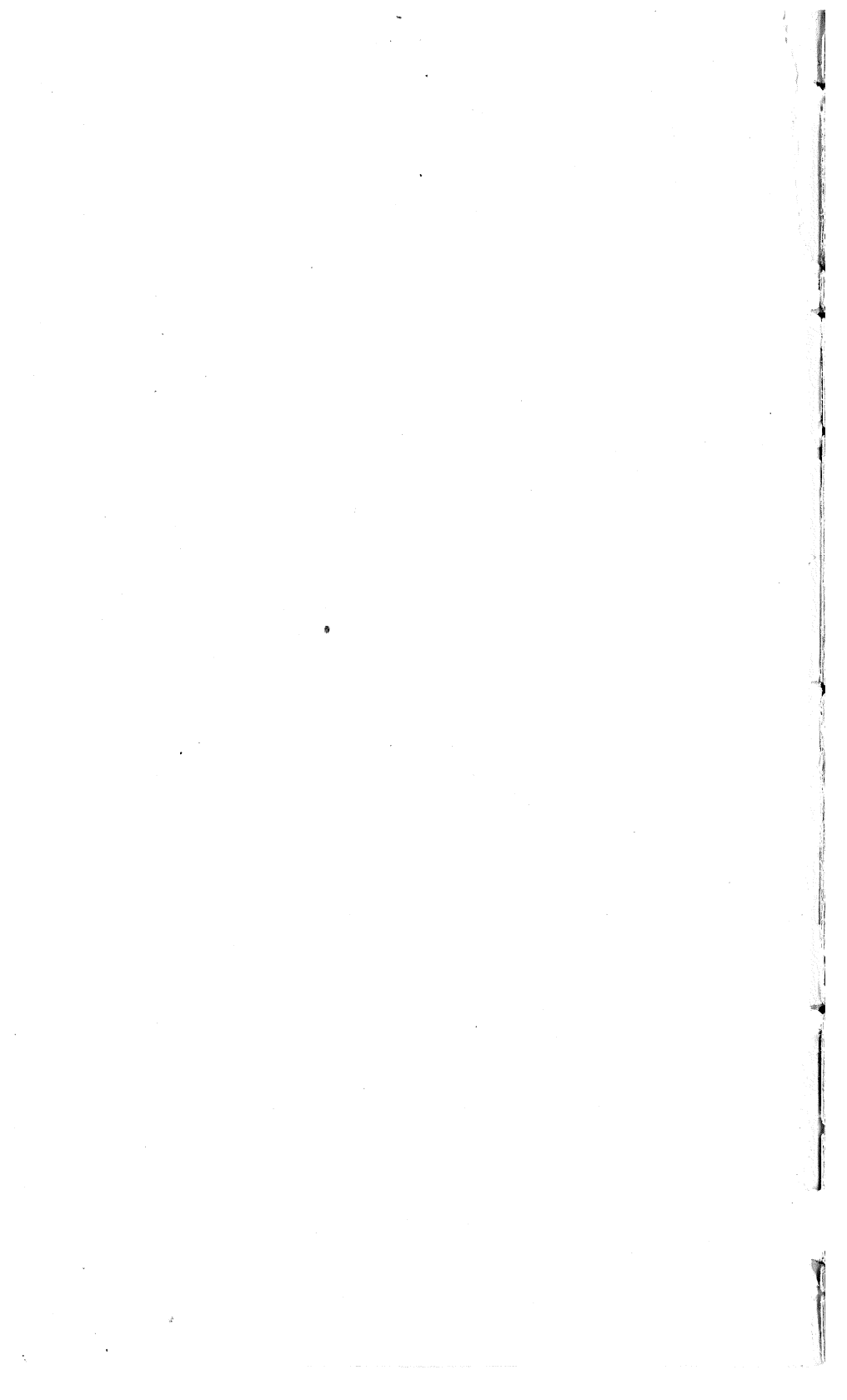


ANNUAL REPORT
OF THE
ATTORNEY - GENERAL
TO THE
GOVERNOR OF VIRGINIA,
FOR THE
YEAR 1891.

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ANNUAL REPORT OF THE ATTORNEY-GENERAL.

COMMONWEALTH OF VIRGINIA,
ATTORNEY-GENERAL'S OFFICE, RICHMOND, *November 12, 1891.*

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

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

Within the year I have tried the following cases in the Supreme Court of Appeals, viz:

1. Commonwealth *vs.* Chaffin & Co.—“*A coupon case*”—appealed from the Circuit Court of the city of Richmond, *was dismissed.*

The court *held* the amount involved insufficient to give jurisdiction, and no “*Constitutional question*” was presented by the record.

2. Lewis *vs.* Commonwealth. From the County Court of Spotsylvania county. *Charge*—Seduction under promise of marriage. No “*writ of venire facias*” appeared in the record, and *new trial* was ordered.

3. Piedmont (Lynchburg) Club *vs.* Commonwealth. From the Corporation Court of Lynchburg. *Charge*—Selling liquor without license. The court *held* no sale was proved within the intent and meaning of the statute. *Reversed.*

4. Perrin *vs.* Commonwealth. From Circuit Court of Gloucester county. *Charge*—Larceny. *Held* the “*Corpus-delicti*” not proved. *Reversed.*

5. Custis *vs.* Commonwealth. From the Circuit Court of Norfolk County. *Charge*—Murder. Death penalty. *Affirmed.*

6. Randall Watson *vs.* Commonwealth. From the Circuit Court of Greenesville county. *Charge*—Murder. Death penalty. *Affirmed.*

7. Terry *vs.* Commonwealth. From the County Court of Campbell county. *Charge*—Forgery. *Reversed.*

8. Tucker *vs.* Commonwealth. From the Circuit Court of Craig county. *Charge*—Murder. *Reversed.*

9. Cunningham *vs.* Commonwealth. From the Corporation Court of the city of Bristol. *Charge*—Attempt to commit rape. *Affirmed.*

10. Thompson *vs.* Commonwealth. From the Corporation Court of the city of Bristol. *Charge*—Robbery. *Affirmed.*

11. N. & W. R. R. Co. *vs.* Commonwealth. From the Circuit Court of Pulaski county. *Charge*—Violation of “*Sunday law.*” Sec. 3801, Code 1887. *Held* the statute *unconstitutional and void*, being repugnant to the *inter-State Commerce clause* of the Federal Constitution. *Reversed.*

12. Hash *vs.* Commonwealth. From the Circuit Court of Grayson county. *Charge*—Murder. *Reversed.*

13. Sawyers *vs.* Commonwealth. From the Circuit Court of Alleghany county. *Charge*—Arson. *Affirmed.*

14. *Bell vs. Commonwealth.* From the Circuit Court of Rockingham county. *Charge*—Attempt to poison his wife. *Affirmed.*

IN THE CIRCUIT COURT OF RICHMOND.

Commonwealth vs. James W. Pope, Treasurer of Virginia N. & C. Institute.

Judgment for \$1,656.37, interest from June 7, 1887, and costs.

In the following cases no change since my report for 1890:

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. Ingle'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.

Farmer's 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 defendant to the payment of a judgment.

The above are all old cases.

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

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.

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

H. M. Smootz *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.

"Winfree *vs.* Bransford, treasurer," and "W. W. Larkin *vs.* Same," have been tried and the bills dismissed.

William Marsh, a citizen of Maryland, was indicted in the county court of Accomac county, for violating "section 2156," Code '87; made his escape to Maryland; was captured, delivered up to State authorities and admitted to bail. Marsh applied to Judge Hugh L. Bond for "writ of habeas corpus." On the 24th of October, 1891, I appeared in the Circuit Court of the United States for the District of Maryland, made returns for the sheriff of Accomac and upon this return the Judge denied the writ. Since then Marsh has renewed his bail, and, as I am advised, will stand his trial.

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.

1. William H. Jones *vs.* Commonwealth of Virginia,
2. J. J. Dillard *vs.* E. S. Moorman, treasurer,
3. Mallan Bros. *vs.* Bransford, treasurer,

appeals from the Supreme Court of Appeals of this Commonwealth, stand as in my report for 1890.

1. Pat. Callan *vs.* Bransford, treasurer,
2. Gregory et als. *vs.* Same,
3. Litchford, surviving partner, *vs.* Day, sergeant,
4. Lawson et als. *vs.* Bransford, treasurer,

were, upon my motion, dismissed for want of jurisdiction.

"Writs of error" to the Corporation Courts of Lynchburg have been allowed in

1. Litchford, surviving partner, *vs.* Day, sergeant,
2. R. M. Wooling & Co. et als. *vs.* Bransford, treasurer, and Day, sergeant,
3. James H. Gregory et als. *vs.* Same.

Motion was made by the appellants to advance these causes, resisted by me and denied. They, therefore, await the regular call upon the docket of the Supreme Court.

"VIRGINIA VS. TENNESSEE."

The *status* of this case is unchanged. Ex-Attorney-General Rufus A. Ayers, Judge William F. Rhea and myself met the Attorney-General of Tennessee (Mr. Pickle), and his associate counsel at Bristol in July past, agreed upon "the record-evidence" to be used in the trial and set a day for taking depositions. When the depositions are completed, the record will be made up, and the case set down for argument at the earliest day we can agree upon.

STATUTES NEEDING CONSIDERATION.

I again direct your Excellency's attention to chapter 197, *section* 4047, construed in the *Howells* "*habeas corpus*" by the Court of Appeals at Wytheville.

To "*sections* 3049," 3063 and 3079 providing compensation for judges when holding terms for their brothers. These statutes do not *in terms* apply to the *Hustings Court* of this (Richmond) city, and the omission should be supplied.

To chapter 54, *Acts* 1889-'90, page 43, entitled "*an Act to require the payment of fees on certain charters*," and the amendments to "*the first section*" of this Act, page 98. *The amended first section* omits "*charters granted under section 1145, Code 1887.*" "*Mandamus proceedings*" against the Secretary of the Commonwealth are pending, instituted by a corporation styled "*the Combined Saw and Planer Company.*" Its object is so to construe the amended section as to escape taxation, and should this contention succeed will greatly reduce the Commonwealth's revenues derived from this tax.

To the "*registration laws*"—construed by the Court of Appeals in "*Clay vs. Ballard*" and "*Coleman vs. Sands.*" These laws will be found in Code 87, chapter 8, page 80-86.

The court holds that "*section 84*" confers upon the voter a right to demand and have "copy" of the books. If this be the legislative purpose compensation should be provided for this work.

COUPON LITIGATION.

Truce was declared between Mr. Royall, counsel for the "*English bondholders*," and myself, pending the effort to adjust the "public debt," but contention and strife continues over coupons *in the cities*, especially between tax-paying citizens and the Commonwealth.

The "*Farmers' Alliance*," through Major T. Towson Smith, formerly of Fauquier and now of Rappahannock county, in the Richmond meeting declared against the use of the coupon. If the tax-payers of the *cities* would be as *patriotic* this trouble and expense would end, and a heavy burden be lifted from this Commonwealth.

Coupon litigation is heaviest in the Circuit Court of Lynchburg. At the request of the Commonwealth's Attorney of that city and his associate, the counsel for "the Sinking Fund Commissioners," I assisted at the regular spring term and a special term held in August, in the trial of these cases.

That your Excellency may the better understand the matter, I will incorporate in this report the text of a letter from the Commonwealth's Attorney and the opinion of Judge Horsley upon the points of law discussed in the progress of these trials, cut from the Lynchburg *News* :

LYNCHBURG, VA., *October 10, 1891.**Hon. R. Taylor Scott, Richmond, Va. :*

DEAR SIR—Yours to hand. In May there were four hundred and eight cases on the docket in which the Commonwealth was plaintiff. One hundred and seventy-six of these were decided in favor of the State and fifty-one in favor of the tax-payer, thus leaving on the docket one hundred and eighty-one cases as of May, 1891.

There are pending and undetermined in Circuit Court fifty-six verification cases. According to the ruling of the court we will win half of these on demurrer, and for tax-payer to prevail in any of the remainder they must verify to satisfaction of jury. At August special term there were three judgments against Commonwealth on verification cases, the parties owning and producing bonds in court. The tendering is still continued here by Larkin, and there will be some new motions for Commonwealth *vs.* tax-payer at November term, but how many it is impossible to ascertain. So far as the present legislation is concerned, I am afraid we can only obstruct before jury on question of genuineness, as parties are paying school-tax in money and tendering for Government tax. There are a good number of tenders made for quarterly licenses, but my opinion is that the coupon men are sick of the contest and would be glad to be out of it. At the same time the State, under the United States Supreme Court decision, is at a disadvantage, and if *war* is to continue we must have some new legislation. Our people are anxious to compromise all past matters, and abstain in future if details can be fixed upon. Our next Legislature should forbid payment of liquor license and fines in coupons by direct statute.

Burroughs has seen your letter to me, and will write, no doubt. If my letter is not minute enough, let me know and I will send you any information you may desire. Excuse my delay. I know you will, however, when I tell you I have tried eleven felony cases since Wednesday.

Yours truly, &c.,

FRANK P. CHRISTIAN.

“A COUPON CASE.”

In the Circuit Court Friday, Judge Horsley rendered the following coupon decision :

The first question presented by counsel for consideration in these cases is, whether the tenderer of coupons has a sufficient remedy by virtue of his right to stand upon his tender and treat all as wrong-doers, at their peril, who attempt to dispossess him of his liberty or property, if the coupons are genuine. While not in terms referred to, this point is necessarily settled by *Antoni vs Wright, sheriff, etc.*, and *Wright, sheriff, etc., vs. Smith*, 22 Gratt. 833; *Woodruff vs. Trapnall*, 10. How. 190; *Furman vs. Nicholl, clerk, etc.*, 8 Wall, 44; *Hartman vs. Greenhow*, 102 U. S. 672, and other cases. In which cases the right of the tenderer to compel the collecting officer to specifically receive the notes or coupons in payment of the debt due to the State was involved and settled. In no one of these cases should mandamus have been awarded, if standing upon the tender was a sufficient remedy.

The next point presented is whether the statute requiring the production of the bonds and excluding expert evidence is void in suits against the State. All verification cases under the statute are suits against the State.

In *McGahey, etc., vs State of Virginia*, 135 U. S. 662, it has been settled that this provision for the production of the bonds, etc., is void in all suits which are not subject to mere volition of the State. Whether it would be operative in suits subject to the volition of the State, has not been heretofore considered. In *ex parte Ayers*, 123 U. S. 505, the court says that "although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense"; referring to 20 How. 527; *Beers vs. Arkansas*, and 101 U. S. 337, *Railroad Co. vs. Tennessee*.

There is another important question to be considered in these verification cases, viz.: whether it was the intention of the Legislature that the statute under consideration should be operative at all if void in suits not dependent upon the volition of the State.

The original method of procedure existing when the contract was made was, when the State's collector refused to receive coupons from State bonds in payment of debts, &c., to the State, to compel him individually by mandamus to receive the coupons, and no law of the State could excuse him from receiving genuine coupons, as such law impaired the contract made by the State with the coupon holder. In *Poindexter vs. Greenhow*, 114 U. S. 270, the court says: "At the time of the passage of the Act of March 30th, 1871, there existed a remedy by mandamus in case a tax collector refused to receive coupons issued under that Act tendered in payment of taxes, to compel him specifically to do so."

In this condition of the law the State's collecting officers were being individually proceeded against in the courts, and there was no general policy fixed by law for ascertaining the genuineness of the coupons. Whether there was occasion for such ascertainment is not a matter for the courts; the department of the government having jurisdiction of this matter have so stated, and the courts accept it as a fact, provided the contract rights of the creditors are not impaired. Nor was there any way provided by law for the State's conducting its own litigation by being a party to all proceedings. In brief, the whole burden of litigation, forced by the State, was on the collecting officers individually; and the State's revenues were subject to all delays incident to protracted litigation.

To relieve this situation, and in furtherance of the alleged intention of the State to hamper the use of coupons, (the court of course does not attempt to ascertain intention in the sense of concealed motive for framing an Act, but only seeks the intention of a legal statute as an aid to the interpretation of phraseology, doubtful originally, or rendered so by circumstances) the Act of January 14th, 1882, was passed. By this Act the State required the payment of its debts to it in money when the coupons were tendered, the surrender of the coupons to the collector to be receipted for, the marking of the coupons, and made direct issue with the real litigant, the State.

The fourth section amended the proceedings when a mandamus was applied for to compel a collector to receive coupons, providing for the ascertainment of the genuineness of the coupons in a suit against the State, and not the individual collector; required the payment of the debt in money, and contained other precautionary or obstructive provisions.

The clearly-indicated policy of the State was to interfere between its collecting officers and the tenderer and take from them the burdens of litigation and

liabilities to judgments; and further, that its treasury should not be depleted by awaiting the results of litigation, but require the money to be paid as a condition precedent to litigation. This was held constitutional, 107 U. S. 769, *Antoni vs. Greenhow*; 114 U. S. 340, *Moore vs. Greenhow*, and mandamus without verification proceedings was refused by the Supreme Court of the United States.

Not until January, 1886 (Acts 1885-6, page 36,), was the Act passed requiring the production of the bonds and excluding expert evidence. It was a general provision not confined to suits existing by volition of the State or suits against the State. It was intended to apply to all suits. *Can it be supposed that when this statute was held void in all proceedings not subject to the volition of the State, the Legislature could have intended it to apply to the verification cases, thereby in effect nullifying the verification statute and remanding the tenderer to the mandamus proceedings as they existed at the time of the funding bill of 1871?* For of necessity, if the State has attached unconstitutional conditions to the verification statute, and has the right to do it, it is not giving a remedy substantially sufficient in the place of the remedy existing at the time of the contract. See for the principle involved Trade Mark Cases, and authorities referred to there, 100 U. S. 99.

If there is one thing in which the State has clearly indicated its policy, it is in destroying the remedy by mandamus as it originally existed. Therefore, the statute requiring the production of the bond and excluding expert evidence is void. Under this view it is not necessary to consider whether when a remedy is given by a State by a suit against itself, in the place of a remedy existing at the time of the contract, and as a part of such substituted remedy there are unconstitutional conditions, the court will remand the creditor to his original remedy or apply the substituted remedy, rejecting the unconstitutional conditions. This would seem also a question of legislative intent, but there has been no occasion to examine it."

Your Excellency will note that *Judge Horsley*—the decisions of the Supreme Court of the United States to the contrary—

"*Beers vs. Arkansas*," 20 How. 527,

"*Poindexter vs. Greenhow*," 114 U. S. 270,

"*Ex parte Ayres*," 123 U. S. 769,

and "*McGahy vs. Virginia*," 135 U. S. 662,

adjudged the statute, which requires in verification and identification of coupons, *the production of the bond and proof that it is genuine unconstitutional and void.*

Judge *James Keith*, of the Fauquier Circuit, and our Court of Appeals, in several cases, viz.:

Commonwealth vs. Booker, 82 Va. 964,

Commonwealth vs. Hurt, 85 Va. 918,

and *Commonwealth vs. Tunstall*, 86 Va. 372,

have declared the contrary doctrine, to-wit: That when the Commonwealth lays aside "her sovereignty" and permits the tax-payer to sue, that is "identify and verify" his coupons, *her will is the law!*

The Commonwealth has named the tribunal, prescribed the proof and mode of procedure, in my opinion, conditions precedent to the tax-payer's suit, and unless performed the suitor is "*coram non judice*" and cannot be heard.

Very respectfully,

R. TAYLOR SCOTT,
Attorney-General.