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers or enacting inspection laws, make discriminations against the products and industries of some States in favor of products and industries of its own or of other States. . . .

"It is for all practical ends a statute to prevent the citizens of distant States having for sale fresh meats (beef, veal, or mutton) from coming in competition upon terms of equality with local dealers in Virginia. As such its repugnancy to the Constitution is manifest.

"The case, in principle, is not distinguishable from '*Minnesota vs. Barber,*' where an inspection statute of Minnesota, relating to fresh beef, veal, mutton, lamb, and pork offered for sale in that State, was held to be a regulation of inter-state commerce and void because by its necessary operation it excluded from the markets of the State practically all such meats in whatsoever form, and although entirely sound and fit for human food, from animals slaughtered in other States.

"Without considering other grounds urged in opposition to the statute and in support of the judgment below, we are of opinion that the statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, *has no real or substantial relation to such an object, but by its necessary operation is a regulation of commerce beyond the power of the State to establish.*"

I have quoted from this decision that our legislators may be advised of the difficulties which environ *such laws*.

In March, 1890, the following cases then pending in this Court, and in which my predecessor—Mr. Ayers—and Mr. George A. Mushbach, of Alexandria, were counsel, viz.:

No. 231—Dismal Swamp Canal Company *vs.* Commonwealth of Virginia;

No. 232—Same *vs.* Lamb, Mayor of Norfolk, and

No. 233—James E. Justice *vs.* Commonwealth of Virginia,

to test the right of the Dismal Swamp Canal Company "to set up and promote lotteries within this State, were dismissed. Our State Court decided against this claim of the appellants, and by the dismissal the decision is *affirmed*.

Very respectfully,

R. TAYLOR SCOTT,
Attorney-General.