ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1902.

RICHMOND
J. H. O'BANNON, SUPERINTENDENT OF PUBLIC PRINTING
1902

REPORT

COMMONWEALTH OF VIRGINIA,
OFFICE OF ATTORNEY-GENERAL,
November, 1902.

To His Excellency A. J. MONTAGUE,
Governor of Virginia:

I have the honor to submit my report covering the period of my service from the beginning of my term, January 1st, 1902, to November 1st, 1902.

The cases in which it is the duty of the Attorney-General to represent the Commonwealth, pending during that period, are grouped under the titles of the courts in which they are pending.

CASES IN THE SUPREME COURT OF UNITED STATES.

1. The case of Tennessee *v.* Virginia, which has been pending for several years, will probably be ended by final decree at the next (January) term of the court. The case will then be heard upon the report of W. C. Hodgkins, J. B. Baylor and A. H. Buchanan, the commissioners who were directed and empowered by the decree of the court to re-run and locate the boundary line between the two States as already established by the decision of the court. The line thus established is the one known as the "Compact Boundary Line of 1803, marked with five chops in the shape of a diamond," and the work of the commission, as prescribed by the decree of the Supreme Court, is limited to the location of this line.

I am informed that the commissioners have completed their work in the field, and have ascertained and fixed the location of said "Compact" (or compromise) line, but they have not yet filed their report, and have been given, by a recent order of the court, until January 5th to file the same, at which day it is expected the case will be submitted upon the report and such exceptions to it as may be filed by the counsel for either State.

There are no questions in this case except the fixing of this line, and the determination of the rights of persons who have, under grants from Virginia, in good faith purchased and resided on lands lying on the Tennessee side of the line as now about to be finally established.

2. The Douglas Company *v.* Stone, late Treasurer of Smyth county.

This suit involves the right of the Treasurer of Smyth county to sell the timber on a tract of land claimed by the appellees, to satisfy certain unpaid taxes for which the land was returned delinquent.

It is expected that this case will be argued and submitted as soon as it shall be reached upon the docket of the Supreme Court, probably some time during the month of January next.

3. The Peoples National Bank of Lynchburg *v.* Morton Marye, Auditor of Public Accounts.

This case is one of great importance, as it involves the right of the State to tax the shares of stock of the national banks located and doing business in this State in the manner prescribed in its tax laws. The decision of several other suits depends upon the result of this; and the collection of a large amount of taxes due the Commonwealth by the stockholders of those banks awaits its decision.

It is proper that I should say that upon the issues presented in this suit, in the way in which it has been brought and prosecuted, a decision in favor of the State upon those issues may not settle the question as to the validity of the tax in question.

It is expected that this case will be reached and argued in the next few months.

Extraordinary Litigation in the United States Courts.

Cases in Circuit Courts of United States.

There are four cases, all arising under section 643 of the Revised Statutes of the United States, now pending in the United States Circuit Court for the Western District of Virginia. These are criminal prosecutions begun in the courts of the State, and which have been summarily removed, under the Act of Congress, into the United States Court.

The following is the statute under which these cases have been taken from the State into the Federal jurisdiction:

Sec. 643 (as amended by the Act of February 8th, 1894). "When any civil suit or criminal prosecution is commenced in any court of a State against an officer appointed or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer, or other person, under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial in the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court, and in the following manner:

"Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor-at-law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said Circuit Court, if in session, or if it be not, to the Clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a cause originally commenced in that court; but

all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or another process except capias, the Clerk of the Circuit Court shall issue a writ of certiorari to the State court, requiring it to send to the Circuit Court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the Clerk of the State Court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State Court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the State Court shall be void. And if the defendant in the suit or prosecution be in actual custody or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the Circuit Court, or, in vacation, of any judge thereof and if, upon the removal of such suit or prosecution, it is made to appear to the Circuit Court that no copy of the record and proceedings therein in the State Court can be obtained, the Circuit Court may allow and require the plaintiff to proceed de novo, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said Circuit Court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant."

The cases arising under this law, now pending, are:

Commonwealth *v.* Thomas L. Felts, indicted in the County Court of Wythe for the murder of Walter Vaughan. Case removed to the United States Circuit Court at Lynchburg.

Commonwealth *v.* De Hart, indicted in the County Court of Floyd for assault with intent to maim, disfigure or kill. Removed to United States Circuit Court at Danville.

Commonwealth *v.* Same, prosecuted in Floyd county for carrying a concealed weapon. Removed to United States Circuit Court at Danville.

Commonwealth *v.* A. H. Staples and others, indicted in the County Court of Patrick county for murder. Case removed to the United States Circuit Court at Lynchburg in September, 1902, and by that court transferred to Danville, where it is to be tried on the 14th of November, 1902.

The Felts case was argued at the last September term of the United States Court at Lynchburg, upon a motion to remand, which I submitted, which motion was overruled upon the ground that under the Act of Congress an officer of the United States, employed in the revenue service of that Government or in the execution of the revenue laws of the United States, had a right to have a prosecuton against him, pending in a State court, removed to the United States Court, if the act for which he was prosecuted was done by him under color of his office, *even if such claim was without foundation*, as the learned judge of that court plainly indicated in his opinion.

The far-reaching effect, and the unfortunate and injurious consequences which must follow the execution of the law if this construction is to stand, and the law as thus construed is held to be a constitutional exercise of Federal power, will be obvious.

I thereupon filed a plea, traversing the averments of the petition as to the jurisdictional facts alleged, and with the Commonwealth's Attorney for Wythe county pressed for a trial upon that plea. On the motion of the accused, opposed by counsel for Virginia, the case was reluctantly continued by the court until its March term, 1903, because of the absence of two of the defendant's witnesses.

I was ably assisted in the preparation and argument of the case by Mr. H. M. Heuser, Attorney for the Commonwealth for Wythe county.

There were seven witnesses subpœnaed for the Commonwealth, who attended the court; and there were seventy-two witnesses for the accused—Thomas L. Felts—of whom forty-six attended. The *per diem* and mileage of the witnesses for the defendant was all paid at the rate allowed under the Act of Congress, which is about sufficient to cover actual expenses; but the court decided that there was no warrant in law for the payment of the witnesses for the Commonwealth, so they or their friends advanced the money for their own expenses, which, most of them being poor, was a grievous burden.

In the preparation and argument of the Staples case, I have had, and will have, the benefit of the valuable and indispensable services of Mr. J. M. Hooker, the Commonwealth's Attorney for Patrick county.

It is, of course, impossible for the Attorney-General, without the assistance of counsel for the State living in the locality of the alleged crime and acquainted with the parties and witnesses, and informed as to the facts and circumstances of the case, to properly conduct a trial of this kind, or satisfactorily represent the jeopardized interests of the Commonwealth.

THE EFFECT AND OPERATION OF SECTION 643 OF THE U. S. REVISED STATUTES

It behooves the authorities and the people of the State to consider the nature of the Act of Congress referred to, the consequences which must attend its administration, and the action to be taken to protect the imperilled interests of society.

In at least two of the cases now pending, according to the views of the honorable, capable and conscientious officers who represented the Commonwealth in the inception of the prosecution, flagrant crimes have been committed upon peaceable citizens of this State, and against her laws, by persons who, though officers or employees of the Federal Government, were not at the time these homicides were committed engaged in the discharge of any duty devolved upon them by any law of God or man. The acts which resulted in the death of these citizens of Virginia were, as is earnestly claimed by the sworn officers of the State who have carefully investigated the facts, wholly disconnected with the exercise of any duty or function which the perpetrators of these offences were discharging, or had any right to discharge, under any revenue law, or any other law of the United States.

And yet, upon their *ex parte* petitions, averring that the acts for which they were being prosecuted were performed by them while in the discharge of some duty in connection with the execution of the revenue laws of the United States, or *under color* of their office as officers of the United States, or *under color* of such law, the jails of Virginia have to open their doors and let these criminals go; the cases are summarily removed into the United States Circuit Court for the district, and, unless the Commonwealth will follow them and prosecute the violators of the laws in that tribunal, they will go free, to commit similar crimes with impunity. Even if she does follow the cases and prosecute them with the utmost vigor, the chances of their escape, however guilty they may be, are enormously increased, because of the procrastination and delay occasioned by a removal from the State courts, with their frequent terms and assurance of speedy trial, to the Federal court, meeting only once in six months, and, under its rules, constrained to grant a continuance upon grounds which the accused can almost always present

JUSTICE, TO BE SURE, MUST GENERALLY BE SPEEDY

For various reasons, but all arising from their removal to the Federal court, three of the above cases have been pending for much more than a year

The most guilty are apt to escape the punishment they deserve, if such delays are possible.

Another, and a startling feature of this law, is that the United States not only stops the hand of justice extended by the State to bring these prisoners to a speedy and fair trial, but actually, without any proof that they were acting in the discharge of any duty as officers or employees of the Federal Government, throws the great shield of its protection over them, summonses and pays their witnesses, espouses their cause as though their acts were worthy of the highest commendation, and, free of cost to them, furnishes its own able counsel to defend them.

On the other hand, if the State fails to prosecute in that court, the accused is acquitted and discharged.

Such, in all respects, may not be the purpose and necessary constitutional effect of the law, but such is its effect as now administered in the United States courts.

Again: If the State shall appear in the United States Court, by her legal representatives (as I and my predecessors have deemed it to be our duty), and does what she can to protect the menaced interests of society, and the guilt of the accused is established, even under the necessarily adverse conditions of a trial there, there is no law of Virginia or of the United States under which any punishment could be inflicted. The United States Supreme Court, in its opinion in Davis *v.* Tennessee, 100 U. S., 257 (which is upon that point, to say the least, *inconclusive*), holds that it is competent in such case for the guilt or innocence of the defendant to be ascertained; but it did not decide that the defendant could be punished by that court, even if his guilt should be proved.

I have been unable to find any Act of Congress which expressly, or by implication, denounces a punishment for the crime of murder, or for any

other crime committed in a State and against its laws. If there was such a law, it would hardly be contended that it would be constitutional.

So that, by operation of this law, if the State fails to show to the satisfaction of the United States Court and jury that the defendant is guilty, he will be discharged. If he is found to be guilty, it is at least doubtful whether he can be lawfully punished, under the judgment of the Federal Court, and in order to secure any effective sentence and punishment the case should, and probably would have to be, remanded to the State court and the accused be given another trial and another chance to escape just punishment.

As stated above, the peace and good order of society require that such crimes shall be punished. They cannot be punished unless provision is made for defraying the expenses of their prosecution. The attendance of witnesses and the services of the Attorneys for the Commonwealth from the localities cannot be expected unless due provision is made to cover the necessary expenses of the witnesss and to make some reasonable compensation to the latter for such extraordinary services.

The attendance of the witnesses for the Commonwealth in the Felts and Staples cases at the recent term of the United States Court at Lynchburg was secured through the indefatigable efforts of Messrs. Heuser and Hooker, the Commonwealth's Attorneys for Wythe and Patrick counties; and those gentlemen not only made two trips to Lynchburg at their own expense, but both advanced considerable sums towards defraying the expenses of witnesses whose attendance otherwise would not have been scured.

The State, of course, cannot and should not rely for her protection upon such generous devotion to the public welfare, and should reimburse these gentlemen the amounts which they have advanced in her interest.

The question of the constitutionality of this Act of Congress has, as to its main provisions, been settled by repeated adjudications by the United States Supreme Court; but that court has not yet decided that its provisions could be availed of by a Federal officer upon an unfounded claim that the act for which he was prosecuted was done in the discharge of some duty under the revenue laws of the United States, or under a *simulated* or *fictitious* claim that it was done under color of his office.

Besides these questions, there are others of importance arising under said act, upon which it may be my duty, upon appeal, to invoke the judgment of the Federal court of last resort. It will be useless, however, to raise some of these questions if the State shall decline or fail to make adequate provision for the vindication of the rights and interests of her people, by enabling her officers to efficiently prosecute these cases in the United States courts.

SUPREME COURT OF APPEALS OF VIRGINIA.

The following cases have been argued and submitted:

Doyle *v.* Commonwealth; from Corporation Court of Lynchburg. Argued January 7th, 1902. Affirmed.

Vaughan Andrews *v.* Commonwealth; from County Court of Amelia. Argued March 11th, 1902. Affirmed.

Gordon *v.* Commonwealth; from County Court of Augusta. Argued March 11th, 1902. Affirmed.

Branch v. Commonwealth; from County Court of King William. Submitted on printed arguments at Wytheville, June 10th, 1902. Reversed.

George and John Jones v. Commonwealth; from County Court of Tazewell. Argued at Wytheville, June 13th, 1902. Reversed.

The cases now pending in this court are:

Ellinger v. Commonwealth; from Circuit Court of Accomac county. Will be argued during the next winter term.

Goldman v. Commonwealth; from Corporation Court of Roanoke city. To be argued on the first day of the November term, 1902.

Anderson v. Commonwealth; from County Court of Campbell. To be argued at the November term, 1902.

Adams, Treasurer, v. John Stewart Walker & Co.; from Corporation Court of city of Lynchburg. To be argued at the November term, 1902.

CIRCUIT COURT OF CITY OF RICHMOND

AT LAW

1. Commonwealth v. Bennett Taylor, Clerk Albemarle County. 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 county, et als. Suit instituted October, 1886.

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

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

7. Commonwealth v. G. H. Baughman et als. Suit instituted November, 1886.

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

9. Commonwealth v. G. R. Barr, Treasurer Washington County. Suit instituted April, 1887.

10. Commonwealth v. C. H. Ingles, Treasurer Henry county, et als. Suit instituted October, 1886.

11. Commonwealth v. Same. Instituted May, 1887.

12. Commonwealth v. Same. Instituted May, 1887.

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

14. Commonwealth v. W. M. Gray and J. J. Gusler, Washington county. 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'x. Suit instituted March, 1893.

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

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

20. Commonwealth *v.* C. I. Reynolds, Adm'r of John R. Cabell. Suit instituted July, 1894.

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

23. Commonwealth *v.* Board of Supervisors of Russell county. Suit instituted October, 1899.

24. Commonwealth *v.* Board of Supervisors of Bedford county. Suit instituted October, 1899.

25. Commonwealth *v.* H. L. Stone and sureties. Motion for judgment, which was duly docketed on October 15, 1900.

26. Commonwealth *v.* Horatio H. Snead, Principal, &c.

AT EQUITY.

1. Commonwealth *v.* Sam'l M. Page. Suit instituted March, 1872.
2. Commonwealth *v.* Walter Millan. Suit instituted April, 1872.
3. Commonwealth *v.* P. H. Huffman et als. Suit instituted April, 1873.
4. Commonwealth *v.* J. W. Grantham. Suit instituted December, 1874.
5. Commonwealth *v.* James Hilton's Adm'r. Suit instituted April, 1879.
6. Commonwealth *v.* Martha Goode, &c. Suit instituted April, 1879.
7. Commonwealth *v.* Spencer D. Ivey, &c. Suit instituted April, 1879.
8. Commonwealth *v.* J. T. Young. Suit instituted August, 1884.
9. Commonwealth *v.* A. A. Chapman. Suit instituted February, 1893.
10. Commonwealth *v.* George Dusner's Curator and Adm'r. Suit instituted March, 1897.
11. Commonwealth *v.* B. Vandegrift et als. Suit instituted February, 1898.
12. T. H. Martin *v.* Commonwealth of Virginia et als. Suit instituted January, 1902.

The foregoing are the cases now pending in the Circuit Court of the city of Richmond in which the Commonwealth is represented by the Attorney-General

Many of these cases have been pending for years, and have become chronic; but it is my purpose to have them disposed of as far and as soon as possible. Most of them seem to now involve matters of no great importance to the Commonwealth.

During the ten months of my service I have been called upon to give advice to officers of the Government, and others, upon a number of questions of greater or less interest and moment.

I will include in this report only the more important of these, omitting a large number which relate to matters of no great interest, or which are substantially repetitions of similar opinions already given.

As will be seen, a large number of the questions considered relate to the meaning and effect of provisions of the Constitution of the State, and of the Registration Ordinance adopted by the Constitutional Convention.

For convenience of reference, these will be grouped separately.

I. OPINIONS MAINLY RELATING TO THE REGISTRATION ORDINANCE.

Concerning Judges and Registrars of Election

August 4th, 1902

Hon. R. Walton Moore,
Fairfax, Va.:

Dear Sir:

Your favor of the 1st just received.

The question you submit had already been considered, and my opinion given upon it, which I now, after further consideration, confirm.

The provisions of the last paragraph of section 31 of the Constitution, which render any person, or the deputy of any person, holding any elective office of profit or trust in the State, or in any county, city or town thereof, ineligible to the office of registrar, apply only to the registrars and judges of election to be hereafter appointed by the several electoral boards of the counties and cities of the State. These registrars will not, of course, go into office until after December 31st, 1903.

The provisions and restrictions of section 31 of the Constitution do not, in my opinion, apply to the members of the Boards of Registrars chosen by the Convention. This question was carefully considered in the Committee on Final Revision, and the opinion here expressed is in accordance with that of the Committee, which was afterwards stated by me in the Convention and received without dissent.

Apart from any other consideration, it seems to me that the action of the Convention in the selection of the members of the several Boards of Registrars, provided for by the Registration Ordinance, was conclusive as to the eligibility of the persons thus selected.

Very truly yours,

WILLIAM A. ANDERSON
Attorney-General

Concerning Time and Manner in Which Boards of Registrars Must Hold Sessions

August 12th, 1902

R. W. Coakly, *Esq.*,
Owens, King George County, Va.:

Dear Sir:

It gives me pleasure, in reply to your favor of the 9th inst., to say that by the 2d section of the Registration Ordinance each Board of Registrars is required to sit at least one day, at dates to be designated by the Board, in each precinct in its district, and thereafter at such other places within its district as may be necessary to complete the registration of the voters.

It may sit therein consecutively, or at such intervals of time as the commission may find to be best. After meeting at least one day in each precinct

at some designated place, which I suppose would be usually, though not necessarily, at the precinct, it would be its duty to sit at such other place or places in its district as may be most convenient for the registration of the voters of the district.

The Board can only sit fifteen days, all together, for all the precincts in its magisterial district; but if this time is found not to be sufficient, it may be extended, on the application of the Board to the judge of the County Court, for such time as the judge may determine to be necessary; and in the order extending the time the judge should fix the places and days for the registration.

The Board should publish the notice of the days and places at which it will open the books for registration for at least twenty days, by bills posted at five or more places in the precinct and district, and by advertisement for two successive weeks in a newspaper, if one is published in the county, and in such other manner as the Board may deem expedient.

These notices can all be included in one hand-bill or advertisement, in like manner as county treasurers give notice of the times and places at which they will be present to receive taxes.

Of course, the voters for each precinct will be enrolled separately, no matter at what place they are registered.

I hope I have made myself clear.

If you will carefully read the Registration Ordinance I don't think you will find any difficulty in understanding it.

Very truly yours,

WILLIAM A. ANDERSON.
Attorney-General.

CONCERNING CLERKS FOR BOARDS OF REGISTRARS IN CITY OF RICHMOND.

August 19th, 1902.

R. T. LACY, *Esq.*,
Chairman Committee of Registration, Richmond, Va.:

DEAR SIR:

In response to your inquiry, I beg leave to say that in my opinion the registrars who are authorized by the 2d section of chapter 14 of the Acts passed by the General Assembly at the Extra Session of 1902-'3, approved July 18, 1902, page 15 of said Acts, are undoubtedly those mentioned in the 1st section of said Act, viz.: The registrars appointed under the Registration Ordinance adopted by the Constitutional Convention. Under the provisions of said section, each registrar is authorized to employ a clerk. Under the Registration Ordinance, all of the expenses of the Boards of Registrars, except the printing of the books and blank forms to be furnished by the Secretary of the Commonwealth, are required to be paid by the counties and cities, respectively, so that the salaries of these clerks will be paid by the city of Richmond.

Very truly yours,

WILLIAM A. ANDERSON.
Attorney-General.

CONCERNING REGISTRATION OF VOTERS FOR TOWNS.

August 28, 1902

G. A. GUARD, *Esq.*,
New Market, Shenandoah County, Va.:

DEAR SIR:

Your favor of the 21st inst. was duly received.

New Market precinct is merely a political sub-division of Lee Magisterial District, within the meaning of the Registration Ordinance, and, when your Board sits in New Market precinct for the purpose of registering voters therein, it will be to register them, not as the voters of the town, but as the voters of a portion of the magisterial district.

The town registration will be a separate affair, and provided for by an Act of the General Assembly.

The hours for your Board, therefore, will be from 8 o'clock in the morning until sunset.

Very truly yours,

WILLIAM A. ANDERSON
Attorney-General

CONCERNING LIST OF TAX-PAYERS FOR REGISTRATION PURPOSES

August 28, 1902

S. H. CHILES, *Esq.*,
Treasurer of Frederick County,
Winchester, Va.:

DEAR SIR:

Your favor of the 27th inst. just received.

The list which you are to prepare under section 9 of the Registration Ordinance should embrace those persons, and those persons *only*, who have paid, for the year 1901, *State taxes*, amounting to at least $1.00, on property, which should include neither the capitation tax, income tax, nor any other tax except that paid to the State on property.

Very truly yours,

WILLIAM A. ANDERSON
Attorney-General

APPLICATION IN PERSON NECESSARY.

August 29, 1902

NELSON S. GROOME, *Esq.*,
Hampton, Va.:

DEAR SIR:

Your favor of the 28th inst. just received, and in reply I would beg leave to say that I do not think it would be proper or legal for the Boards of Registrars to register any person who does not appear before them in person. A man had as well be allowed to vote by mail, telegraph or telephone as to be allowed to register except in his own person.

The Registration Ordinance evidently contemplates his being present in person, because it authorizes the Board to examine him upon oath.

I am therefore of the opinion that no citizen should be registered who does not appear before the proper Board in his own person.

Very truly yours,

WILLIAM A. ANDERSON.
Attorney-General.

AS TO INCOMPATIBILITY BETWEEN OFFICE OF JUDGE OF ELECTION AND REGISTRAR.

September 4, 1902.

H. H. HAMILTON, *Esq.*,
Mendota, Va.:

DEAR SIR:

Your favor of the 29th ult. has been received.

The same person can hold the offices of District School Trustee and Judge of Election, or District School Trustee and member of the Board of Registrars, appointed by the Convention.

There is no prohibition in the Constitution against the same person being a member of the Board of Registrars, and, at the same time, a Judge of Election, but it seems to me that there is an incompatibility between the two offices, and that the same person should not hold them both. He should either resign the position of Judge of Election or the position of member of Board of Registrars.

Very truly yours,

WILLIAM A. ANDERSON.
Attorney-General.

ROLL OF VOTERS; HOW AND WHERE PRESERVED.

September 22, 1902.

J. M. BROWN, *Esq.*,
Clerk of Circuit Court of Carroll,
Hillsville, Va.:

MY DEAR SIR:

Your favor of the 19th has been received.

The Legislature, at its late special session, by an Act approved July 28, 1902, cured any conflict between the provisions of section 19 of the Constitution and section 4 of the Registration Ordinance by requiring one copy of the roll of voters returned by the Boards of Registrars to be filed with the Clerk of the Circuit Court, and another set of the registration books to be returned to the Clerk of the County Court and copied in a proper book and preserved in his office.

One roll has to be filed with the Clerk of the Circuit Court for record and preservation in his office, and the other set of the books delivered to the Clerk of the County Court, to be copied in a proper book and preserved in his office.

To follow this law strictly, it would seem to require both sets of the books or rolls to be copied—one in the Circuit Court Clerk's office, and the other in the County Clerk's office.

The books sent to the County Clerk and filed in his office should certainly be copied as soon as received. The law does not provide when the books sent to the Circuit Clerk's office shall be recorded.

Very truly yours,

WILLIAM A. ANDERSON.
Attorney-General

ALLOWANCE TO BOARD OF REGISTRARS.

September 29, 1902.

C. M. WAITE, *Esq.*,
Commonwealth's Attorney, Culpeper, Va.:

DEAR SIR:

Your favor of the 27th instant just received.

I construe the language of section 2 of chapter 10 of the Acts of the Special Session of 1902-'3, approved July 28th, 1902, to authorize a *single* allowance of one cent for every thirty words, counting initials as words. It will be, I suppose, for the Board to decide how this thirty cents shall be apportioned as between the secretary and the other members of the Board.

Very truly yours,

WILLIAM A. ANDERSON.
Attorney-General

CONCERNING EXTENSION OF TIME IN WHICH BOARD OF REGISTRARS MAY HOLD SESSION.

October 15, 1902.

T. J. CARTER, *Esq.*,
Roanoke, Va.:

DEAR SIR:

Yours of the 13th, forwarded from Richmond, has just reached me here.

By the Registration Ordinance the judge of your Corporation Court is authorized, upon the application of any of the Boards of Registrars of your city, to extend the time in which such Board shall sit for the registration of voters, and to fix the days upon which the Board shall hold its sessions for this purpose.

It was contemplated, as appears from the ordinance, that the registration would be closed by or before October 15th, but in a case of emergency the court can, I think, extend the time even beyond this date; but this power should not be exercised by the court, except in a case of great emergency.

Any voters not registered in 1902 will have an opportunity to be registered in 1903.

Very truly yours,

WILLIAM A. ANDERSON
Attorney-General

II. OPINIONS MAINLY RELATING TO THE SUFFRAGE ARTICLE OF THE CONSTITUTION.

Concerning Capitation Taxes.

July 25th, 1902.

George E. Smith, *Esq.*,
Treasurer of Lunenburg County,
Rehoboth, Va.:

Dear Sir:

Your favor of the 20th instant received.

The provision in section 173 of the new Constitution, which provides that the capitation tax therein mentioned "shall not be a lien upon, nor collected by legal process from, the personal property which may be exempt from levy or distress under the Poor Debtor's Law," applies only to the State capitation tax of not exceeding $1.50 per annum, which the General Assembly is hereafter required to levy by the terms of that section. It does not apply to the capitation tax for 1901 or 1902, or any other capitation tax levied under the late Constitution.

There is, however, the following very important provision in section 22 of the Constitution: "The collection of the State poll tax assessed against anyone shall not be enforced by legal process until the same has become three years past due."

By this mandate of the Constitution, no State poll tax can be collected by levy, garnishment or sale, until it has been *due* for at least three years. I take it that a tax is due when it becomes payable—say, in November of the year in which it is assessed.

This does not apply to local capitation taxes, which can be collected as formerly.

Very truly yours,
WILLIAM A. ANDERSON.
Attorney-General.

1. As to Residence of Applicant for Registration.

2. As to Property Qualification.

August 1st, 1902.

William E. Allen, *Esq.*,
Attorney-at-Law, Covington, Va.:

Dear Sir:

Your favor of the 26th ult., forwarded from Richmond, has been received

1. The language of section 18 of the new Constitution to which you refer is, in the particular mentioned by you, identical with that used in the suffrage articles of the Constitutions of a number of the States of the American Union.

The question which you raise is one which has been frequently discussed, and decided in various ways.

As a rule, a man's residence is where his family and home are

If a man living in Louisa county goes to Alleghany county to accept employment there, with the intention of returning to Louisa county, he will never acquire a residence in Alleghany county, no matter how long he may remain in the latter county, so long as the animus revertendi continues.

It is very difficult, as your investigation must have convinced you, to define distinctly what the word "residence" means, so as to cover every case which may arise.

As the courts, and other tribunals which have passed upon it, have decided, it is largely a matter of *intention*, but it is also, of course, *a question of fact*.

I would say that the mere fact that a man has come to Alleghany county from Louisia county and taken temporary employment by the month, or even by the year, in Alleghany county, would not constitute him a resident of Alleghany county within the meaning of section 18 of the Constitution, if he has left his family, or if his home continues to be, in Louisa county.

A question of this kind is not only one of intention, but it is also a question of common sense, and the Board of Registrars should decide each case as it arises upon the facts and according to the right of the particular case, and in doing this they are vested with a large discretion.

Neither the Attorney-General, nor any other officer of the State Government, can give an authoritative and binding definition or construction of any section of the Constitution. The courts alone are competent to do this.

An effort was made in committee to make the language of this section more explicit and restrictive in its terms, but it was found that this would operate great injustice in many cases, particularly in respect to commercial travelers and others whose business requires them frequently to be absent almost continuously from home, and who are among the most intelligent, patriotic and deserving class of the State.

2. As to the construction of the third sub-division of section 19 of the Constitution, I beg leave to say that the purpose and effect of the language there used is, in my opinion, to entitle any citizen not otherwise disqualified to be registered who is the *beneficial* owner of property upon which State taxes aggregating at least $1 have been paid for the year next preceding that in which he offers to register.

It is not necessary that the property shall have been assessed in his name. It is sufficient if it was held by a trustee for him either as the sole beneficiary or along with others. He is, I think, entitled to be registered, provided State taxes to the amount of $1.00 have been paid upon his share of that property for the next preceding year.

It has given me pleasure to answer your inquiries as fully as I am able to do, and I shall be glad to know that my response is in accordance with your own conclusions.

Very truly yours,

WILLIAM A. ANDERSON
Attorney-General of Virginia

WILLIAM E. ALLEN, *Esq., Covington, Va.*

CONCERNING CAPITATION TAXES.

August 9, 1902.

JAMES DUNCAN, *Esq.*,
Unionville, Orange County, Va.:

DEAR SIR:

Your favor of the 4th instant has been received.

The prepayment of a poll tax as a prerequisite to registration and to voting is not required of voters until after January 1, 1904.

The prepayment of a capitation tax alone will never entitle a man to vote under the new Constitution.

If not otherwise disqualified, he may before January 1, 1904, be registered upon the permanent roll of voters, provided a tax of at least $1.00 has been paid to the State for the year next preceding that in which he offers to register ON PROPERTY owned by him.

A poll tax is never a tax on property.

After January 1, 1904, as you will see from section 20, the voter, before he can be registered, unless exempt under section 22 from paying the capitation tax as a prerequisite to the right to vote, must have paid all State capitation taxes assessed or assessable against him for the next preceding three years, and must also prepare his application for registration in his own handwriting.

All voters who register before January 1, 1904, are permanently registered, and do not have to register again after 1904.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING QUALIFICATIONS NECESSARY IN ORDER TO BE REGISTERED.

August 12, 1902.

WALTER M. PIERCE, *Esq.*,
Christiansburg, Va.:

DEAR SIR:

In response to your favor of the 9th instant, I beg leave to say:

1. No person is entitled to be registered under the new Constitution and registration ordinance unless he has been, or will have been by the 4th day of November, 1902, a resident of the State two years and of the city or county in which he offers to register for one year.

2. A citizen, otherwise legally qualified to vote, is entitled to register if prior to the adoption of the new Constitution he served in time of war in the army or navy of the United States or of the Confederate States, or of any State of the United States or of the Confederate States.

The registrars have no right to inquire into the question as to whether such soldier was a deserter or not, or whether he served honorably or was

honorably discharged or not. He is entitled to register without reference to the character of the military service which he rendered.

It was proposed in the Convention that only such soldiers as had honorably served, or been honorably discharged, should be entitled to vote; but it was found that this would impose what was regarded as an unreasonable, and probably in many cases an intolerable burden upon the voters, as it might and probably would be very difficult for thousands of gallant men to show that they had been honorably discharged; and it was considered that the cases of desertion from the army of Virginians were too few to justify imposing any such burden upon the many thousands who had served honorably and well.

It gives me pleasure to concur with your views upon the above questions, as you will see.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

CONCERNING QUALIFICATIONS NECESSARY IN ORDER TO BE REGISTERED

August 15, 1902.

S. T. THOMAS, *Esq.*,
Snead, Franklin County, Va.:

DEAR SIR:

Your favor of the12th instant just received, and in reply beg leave to say that any person who has heretofore served *in time of war* in the army or navy of the United States or of the Confederate States, or any State of the United States or of any Confederate State, is entitled to be registered as a voter under section 19 of the new Constitution, if he has lived in the State two years, in the county one year, and in the precinct in which he offers to vote thirty days preceding next election, unless he is disqualified under section 23 of the Constitution.

The boards of registrars have nothing to do with the character of the services which he rendered in the army, nor is it necessary for him to show that he was honorably discharged. The boards of registrars have no right to inquire into the question as to whether he was a deserter or not, the only question is, did he actually serve in time of war in the army or navy of the United States or of the Confederate States?

It would be very difficult in many cases for a man who served honorably and faithfully to show that he was honorably discharged from the service, because many such soldiers received no discharge at all, and those who did receive discharges have, in many cases, lost them. And there are also cases in which doubtless men are charged with being deserters who were not deserters, but gallant and true men.

At any rate, the board of registrars have nothing on earth to do with that question under the provisions of the Constitution.

The fourth sub-division of section 19 of the Constitution is intended to prescribe an *educational* and *intelligence* qualification, and under it, whether

the voter can read or not, he must be able to give a reasonable explanation of any section of the Constitution submitted to him by the registrars. Of course, he would not be expected to give such an explanation as a constitutional lawyer would give, but to show such a reasonable understanding of a section of the Constitution to be selected by the registrars as a man of ordinary intelligence, whether he can read or write or not, ought to have. I presume that the idea upon which this requirement of *intelligence* is founded is: that a man who is to be entrusted with the duties and responsibilities of a voter should have a reasonable idea of the government under which he lives. The sections should, of course, be fairly selected by the registrars, and a fair opportunity given to the voter to show that he *reasonably* understands what is read to him or what he reads himself.

This *sub-section* was intended to exclude from a voice in the control of the government of the State only those who have made no contribution to the support of the government by the payment of so small a tax as $1.00 on property owned by them; who (or whose fathers) have not served their country in time of war, or who do not possess such a reasonable understanding and intelligence in respect to the Constitution under which they are to live as to entitle them to the exercise of this great trust and duty.

I have known many men without "book learning," and who are not able to either read or write, who had a better comprehension and common sense understanding of the duties of citizenship than others who possessed fair educations.

While this sub-division was intended to exclude from the rolls the very ignorant and vicious voters, it was intended to admit to suffrage thousands of intelligent men well qualified for the duties of citizenship, but who had been deprived of the benefit of training in the schools. In other words, intended to be an enfranchiser of the intelligent but uneducated man, and a disfranchiser only of the ignorant and incompetent man.

Under section 19 of the Constitution the following persons are entitled to be registered on the permanent roll of voters:

1. A man who has served his country in time of war.

2. A son of such soldier. (This class were included because thousands of soldiers came out of the war too poor to give their sons the benefit of education in the schools.)

3. A person who owns property on which State taxes amounting to at least $1.00 have been paid for the year next before that in which he offers to register.

4. A person who has sufficient intelligence reasonably to understand a section of the Constitution fairly chosen and presented to him by the Board of Registrars.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING PROPERTY QUALIFICATION.

August 20, 1902.

A. W. DOUTHAT, *Esq.*,
Danville, Va.:

DEAR SIR:

Your favor, postmarked the 14th, received to-day, on my return here.

The third sub-section of section 19 of the Constitution entitles a person not otherwise disqualified under section 18 or section 23, to register, provided that at the time he offers to register he owns property upon which State taxes aggregating at least $1.00 shall have been paid for the year preceding that in which he offers to register.

He need not have owned the property in 1901 to entitle him to register in 1902, but he must own it in 1902.

The property need not have been assessed in his name in 1901, and need not be assessed in his name in 1902.

It is sufficient if he is the *beneficial owner* of property in 1902, at the time he offers to register, upon which taxes aggregating $1.00 were paid to the State for the year 1901.

It may be property that stands in the name of a trustee, or in the name of heirs, or in the name of a vendor, or in which the applicant for registration has an undivided interest.

It is sufficient if he is the beneficial owner at the time he offers to register, of property upon which the State was paid $1.00 in taxes for the preceding year.

Very truly yours,
WILLIAM A. ANDERSON,
Attorney-General

CONCERNING QUALIFICATIONS NECESSARY IN ORDER TO BE REGISTERED.

August 25, 1902

J. B. CAUTHORN, *Esq.*,
Dragonville, King and Queen County, Va.:

DEAR SIR:

Yours of the 21st instant just received, and, answering same, I beg to say:

1. A man who has served in time of war in the army or navy of the United States or the Confederate States is entitled to be registered, even though he cannot read, or understand, or give a reasonable explanation of any section of the Constitution.

He is entitled to register, even though he has never paid a dollar of taxes in his lifetime.

2. The son of such a soldier is entitled to be registered, even though he does not own a dollar of property, has never paid a dollar of taxes, and can neither read nor write, nor understand any section of the Constitution, or give a reasonable explanation of the same.

3. A man who is now the owner of property, whether it stands in his name or in the name of another, upon which taxes, amounting to at least

$1.00, were paid to the State for the year 1901, is entitled to be registered, even though he can neither read, nor write, nor understand, nor explain any section of the Constitution.

The above is undoubtedly the manifest meaning and intention of section 19 of the Constitution.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

SUBSTITUTES ENTITLED TO REGISTER.

August 28, 1902.

WILLIAM EDWARDS, *Esq.*,
Rumford P. O., King William County, Va.:

DEAR SIR:

In reply to your favor of the 23d instant, I beg to say that:

1. Every man not disqualified by idiocy, lunacy, or crime, or insufficient residence, who served *in time of war* in the Confederate *army* or *navy*, or United States *army* or *navy*, whether as an independent volunteer, as a conscript, or as a regularly enlisted soldier, and whether regularly mustered into the service or not, is entitled to be registered as a voter.

2. A man who furnished a substitute, but did not actually serve in the army himself, is not entitled to be registered as a voter under the first subsection of section 19 of the Constitution.

3. A substitute who actually served in the army would undoubtedly have the right to be registered under said section.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING PROPERTY QUALIFICATION.

August 28, 1902.

JAMES W. BOISSEAU, *Esq.*,
Waldemer, Dinwiddie County, Va.:

DEAR SIR:

Your favor of the 27th instant received.

The State tax, the payment of which entitles a man to be registered under section 19 of the new Constitution, means *any* and *all* State tax on property, both the 10 cents in the dollar levied for schools, and the 30 cents in the dollar levied for the support of the government.

If the State taxes paid for the year 1901 on property aggregate, altogether, including all kinds of State taxes on property, $1.00, the man is entitled to be registered, unless disqualified by insufficient residence, insanity, idiocy, or crime.

Of course, the income tax and capitation tax cannot be included in making up the $1.00.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

WHO IS ENTITLED TO REGISTER UNDER "SOLDIER'S" CLAUSE.

September 3, 1902.

R. H. TRICE, *Esq.*,
Balham, Goochland County, Va.:

DEAR SIR:

Your letter, without date, has been received.

No man is entitled to register under the soldier clause, or the son of a soldier clause, of section 19 of the new Constitution unless he, or his father, *actually* served *in time of war*, in *the army or navy* of the Confederate States, or the United States, or of any State of the Confederate States or United States.

The driver of a wagon, and a slave or a hireling who worked on the fortifications, in no such sense served in the army or navy.

If the driver of a wagon, or the man working on fortifications, was an enlisted soldier, he would be entitled to register, not because he drove the wagon, or worked on fortifications, but because he *was* a soldier.

The language of section 19 is perfectly plain, and only entitles those who served in the *army* or the *navy*, in time of *war*, to be registered.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING SOLDIERS AND SONS OF SOLDIERS.

September 4, 1902.

B. BOUTWELL, *Esq.*,
Brandywine, Va.:

DEAR SIR:

Your favor of the 30th ultimo has been received.

1. A person is not entitled to vote as a soldier, under section 19 of the Constitution, unless he actually served in the army in time of war, which means that he must have been a soldier. It makes no difference whether he was a volunteer, conscript, home guard, or a substitute, or whether he ever took part in any battle. He must have actually served for a time, however short, as a soldier in the army.

A teamster cannot come in under this section, unless he was a soldier Some soldiers were made teamsters.

He need never have fired a shot. All that is necessary is that he shall have actually served in the army in time of war, and been ready to obey orders.

2. The word "son," in the second sub-division of section 19 of the Constitution, imports, I think, a lawful son of a soldier, and requires that a man shall be the lawful son of such soldier, as is above defined, to be entitled to vote, because of being the son of a soldier.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

REQUIREMENTS OF RESIDENCE.

September 4, 1902.

D. P. MCCORMICK, *Esq.*,
Crewe, Nottoway County, Va.:

DEAR SIR:

Replying to the questions submitted in your favor of the 3d instant, permit me to say:

1. The gentleman from Alabama to whom you refer cannot be registered under the new Constitution and Registration Ordinance, which positively requires that, to be entitled to registration, the person must have resided in the State two years, and in the county one year, next preceding the election at which he expects to vote.

It would be necessary for the gentleman to whom you refer to have settled in Virginia on or before November 4, 1900.

2. The Danville gentleman you mention will be entitled to vote only if he removed to Nottoway county on or before November 4, 1901, because he must have resided in that county one whole year before the election at which he is to offer to vote.

These requirements were carefully considered by the Convention. They were designed to eliminate a large class of floating voters, many of them having no interest whatever in the Commonwealth, and who in some localities have been a menace to our civilization, and to the peace and order of society.

While in some cases they will exclude from suffrage most worthy and desirable citizens, they will also operate to keep from the polls, perhaps, ten times as many who are unfit to exercise the right of suffrage; but, whatever the reason for the provision, there is no question that such is the effect and meaning of the Constitution, and it should be carried out without fear, favor, or affection.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

REQUIREMENTS OF RESIDENCE.

(Telegram.)

September 7, 1902.

To Free Lance,
Fredericksburg, Va.:

The requirements of residence in the new Constitution were designed to eliminate a large number of floating voters, who were a menace to the welfare of the State. They were adopted for the same reason which prompted other Southern States to adopt similar provisions, and will, doubtless, get rid of ten unworthy votes for every good man whose right to vote is postponed. Neither compliance with requirements of old Constitution nor ownership of

property will avail anything if citizen has not resided in the State, county or city for time required by new Constitution.

These requirements have for years operated satisfactorily in other Southern States, and they are doing good now in Virginia.

WILLIAM A. ANDERSON,
Attorney-General.

QUALIFICATION IN RESPECT TO AGE, &C.

September 17, 1902.

Dr. W. P. MARKS,
Chairman Democratic Committee of Prince George County,
Garysville, Va.:

DEAR SIR:

Your favor of the 15th has been received.

Section 26 of the Constitution provides that "Any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, notwithstanding that at the time thereof he is not so qualified, and shall be entitled to vote at said election if then qualified under the provisions of this Constitution."

From the above you will see that the young man, who will become of age before November election, next, is entitled to register now.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

INMATES OF SOLDIERS' HOMES AND SIMILAR INSTITUTIONS NOT ENTITLED TO REGISTER.

September 17, 1902.

My opinion has been requested upon the question whether the inmates of the Soldiers' Home in Henrico county are entitled to be registered by the Board of Registrars for Tuckahoe Magisterial District, in which said Home is located.

Section 24 of the Constitution contains this provision: "Nor shall an inmate of any charitable institution, or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution."

The effect and purpose of this provision is to preserve to any inmate of such an institution his right to vote in the county or city in which he resided up to the time he became an inmate of that institution, and to deny him the right to register or vote in the county in which such institution is located, unless he was a resident of such county at the time he entered the institution.

Under this section no sojourn in any such institution, however long, can entitle a person to vote in the county where the institution is located.

Its provisions apply to all charitable institutions, and a Soldiers' Home, or any institution the inmates of which are taken care of free of cost to themselves or their families, is undoubtedly a charitable institution.

There can be no question that the provisions of section 24 do apply, and were intended to apply, to the Soldiers' Homes at Hampton and in Henrico county.

WILLIAM A. ANDERSON,
Attorney-General.

WHERE GOVERNMENT OFFICERS AND EMPLOYEES ENTITLED TO REGISTER AND VOTE.

September 19, 1902.

To all Boards of Registrars:

Having been requested to state where officers and employees of the State government, who have moved to Richmond for the purpose of accepting such offices or employment, are entitled to be registered and to vote, I beg leave to say that a man does not lose his domicil for the purpose of voting by removing from one county or city to another, if he makes such removal with the purpose of returning to the county or city where his home is when such office or employment shall terminate. Officers of the government, both State and Federal, have always been regarded as retaining their legal residence in the States and counties from which they have been appointed.

It is, of course, largely a question of intention, and such an officer or employee may abandon his *legal* domicil and residence in the locality from which he is appointed, and acquire a residence in the city of Richmond, or wherever his official duties may require him to be; but, unless he has abandoned his original residence, he retains it in the locality from which he was appointed, and has a right to be registered and to vote there.

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING "PAUPERS."

September 24, 1902.

Mr. W. S. GOODE,
Powhatan C. H., Virginia:

DEAR SIR:

Your favor of the 23d this instant received.

According to my view and construction of section 23 of the Constitution, the word "paupers" includes all persons who are so poor that they have to be supported by the public. That is in accordance with the definition given by Bouvier in his Law Dictionary.

I do not think it includes those who receive assistance from the county in their own homes, or in the homes of their friends, but are not entirely supported by the public.

I do not think, therefore, that the old soldiers whom you mention, who are not inmates of the almshouse, but who do receive some aid from the county and pensions from the State, can be regarded as "paupers" within the meaning of section 23 of the Constitution.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

DUELISTS DISQUALIFIED.

September 24, 1902.

G. T. CROXTON, *Esq.*,
Zaza, Essex County, Va.:

DEAR SIR:

In reply to your favor of the 23d instant, I can only refer you to the last clause of section 23 of the Constitution, which states the disqualification of any person who sends or accepts a challenge to fight a duel, or knowingly conveys a challenge, as explicitly as it would be possible to express that prohibition.

There is no qualification whatever. The man man who sends, and the man who bears, the challenge are disqualified, whether it is accepted, or whether a duel is fought or not.

The fact of the sending, etc., would have to be proved, and there might, and probably would, be some diffculty on that score.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

MERCHANT'S LICENSE TAX ENTITLES HIM TO REGISTER UNDER PROPERTY QUALIFICATION.

September 29, 1902.

G. B. WALLACE, *Esq.*,
918 Princess Anne Street,
Fredericksburg, Va.:

MY DEAR SIR:

Your favor of the 27th just received.

The question you propound is very difficult to answer satisfactorily.

A *merchant's* license tax is a tax paid in lieu of a property tax, and yet it may be claimed that it is not distinctly a tax on property. I am inclined to think that the courts would be justified in holding that it is substantially a tax on property. To be sure, it is a license tax on a business, but it is by the statute made expressly to take the place of a tax on the capital or property of the merchant.

It seems to me we should look to the substance, rather than the form, and that both the registrars and the courts would be justified in treating a *merchant's* license tax as a property tax in substance, within the meaning of section 19 of the Constitution.

While such are my views, it is proper that I should say that neither the Attorney-General nor any executive officer of the State government can give a binding construction of any section of the Constitution. The courts, alone, are competent to do this; and many questions must, and doubtless will, arise under its provisions which can only have their final settlement in the court of last resort.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

REQUIREMENTS OF RESIDENCE.

October 10, 1902.

S. A. D. MCKEE, *Esq.*,
Chairman Board of Registrars, Greenville, Va.:

DEAR SIR:

Your favor of the 8th instant just received.

The question as to what is the place of a man's legal residence is often one of great difficulty, and about which there have been divergent opinions.

It is held to be largely a matter of intention. That is, a man's home is supposed to be where he intends it shall be; but it is also a question of fact, and a man ought not to be allowed to register on a fictitious claim of residence.

As a rule, a man's home is where his wife and family live; but it is not necessarily there.

If his wife owns a farm in one district or county, and he owns a farm in another district or county, he has a right to claim and to make his home on his own farm.

If the man you refer to has never left his home in your district with the purpose of returning to it, then his home is still in your district, even though he spends most of the time in the district where his wife lives.

A man may leave his county or district upon some errand of business, or duty, or pleasure, and remain away twelve months or more, and he does not lose his residence, provided he goes with the intention of returning at some future time.

I could not well decide any particular case without knowing the facts more fully even than you state them; but I am strongly inclined to the opinion that the man to whom you refer is entitled to register and vote in the district where he has heretofore claimed his home, and where for years he has heretofore voted.

As requested, I return your letter.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

III. OPINIONS RELATING TO OTHER PROVISIONS OF THE CONSTITUTION.

CONCERNING SECTION 161 OF THE CONSTITUTION, AS TO "FREE PASSES," &c.

July 5, 1902

I have been requested by officers of the State government to state what, in my opinion, is the meaning and effect of the provisions of the new Constitution in reference to the issuance and use of free passes.

Those provisions, in so far as they go into immediate operation and are self-enforcing, are contained in section 161 of the Constitution, the language of which is as follows:

"SEC. 161. No transportation or transmission company doing business in this State shall grant to any member of the General Assembly, or to any State, county, district or municipal officer, except to members and officers of the State Corporation Commission for their personal use while in office, any frank, free pass, free transportation, or any rebate or reduction in the rates charged by such company to the general public for like services. For violation of the provisions of this section the offending company shall be liable to such penalties as may be prescribed by law; and any member of the General Assembly, or any such officer, who shall, while in office, accept any gift, privilege or benefit as is prohibited by this section, shall thereby forfeit his office, and be subject to such further penalties as may be prescribed by law; but this section shall not prevent a street railway company from transporting free of charge any member of the police force or fire department while in the discharge of his official duties, nor prohibit the acceptance by any such policeman or fireman of such free transportation."

1. This section expressly prohibits any such company from granting to any member of the General Assembly, or any officer of the State, or of any political sub-division thereof, "any frank, free pass, free transportation, or any rebate or reduction in the rates charged by such company to the general public for like services;" and also provides that any such officer who shall accept any such gift, privilege or benefit shall thereby forfeit his office, and that both the offending company and officer shall be subject to such other penalties as may be prescribed by law.

This section applies to every transportation and transmission company doing business in this State, and to every officer—State, county, district, and municipal—excepting only members and officers of the State Corporation Commission while in office; and except, also, that members of the police force and fire departments of municipalities may be carried free of charge by street railway companies. There are no other exceptions whatever, and, subject to these exceptions, the prohibition of this section applies to every officer under the State or local government in Virginia.

2. Some cases have been brought to my attention in which an officer of the State, or of some political sub-division thereof, is employed by a railroad

company for some service or in some professional capacity—for instance, as attorney for such company—and is given trasportation in part compensation for his services.

I have been asked whether such State or local officer, in the employment of a railroad company, can receive and use such free transportation or pass.

There is no such exception in the text of the Constitution as would exclude such an officer from its operation, and I do not think he should, or could, safely, accept or use a free pass.

What is the evident design of the framers of the Constitution, is that no preferences or privileges shall be extended by railroad companies to any State or local officer over any other passenger upon their cars. He certainly should not use a free pass, or be given or accept free transportation, when he is traveling on his own private business or on the business of the public.

In these or other cases, a number of which, I am informed, exist, in which free transportation has been by agreement given to office-holders of the State or some of its political sub-divisions, or to a member of the General Assembly, for services rendered or to be rendered, or for work done or to be done for such company, entirely independent of any official function or duty of such officer, any violation of the broad and sweeping prohibition of this section, and any possible criticism, can be avoided by putting the agreement upon an unquestionably valid and distinctly business basis—by the railroad company paying any employee, who is an officer of the government, for his work or services, the agreed value thereof in money, and the employee paying his fares to the railroad company in like manner.

In some such valid and unobjectionable way, compensation for the reciprocal services to be rendered by each to the other could be provided for without violating either the letter or the spirit of the fundamental law.

Hereafter no public officer in Virginia can, in my opinion, travel upon a railway upon any other terms, or upon any other sort of ticket, than such as are accorded to the general public.

The opinion here expressed has been the result of mature consideration, with full knowledge that in some instances the law as thus interpreted will run counter to private and personal interests; but, after carefully weighing what could be more or less plausibly urged in favor of any different construction, I have been forced to the conclusions here expressed.

Respectfully submitted,

WILLIAM A. ANDERSON,
Attorney-General.

WHAT OFFICERS REQUIRED TO TAKE OATH TO SUPPORT NEW CONSTITUTION.

July 14, 1902.

ROBT. P. CUMMINGS, *Esq.*,
Abingdon, Va.:

DEAR SIR:

Your favor of the 7th instant received on my return here to-day.

County and district officers are not required to take the oath to support the new Constitution.

The only State officers required to take it are members of the General Assembly, judges of courts, and the Governor and all other executive officers of the State *whose offices are at the seat of government.*

The oath to be taken is that prescribed by section 34 of the Constitution, and it may be taken before any officer of the State authorized to administer oaths.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

CERTAIN MUNICIPAL CONTRACTS NOT IN VIOLATION OF SECTION 161 OF THE CONSTITUTION.

July 18, 1902

C. B. MOOMAW, *Esq.*,
City Attorney, Roanoke, Va.:

DEAR SIR:

Your favor of the 10th instant has been received.

I do not think that a contract between the city of Roanoke and a telephone company, by which, as a part of the consideration for the franchise granted to such company by the municipality, it is required to furnish telephones for the use of the city government and its officers in the discharge of their public duties, is any violation of section 161 of the new Constitution of Virginia.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

PROVISIONS OF NEW CONSTITUTION CONCERNING SCHOOLS.

July 23, 1902

Hon. JOSEPH W. SOUTHALL,
Superintendent of Public Instruction, Richmond, Va.:

DEAR SIR:

The letter of Mr. George C. Round, of date July 14, 1902, addressed to you, and by you referred to me on the 21st instant, has been considered.

The questions submitted by Mr. Round, in the main are not questions of law, but largely questions of definitions—"What is a high school? What is a grammar school? And what is a primary school?"—which do not come within the duties of the Attorney-General to answer. They are matters which should be regulated by the school authorities.

Section 101 of the school laws of the State, prescribing the conditions upon which school money may be paid for a public free school in any school district, is not affected by the new Constitution, but is still operative.

Section 136 of the new Constitution simply prohibits local authorities from appropriating any money derived from local taxation to the support of schools of higher grade than primary schools until adequate provision has

been made for the maintenance of such primary schools as may be established in any school year for at least four months of such year.

What are schools of the higher grade, and what are primary schools, are not questions of law, but are matters to be determined by the school authorities. I know of no statute which defines them.

There are important provisions of the new Constitution which cannot be put into effective operation until the new Board of Education, provided for by the Constitution, shall have been organized and shall have adopted the regulations for this purpose; and some regulations upon these subjects will be necessary.

The above mentioned letter is herewith returned.

Very truly and respectfully,

WILLIAM A. ANDERSON,
Attorney-General.

IDEM.

July 23, 1902.

Hon. JOSEPH W. SOUTHALL,
Superintendent of Public Instruction, Richmond, Va.:

DEAR SIR:

The letter of Mr. W. B. Livezey, a member of the School Board of Newport News, addressed to you, dated the 19th instant, and referred to me on the 21st instant, has been carefully considered.

The new Constitution of Virginia went into complete operation, except in so far as modified by the schedule, on the 10th instant. Section 135 of the Constitution provides that the number of children between the ages of seven and twenty years, in each school district, shall be the basis of apportionment of the funds derived by the State from taxation for school purposes and from the interest on the literary fund. It is evidently the purpose and effect of this section to substitute these limits of school age, in determining the basis of apportionment of the State school fund, for those prescribed in section 8 of article 8 of the late Constitution of the State, by which the limits of the school age were made five and twenty-one years.

It will not, however, in my opinion, operate to exclude from the schools of the State pupils between the ages of five and seven years, who may be already enrolled, without some further regulation by the State Board of Education, or by law enacted by the General Assembly.

The provision of section 135 of the Constitution, above referred to, does require State school funds to be hereafter apportioned on the basis of the school population between the ages of seven and twenty years. In the nature of things, however, it is impracticable, certainly without further and immediate legislation by the General Assembly, to put that provision into actual operation during the next school session, for the reason that it will be impossible to take a new census of the school population in time to make it a basis of apportionment of the school fund for 1902-'3; and the session of 1903-'4 will be the earliest one to which the provision of section 135 can be applied.

Mr. Livezey's letter is herewith returned.

Very truly and respectfully,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING TAXATION OF RAILROAD AND CANAL COMPANIES

July 24, 1902

Hon. JOSEPH E. WILLARD,

President of the Senate:

SIR:

In response to the resolution of the Senate, hereunto annexed, I beg leave to say that by operation of sub-section "k" of section 156 of the new Constitution, and of sections 2 and 12 of the schedule thereto, the Board of Public Works is continued for the purposes and with the powers now prescribed by law until the organization of the State Corporation Commission, and is clothed with the power and charged with the duty of assessing the property of railroad and canal companies, for the purposes of both State and local taxation.

After January 1, 1903, the assessed value of the property of such companies, pursuant to sections 176 to 181 of the new Constitution, will be ascertained by the State Corporation Commission, and the system of taxation as to such companies, prescribed in said sections, must be maintained until January 1, 1913.

After January 1, 1913, the system of taxation authorized by section 169 of the Constitution may be inaugurated, under which the several kinds and classes of property may be segregated, so as to provide that State taxes may be levied upon one class of subjects of taxation and local taxes upon another class.

The effect of the above constitutional provisions is to continue the system of taxation of the property of railroad companies, in operation on the day before the present Constitution went into effect, until the first day of January, 1913.

As I understand the provisions of the new Constitution, and of section 19 of the Tax Law, as amended by the Act of January 20, 1898 (Acts of 1897-8, p. 78), the property of the railroad and canal companies which the Board of Public Works and the State Corporation Commission are required to assess is that mentioned in said section of the Tax Law.

The basis of this assessment is prescribed in said section, but, in my opinion, there is no limit to the amount of the assessment, either for the purposes of State or local taxation, except the fair, reasonable and just value of the property to be assessed.

The assessed value for the purposes of local taxation, both by the statute and by section 176 of the Constitution, is that which is thus fixed for State taxation.

The Act of January 20, 1898, referred to, contains the following provision: "A company failing to make such report or to pay the tax assessed upon its property shall be immediately assessed, under the direction of the Auditor of Public Accounts, by any person appointed by him for the purpose, *rating their real estate and rolling stock at twenty thousand dollars per mile*, and assessing a fair cash valuation of all their property, upon his own view, or upon such information as he may obtain or possess. And a tax shall at

once be levied on such value at the annual rate levied upon the value of other property for the year."

This provision was evidently designed as a penalty for the failure of any railroad or canal company to make the report or to pay the tax required by this act.

At the time the act was passed no railroad in the State, as I am informed, was assessed at a higher rate than fifteen thousand dollars per mile, so that its failure to comply with the law in making the required report or in paying the tax assessed upon it, would result in a very material increase in the taxes which it would otherwise have to pay.

A careful consideration of the Constitution and of the statutes, in so far as they relate to this subject, has brought me to the conclusion that the Legislature or the State Corporation Commission, when it shall have been organized, will not be precluded from imposing such additional penalties as may be just and reasonable, and necessary to secure the prompt making of the reports by railroad and canal companies called for by said section 19 of the Tax Law.

Sub-section "b" of section 156 of the Constitution provides that "The (State Corporation) Commission shall have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business * * * * * * * *."

Section 157 of the Constitution relates to the same subject, and is as follows:

SEC. 157. Provision shall be made by general laws for the payment of a fee to the Commonwealth by every domestic corporation, upon the granting, amendment or extension of its charter, and by every foreign corporation upon obtaining a license to do business in this State as specified in this section; and also for the payment, by every domestic corporation and foreign corporation doing business in this State, of an annual registration fee of not less than five dollars nor more than twenty-five dollars, which shall be irrespective of any specific license, or other tax, imposed by law upon such company for the privilege of carrying on its business in this State, or upon its franchise or property; and for the making, by every such corporation (at the time of paying such annual registration fee), of such reports to the State Corporation Commission, of the status, business or condition of such corporation, as the General Assembly may prescribe. No foreign corporation shall have authority to do business in this State until it shall have first obtained from the commission a license to do business in this State, upon such terms and conditions as may be prescribed by law. *The failure by any corporation for two successive years to pay its annual registration fee, or to make its said annual reports, shall, when such failure shall have continued for ninety days after the expiration of such two years, operate as a revocation and annulment of the charter of such corporation if it be a domestic company, or, of its license to do business in this State if it be a foreign company; and the General Assembly shall provide additional and suitable penalties for the failure of any corporation to comply promptly with the requirements of this section, or of any laws passed in pursuance thereof. The Commission shall*

compel all corporations to comply promptly with such requirements, by enforcing, in the manner hereinbefore authorized, such fines and penalties against the delinquent company as may be provided for, or authorized by, this article; but the General Assembly may relieve from the payment of the said registration fee any purely charitable institution or institutions.

These provisions of the Constitution either impose, or empower the General Assembly or the State Corporation Commission to impose, any penalties which may be necessary to compel any delinquent company to promptly make such reports as may be necessary to ascertain fairly and justly the value of its property liable to taxation.

It seems to me, therefore, that the clause in section 19 of the Tax Law requiring any transportation company failing to make such report or to pay the tax assessed upon its property—to be assessed upon its "real estate and rolling stock at twenty thousand dollars per mile" and *upon all of its property* at " a fair cash value"—was not intended to confer any immunity upon such delinquent company, but merely to operate as a penalty to enforce compliance with the law; and that under the new Constitution such additional penalties as may be found to be just and reasonable can be imposed, if necessary, to insure such compliance.

I am of opinion, therefore, that the only limit upon the valuation of the property of such companies, for the purposes of local taxation, is that it shall comform to the valuation assessed and ascertained by the Board of Public Works until January 1, 1903, and thereafter conform to that fixed by the State Corporation Commission.

Respectfully submitted,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING RAILROAD COMMISSIONER AND THE BOARD OF PUBLIC WORKS.

July 25, 1902.

Gen. J. C. HILL,
Railroad Commissioner of Virginia.

DEAR SIR:

In response to your letter of inquiry of the 24th instant, I beg leave to say that, by the terms and effect of sub-section "k" of section 156 of the new Constitution and of sections 1 and 12 of the schedule thereto, the present Railroad Commissioner and the Board of Public Works are continued as now constituted, with the powers and duties now prescribed by law, until March 1, 1903, when the State Corporation Commission will take their place.

I do not think that the Railroad Commissioner and his clerk and experts, when traveling on official business, are passengers in the meaning of section 161 of the new Constitution, and am of opinion that section 1313 of the Code, which provides that they shall be transported free on every railroad in the State when traveling on official business, continues in force during the existence of the present Railroad Commissioner.

In this regard, the Railroad Commissioner and his clerk, and the Board of Public Works and its secretary, stand upon the same footing, and, as is pre-

scribed as to the latter Board and its secretary in section 19 of the Tax Law (Acts 1897-'8, page 78), "shall at all times be transported over the properties of such companies, free of charge, for the purpose of inspecting the same with reference to the assessments required by this Act."

The requirement and permission of the grant of free transportation to those officers is limited in each case to travel upon official business.

Very truly and respectfully,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING SECTION 161 OF THE CONSTITUTION, AS TO "FREE PASSES," &C.

August 1, 1902.

Hon. A. J. MONTAGUE,
Governor of Virginia:

SIR:

As requested by your endorsement of the 26th ultimo upon the letter of Mr. C. G. Larew to you of the 15th ultimo, which has been forwarded to me and received here, I beg leave to say that, construing section 161 of the new Constitution with reference to the text of that section, and the context of Article XII., of which it is a part, the effect and design of that section is, in my opinion, to prohibit any State, county, district or municipal officer, when traveling as a passenger upon the line of any railroad company, from accepting any reduction in the rates charged by such company to the general public for like transportation.

If the prohibition of this section was confined to the use of "free passes," then I am not prepared to say that the construction suggested by Mr. Larew, and which he says is approved by Mr. Wysor, would not be tenable; but the prohibition is not only against the use of free passes, but against the acceptance of any reduction in the rates of charge not accorded to the general public.

In other words, it seems to me that the purpose of the prohibition embodied in this section was to prevent any State or local officer when traveling as a passenger from accepting, and to prohibit the railroad companies from granting to him, more favorable rates of travel than are accorded to the general public.

If rates of travel such as have been granted to Mr. Larew are open to the general public, then I take it that the arrangement between him and the Norfolk and Western Railway Company would not be in contravention of the provisions of section 161; but this could not be the case, unless the Norfolk and Western Railway Company accords to every person the right to obtain a pass, giving such person an *unlimited right to travel over its lines at his pleasure, for an indefinite consideration, to be rendered either in service or in money*, for periods of as much as a year at a time.

While some of the ablest lawyers in the State agree with me fully in my construction of this section, it is proper to say that others of equal ability and of the highest standing in the profession have dissented from these conclusions.

In every instance in which there has been such dissent, so far as I have observed, it has been founded, as it seems to me, upon a misconception of the language of section 161.

If that language was confined to the prohibition of free passes, as these gentlemen seem to assume, their contention would at least be plausible, but when the whole section is examined and read together, it appears to me that its evident effect and purpose is to prohibit any arrangement between any State or local officer and a transportation company by which such officer will be carried as a passenger at rates less than those accorded to the general public.

The broad and sweeping provisions of this section were formulated in these comprehensive terms doubtless to prevent evasions of the inhibition they express.

I take it as a matter of course that they are intended only to apply to persons traveling *as passengers*. In the nature of things, and read in the light of other provisions of the same article, they do not apply to employees of a railroad company, necessarily, traveling upon the business of their employer, for such employees, when so transported by their employer, are not passengers within the meaning of Article XII. of the Constitution, and they are then receiving no privilege whatever from the transportation company

It is equally clear to me that they do apply to any officer, State or local, who, though an employee of such company, is traveling upon *his own business*.

While such are the conclusions to which the most careful consideration which I have been able to give this subject has brought me, I fully and cheerfully recognize that no opinion of mine is a conclusive or authoritative settlement of the questions presented.

Neither the Attorney General nor any other officer of the State government can give a binding construction of any section of the Constitution. The courts alone are competent to do this; and many questions must, and doubtless will, arise under the provisions of the new Constitution which can only have their final adjudication in the courts of last resort.

It follows as a corollary from the above that, when Mr. Larew is traveling as a Claim Adjuster of the Norfolk and Western Railway Company, and thus upon the business of his employer, and not upon his own business, he is not receiving any privilege such as is prohibited within the meaning of section 161, and his transportation by the railroad company, under such circumstances, is not in contravention of the spirit and true intendment of the Constitution.

Respectfully submitted, WILLIAM A. ANDERSON,
Attorney-General

CONCERNING "EXCURSION TICKETS" AND SECTION 161 OF THE CONSTITUTION

August 1, 1902

H. M. HEUSER, *Esq.*,
Attorney for the Commonwealth, Wytheville, Va.:

DEAR SIR:

Your favor of the 26th ultimo, forwarded from Richmond, has been received here.

Your inquiry is a difficult one to answer.

Reading section 161 of the Constitution in the light of other provisions in Article XII. thereof, I am strongly inclined to the opinion that the prohibition of section 161 does not relate at all to excursion tickets such as are universally sold by railroad companies in the regular course of their business.

That section was designed to prevent railroad companies from granting, and State and local officers from accepting, any privilege or benefit not accorded to the general public. As I understand it, these excursion rates are accorded under like conditions to the general public.

Action by the State Corporation Commission, after it shall have been organized, or by the General Assembly, or both, will be necessary to give full effect to sections 160-161, as well as to other sections of the Constitution; and until some competent tribunal shall have definitely passed upon these sections, no authoritative decision of many questions that will arise thereunder can be reached.

I will be glad to know that your own judgment approves the opinion, which, subject to the above qualification, I have here indicated.

Very truly yours,

WILLIAM A. ANDERSON,

Attorney-General.

PROVISIONS OF THE NEW CONSTITUTION CONCERNING TOWNS, &C.

August 1, 1902.

C. L. HAMBLIN, *Esq.*,

Big Stone Gap, Va.:

DEAR SIR:

Your favor of the 29th ultimo received.

By section 117 of the new Constitution, the charters of all towns are continued until amended or repealed by the General Assembly.

Excepting so far as amended by the Constitution, the present officers of such towns will continue in office until their successors are elected in accordance to the general law to be enacted by the General Assembly.

Section 14 of the Schedule to the Constitution applies only to the cities of the State.

Very truly yours,

WILLIAM A. ANDERSON,

Attorney-General.

AS TO A JUSTICE OF THE PEACE BEING ALSO DEPUTY TREASURER.

August 1, 1902.

G. B. WALLACE, *Esq.*,

918 Princess Anne Street, Fredericksburg, Va.:

DEAR SIR:

Your favor of the 26th ultimo, forwarded from Richmond, has been received here.

It is difficult to understand from your letter, a verbatim copy of which I herewith hand you, to what provision of the Constitution your inquiry refers.

There is no section of Article VIII. of the Constitution which contains such language as that which your inquiry mentions, and section 5 of the Constitution is part of the Bill of Rights, and relates to another subject.

It occurs to me that possibly your inquiry has reference to section 113, which is in Article VII., which relates entirely to county and district officers.

If I am correct in this, the same person can be a Justice of the Peace of a magisterial district and Deputy Treasurer of a county.

You will observe that "Justices of the Peace" are not mentioned in Article VII. The only mention of Justices of the Peace in the Constitution, so far as I can recall, is in section 108, which is in Article VI.

Please do me the kindness to let me know whether this reply covers your inquiry.

Very truly yours, WILLIAM A. ANDERSON,
Attorney-General

CONCERNING CONSTABLES.

August 9, 1902

Hon. S. H. BOND,
Gate City, Va.:

DEAR SIR:

Your favor of the 4th instant, forwarded from Richmond, received here.

Under the new Constitution, the office of Constable will be a statutory office, and the term of office, duties and mode of selection of the Constable will be hereafter determined by the Legislature.

Until the Legislature enacts a law covering the subject, the present law will continue, and the Constables continue in office, at least, I think, until the 1st of January, 1904.

Very truly yours,
WILLIAM A. ANDERSON,
Attorney-General

AS TO SECTION 161 OF THE CONSTITUTION CONCERNING "FIREMEN AND POLICEMEN."

August 11, 1902

G. D. W. AINSWORTH, *Esq.*,
care R. P. Bunton, Esq., Portsmouth, Va.:

DEAR SIR:

Replying to your letter of inquiry of the 7th instant, I beg leave to say that the last clause of section 161 of the new Constitution permits "a street railway company" to transport, free of charge, any member of the police force "*while in the discharge of his official duties.*" This would cover a street railway company, whatever the motive power which propels its cars. It only applies to street railway companies.

I think it would apply to a member of the police force of a county as well as to a member of the police force of a city, provided such officer was being transported in the discharge of his official duty by a street railway company.

Very truly yours,
WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING GRANTING OF CHARTERS.

August 15, 1902.

J. POWELL ROYALL, Esq.,
Tazewell, Va.:

DEAR SIR:

Your favor of the 13th instant received.

Under the new Constitution *the Legislature* cannot grant any charter whatever. The courts are empowered under section 13 of the Schedule, until April 1, 1903, to grant original and amended charters in accordance with the laws in force at the time the new Constitution went into effect, until and unless the General Assembly shall sooner provide for the creation of corporations in the manner prescribed in the Constitution.

After the organization of the Corporation Commission—which cannot take place until the 1st of March, 1903—that Commission will issue all charters, such as you desire, upon such terms as shall be prescribed by a general law to be enacted by the present Legislature.

Persons desiring to obtain charters such as were heretofore granted by the Legislature are left by the new Constitution in no worse predicament than that in which they would have been had no new Constitution been adopted. Indeed, their position will probably be a little better, as they can probably get a charter in the *spring* of 1903 now, whereas if the new Constitution had not been adopted and the Legislature convened for the purpose of putting it into execution, there would have been no session of the General Assembly until *December, 1903.*

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING MEMBERS OF CITY COUNCILS.

August 27, 1902.

Hon. H. F. CRISMOND,
Fredericksburg, Va.:

DEAR SIR:

Your favor of the 23d instant has been received.

I know of no provision in the new Constitution which renders a person who holds any State or county office ineligible as a member of a City Council. Section 121 of the Constitution renders a member of a Council ineligible to any office filled by the Council during his tenure of office, or for one year thereafter. Sections 161 and 162 of the Code render any person who holds a post or office of profit, trust or emolument under the United States Govment ineligible to any office under the government of this State, or any county, city or town thereof.

I know of no statute or constitutional provision which prohibits any officer, holding the positions you mention, from being a member of the Council of a city, except that section 31 of the new Constitution prohibits any

person holding an elective office of profit or trust in any city, county or town of this State from being appointed a member of the Electoral Board; but this provision, I think, refers to the Electoral Boards to go into office after January 1, 1904, under the new Constitution.

If there is any such prohibition as your inquiry seems to suggest, it must be contained in some statute that I have been unable to find. Please let me know what suggested the inquiry which you have made.

With cordial regards,

Very sincerely yours,

WILLIAM A. ANDERSON,
Attorney-General

CONCERNING MUNICIPAL FRANCHISES.

August 28, 1902

CHARLES M. BROUN, *Esq.*,
Berryville, Va.:

DEAR SIR:

Your favor of the 19th was duly received.

Under section 125 of the new Constitution no municipal franchise or privilege can be granted for any term of years, until the General Assembly shall have, by appropriate legislation, prescribed how bids therefor shall be advertised and received.

All that the Councils of cities and towns have the power to do in such a matter now is to make some temporary arrangement, for a period less than a term of years, in reference to such franchise or privilege.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

1. CONCERNING THE ACTS OF THE EXTRA SESSION OF THE LEGISLATURE IN JULY, 1902. 2. CONCERNING QUALIFICATIONS OF JURORS.

September 4, 1902

EDWIN E. GARRETT, *Esq.*,
Commonwealth's Attorney for Loudoun County, Leesburg, Va.:

DEAR SIR:

In reply to your favor of the 3d instant, I am glad to be able to say that:

1. The Act approved July 28, 1902, page 28, chapter 25, Acts of the extra session of the General Assembly, amending section 3976 of the Code, is a perfectly valid and constitutional enactment.

Section 19 of the Schedule precisely and effectually relieved the present General Assembly, at the extra session, from the restrictions and prohibitions of section 53 of the Constitution. You will see that section 19 of the Schedule provides that the General Assembly shall not be subject to the limitations

imposed by the Constitution "as to the time when any of its Acts shall take effect."

2. The common and statute law of Virginia, in force at the time the Constitution went into effect, July 10, 1902, is continued in force by section 1 of the Schedule, except in so far as repugnant to the Constitution, so that the law of Virginia in reference to Grand Juries, and to all proceedings in criminal cases, is precisely what it was on the 9th day of July, 1902, except in so far as amended by chapters 8, 22 and 25 of the Acts of said extra session.

With cordial regards, I am,

Very sincerely yours,

WILLIAM A. ANDERSON,
Attorney-General.

POWER OF GOVERNOR CONCERNING DISABILITIES.

September 26, 1902.

Hon. A. J. MONTAGUE,
Governor of Virginia, Richmond, Va.:

SIR:

The question submitted in your reference to me of the enclosed petition of H. G. McNutt is one of no little difficulty, and I have found no authority directly bearing upon it.

In the case of Ridley *v.* Sherbrook, 3 Coldwell (Tenn.), 569, and Ex Parte Hunter, 2 W. Va., 122, it is held that a pardon by the President of the United States will not remove disabilities imposed upon the pardoned person under the laws of a State; but the question arising in those cases is barely analagous to the one which you submit. We are, therefore, controlled in its consideration by the language of the Constitution.

By the last sentence of section 73 of the Constitution the Governor is expressly empowered "to grant reprieves and pardons after conviction," and "to remove political disabilities consequent upon conviction for offences committed prior or subseqquent to the adoption of this Constitution."

This language is extremely comprehensive, and, it seems to me, confers upon the Executive the power and the right to relieve any citizen of the Commonwealth of any penalties or disabilities which may rest upon him, "consequent upon conviction for offences," wherever or whenever such conviction may have been had.

I have the honor to be,

Very respectfully yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING BOARD OF AGRICULTURE AND IMMIGRATION.

October 29, 1902.

Dr. J. M. MCBRYDE,

President Virginia Polytechnic Institute, Blacksburg, Va.:

DEAR SIR:

Your favor of the 26th was received yesterday, and in answer, I have to advise you that, in my opinion, the new Board of Agriculture and Immigration, provided for by Article X. of the Constitution, cannot, by the terms of section 12 of the Schedule, be organized or have any legal existence, as constituted by said Article, until on or after March 1, 1903, and, consequently, that the president of your institution will not, by virtue of said Article, become *ex officio* a member of said Board, nor the president of said Board, *ex officio* member of the Board of Visitors of the Virginia Polytechnic Institute, until the new Board of Agriculture and Immigration shall, on or after March 1, 1903, come into being.

I have the honor to be

Very truly and respectfully, WILLIAM A. ANDERSON,
Attorney-General

IV. OPINIONS RELATING TO MISCELLANEOUS SUBJECTS OF GENERAL OR SPECIAL INTEREST.

AS TO RIGHT OF THE COMMONWEALTH TO AN APPEAL FROM THE JUDGMENT OF A JUSTICE IN A REVENUE CASE.

January 9, 1902.

ED. S. CONRAD, *Esq.*,

Commonwealth's Attorney, Harrisonburg, Va.:

MY DEAR SIR:

The question presented by your letter of the 3d instant has been carefully considered, and I beg leave to say that neither section 4,052 of the Code, as amended by the Act of 1897-'8, p. 622, nor section 4,106 and 4,107, amended by Act of 1897-8, p. 289, which seem to embody the law governing the subject, either expressly or by implication give the Commonwealth any right of appeal from the judgment of a Justice of the Peace.

The failure to provide for such appeal was evidently an omission of the Legislature which passed the Act last recited, and it should be cured by an amendment of section 4,107.

I am of opinion that the judgment you describe is final and that no appeal lies from it. You can, however, of course avoid the trial of other like cases by magistrates by proceeding in the County Court, which by section 4,106 has complete jurisdiction of revenue cases, though it is concurrent with that of Justices of the Peace.

Regretting that the law is as it is,

Very truly yours, WILLIAM A. ANDERSON,
Attorney-General.

AS TO THE COMPENSATION OF ATTORNEYS FOR COMMONWEALTH.

January 11, 1902.

To the Auditor of Public Accounts:

Opinion upon question raised by letter of J. S. Ashworth, Esq., Commonwealth's Attorney for Bristol, to the Auditor, dated December 20, 1901, and submitted to me January 8, 1902:

The question presented in the annexed papers is not without difficulty; but, after careful consideration, I am of opinion that it was the purpose and effect of the Act of 1897-'8, page 992, amending section 3,528, to limit the aggregate compensation which each Attorney for the Commonwealth should be entitled to receive for services rendered in any one year, to the maximum sum specified in the Act for each county and city. I do not think the compensation was designed by the Act to be cumulative, or that the fees in excess of the sum limited earned in one year could be carried over to the next year; but that under the law, each year, and the account and transactions for each year, should be kept separate. Any other rule would work confusion and cause complications in cases which are not unlikely to arise, and, in my opinion, be inconsistent with what appears to be the object and true intent of the law.

Very respectfully, WILLIAM A. ANDERSON,
Attorney-General.

AS TO THE PER DIEM OF JURORS.

January 15, 1902.

To the Auditor of Public Accounts:

In reference to the question raised by the accompanying letter of Mr. D. O. Coleman, of January 6, 1902, I would say that the question is governed by section 4,025 of the Code as amended by the Act of 1893-'4, page 223, which provides that—

"When the jury are so kept together, the court shall direct its officers to furnish them with suitable board and lodging when so confined, the expenses thereof, not exceeding the rate of one dollar per entire day for each juror, to be paid out of the Treasury when allowed by the court."

This statute expressly limits the amount which you can pay to one dollar per entire day for each juror.

The statute makes no express provision as to a fraction of a day, but its effect would seem to be to limit any allowance for a part of a day to a sum not exceeding a fair ratable part of one dollar. The usage has been, as I am informed, to allow 25 cents for each meal and 25 cents for each juror furnished lodging. This would give 25 cents each for three meals a day and 25 cents for a night's lodging, which allowances, amounting to one dollar per

day, seem to be in accordance with the law. If 50 cents be allowed for a meal, the meals alone would exceed by 50 cents per day the limit fixed in the statute.

Very respectfully, WILLIAM A. ANDERSON,
Attorney-General

AS TO EXPENSES INCURRED BY A COUNTY IN ERADICATING CONTAGIOUS DISEASES

January 20, 1902

E. L. GREEVER, *Esq.*,
Tazewell, Va.:

DEAR SIR:

The questions presented by your valued letter of the 18th are not easily answered. The provisions of the law upon the subject are so indefinite and confused that it is not clear what was intended as to the payment of expenses incurred in protecting a community against contagious diseases.

The law governing the subject is found in Chapter 76 of the Code, sections 1,719 to 1,734, inclusive, and in the Act of 1899-1900, chapter 1,146. The latter Act will prevail wherever it is in conflict with the Code.

This Act makes it the duty of the local Board of Health to adopt the measures therein mentioned for the prevention and eradication of contagious diseases; but neither that Act nor the Code prescribes in what cases precisely the expenses of such measures shall be borne by the county, or in what cases it shall be borne by an incorporated town.

In my opinion, if the action is taken by a county Board of Health, the expenses incurred should be borne by the county, even though the contagious disease to be eradicated or prevented exists or its prevalence is threatened in a town which is an integral part of such county, particularly when such town has no Board of Health.

If the action is taken by the town authorities or a town Board of Health under the statute, then the town should defray its cost. This would seem to be the reasonable effect of the statutes upon this subject, for the town within the county, just like any other political sub-division of it, has to contribute its due proportion towards defraying the cost of such protection to any other part of the county, even when such town may not be immediately threatened.

The law is, however, so indefinite in its provisions that I cannot give a positive opinion as to its effect. The uncertainty should be settled by a legislative amendment of the law.

In the meantime, or until the courts shall settle the question, it must remain involved in some doubt. I believe, however, that the above is, under the circumstances stated, a fair and just construction of the statutes.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

AS TO PER CENTUM TAX ON SALES OF REAL ESTATE AUCTIONEERS.

January 22, 1902.

ROBERT D. YANCEY, *Esq.*,
Commonwealth's Attorney, Lynchburg, Va.:

MY DEAR SIR:

Your letter of the 16th instant was duly received. I beg that you will excuse the delay in reply, as I have tried to get some practical information as to the working of the license law in other sections of the State. I can find no authority whatever, outside of the Act itself, and it seems to me that the whole matter is controlled by sections 50 and 44, as you suggest. The provision in section 50 "to be ascertained and charged as is provided in the case of liquor merchants" has no meaning or practical application. I have traced back this section for some years, and find the same language has been used. This section seems to impose the tax of one-fourth of one per centum without qualification, and I see no reason whatever why it should not be assessed by the Commissioner of the Revenue upon the information furnished under section 44. I am informed by the Commissioner of the Revenue for the city of Richmond that this tax is regularly assessed by him for State purposes, basing it on the sales of the previous year, and it has never been questioned by the real estate auctioneers of this city.

I regret that I cannot give you a more definite opinion, but, as I have said before, I can find no precedent or authority on the subject.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO REFUNDING A PORTION OF CERTAIN LICENSE TAXES ON LIQUOR DEALERS.

January 22, 1902.

Col. MORTON MARYE,
Auditor of Public Accounts, Richmond, Va.:

DEAR SIR:

Your favor of this instant, with accompanying correspondence, relating to the order of the County Court of Greenesville county for the refunding of certain license taxes imposed upon the business of selling wine, ardent spirits, etc., by retail, in the town of Emporia, has been received, and the question presented considered.

I do not find that the Code or laws of Virginia provide that the population of a town, for the purposes of section 8 of chapter 2 of the License Tax Law of the State, shall be determined by the ascertainment of said population by the last preceding Federal census. In fact, the statutes of Virginia do not prescribe how or in what manner the population of a town shall be ascertained in such case.

The last preceding United States census would, in my opinion, be prima facie evidence of the population of such town in such case, but it would be competent for the court to allow the true number of the inhabitants of the town to be proved by any other legal evidence.

Again, our law nowhere makes an enumeration of the inhabitants of a town, made by order of the town authorities, evidence, and if such census was the only proof before the court, I would say that it was incompetent and insufficient; but if an exhaustive enumeration of the inhabitants of such town has been made under any authority, State or municipal, and this fact and the total number of inhabitants proved by the testimony of the enumerators to the satisfaction of the court, and the number living in such town should be thus shown to be less than one thousand at the date of the license, then I would say that the excess of the license tax, based on a population in excess of one thousand, should be refunded; but this fact should be shown by competent legal evidence, and I would say that the ex parte enumeration made by the employees of the town would not alone be such evidence.

If the decision of the County Court of Greenesville county in these cases was based upon the census made by direction of the authorities of Emporia, without any proof of the correctness of that census, I would advise an appeal, but if said local census was, as the order recites to have been done, proved to have been correct, then I am of opinion that the judgment of the County Court cannot be successfully assailed on that account. It is easy to suppose a case—which, indeed, has occurred more than once within the last fifteen years in Virginia—where within a year or two after the Federal census the population of a town has been reduced one-half. The statute would not, I think, preclude the proof of such fact by any legal evidence.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General

AS TO REGISTERED PHARMACISTS.

January 24, 1902

Dr. GEORGE S. WALKER,
Staunton, Va.:

MY DEAR SIR:

Your letter of the 20th instant was duly received. You fail to state whether or not the druggist referred to had ever been registered as required by the original law, which fact, I think, is important in giving a definite answer to your inquiry. In response to your inquiry, however, as I understand it, I would say that a druggist, whether a physician or not, who was engaged in business at the time of the passage of the act, and now wishes to resume such business, should be registered, as all pharmacists then and now are required to be. I am inclined to think that if the party referred to was registered after the passage of the act, he can now resume business without examination by complying with the registration requirement. As to what

should be done to register now, I must refer you to the Board of Pharmacy, as I have no knowledge of their rules and regulations. See Acts of 1897-'8, page 686, which seems to answer the inquiry you make.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO LICENSE TAX ON INSURANCE AGENTS.

January 22, 1902.

T. L. SUTHERLAND, *Esq.*,
Stratton, Va.:

DEAR SIR:

Your favor of the 22d received. The State of Virginia does not require insurance agents transacting business in this State to pay any license tax.

The tax law of the State imposes a license tax on insurance companies doing business in Virginia, but no tax is imposed upon the agents of any such companies for acting as agents therefor.

See section 18, page 11, of "Tax Laws of Virginia," 1900, compiled by the Auditor of Public Accounts.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONSTRUCTION OF WORDS "PER ANNUM" USED IN "CROP PEST" LAW.

January 25, 1902.

C. LEE MOORE, *Esq.*,
Acting Auditor of Public Accounts, Richmond, Va.:

MY DEAR SIR:

In answer to your favor of this date in reference to the proper construction of the words "per annum" in the Act "To create and maintain a State Board of Crop Pest Commissioners, etc.," approved March 5, 1900, I beg leave to say that in my opinion the reference is to the calendar year ending December 31, 1900. That would be the natural construction of the language used, and is supported by the seventh sub-division of section 5, where the word "year," when used in a statute, is construed to mean calendar year.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO COMPULSORY VACCINATION IN COUNTIES.

January 29, 1902

Dr. W. L. DAVENPORT,
Secretary Washington County Board of Health,
Meadowview, Va.:

DEAR SIR:

The questions presented by your favor of the 24th instant have been considered.

Section 5 of chapter 1,146 of the Acts of 1899-1900 gives your County Board charge of the sanitary affairs of your county, and authorizes your Board to provide for compulsory vaccination, and also empowers your Board to "adopt and enforce such reasonable rules and regulations as they may deem necessary to attain these ends."

The Act is silent as to what means or penalties your Board may adopt for the purpose of compelling people to be vaccinated, and your Board can as well determine what rules and regulations you should adopt for this purpose as I could possibly do? You might quarantine any family or person who had been exposed to smallpox who refused to be vaccinated pursuant to your order The Act does not, as does section 1,733 of the Code in reference to the Council of a city or town, empower your Board to enforce "obedience to its ordinance by fixing fines and penalties for the violation of said ordinance." It seems to be a case in which the General Assembly has vested a duty on, or power in, the Boards of Health of the different counties without adequately defining the mode in which they may compel compliance with their regulations. It would require, in my opinion, an express grant of power to fix a penalty, and no such express power is given by this Act to your Board. The Board is authorized to establish a quarantine in cases of any infectious disease, and that is the only mode that occurs to me in which the Board could, under the Act, enforce its orders of compulsory vaccination. It would be well for you to consult your Commonwealth's Attorney on this subject, who is on the spot and familiar with the situation, and he may be able to suggest some mode of procedure that does not occur to me.

The statute is very indefinite upon this point, but it would be very difficult for the General Assembly to prescribe an entirely adequate remedy for such a case.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General

AS TO FINES IN CASES WHERE ANIMALS HAVE TRESPASSED.

RICHMOND, VA., *January 29, 1902.*

Mr. JAMES D. THROCKMORTON,
Justice of the Peace, Bluemont, Loudoun County, Va.:

DEAR SIR:

Your favor of the 26th instant received. The law governing your case is found in chapter 93 of the Code, which has never been decided, so far as I have ever learned, to be unconstitutional, but is still in force in many of the counties of this State. It has been amended by the Acts of 1895-'6, page 466, and by the Acts of 1897-'8, page 524. Section 2,042, as amended by the Act of February 24, 1898, applies to the whole State, except that, for any such damage in the county of Henrico, within three miles of the limits of the city of Richmond, the owner or manager of the animal is liable to a fine of two dollars for each animal so trespassing.

If you will examine the Act as published in the Acts of Assembly, you will see that such is the effect of the law, though this might not be apparent by reading it as copied in Pollard's Supplement to the Code. The "double damages for every successive trespass" applies to the whole State.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO LICENSE TAX FOR FISHING WITH A POUND NET.

January 29, 1902.

J. W. STRIGLE, *Esq.*,
Tangier, Va.:

DEAR SIR:

Replying to your favor of the 26th instant, I beg leave to say that by section 2,086 of the Code, as amended by the Act of 1897-'8, page 864, there is imposed a license tax on the privilege of fishing with a pound net in the waters of the Commonwealth, except in waters in which any such fishing is prohibited. I am at a loss to know why the inspectors have failed to collect this tax from all persons engaged in such business.

The law imposes a fine of one hundred dollars on any oyster Inspector who knowingly fails to perform the duties required of him. It also imposes a fine of not less than twenty-five nor more than two hundred dollars upon any person who fails to comply with the law in obtaining a license to fish with a pound net.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO EXPENSES FOR CARE, &C., OF PERSONS WORKING ON CHAIN-GANGS.

February 3, 1902.

Col. MORTON MARYE,
Auditor of Public Accounts, Richmond, Va.:

DEAR SIR:

Referring to the account of Thomas A. Dawson, Deputy Jailor of Augusta county, in the city of Staunton, of date December 2, 1901, this day submitted by you to me, I beg leave to say that by section 3,933 of the Code the expense of the care and safe-keeping and government of persons employed in chain-gangs, established under the preceding section, are payable out of the city, town or county treasuries in which such chain-gang shall have been established.

It would seem from the memorandum at the foot of the account, signed by the claimant, Dawson, that the prisoner escaped from the chain-gang in the city of Staunton. This being the case, the charge for his recapture should be paid by the city of Staunton.

It appears, also, from the sworn account, approved by the Hustings Court of Staunton, that the prisoner, Robert Pleasants, was charged with felony at the time he escaped. I do not think that circumstance affects the liability of the city of Staunton to pay the cost of his recapture. It was because of his being in the chain-gang that he escaped. At any rate, he was in the chain-gang at that time, and the law places the entire cost of the chain-gang, including the safe-keeping of the prisoners employed therein, upon the city, town or county establishing such chain-gang.

I presume that the prisoner was in the chain-gang under conviction upon some other charge than felony, which, it seems, was also charged against him.

If he had been tried for the felony and convicted of a misdemeanor and sent to the chain-gang, the city would, of course, be still liable for the entire expense of his custody and safe-keeping while in the chain-gang.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO FEES OF COMMONWEALTH'S ATTORNEYS IN MISDEMEANOR CASES.

February 6, 1902.

CARTER BRAXTON, *Esq.*,
Staunton, Va.:

DEAR SIR:

The question presented in your favor of the 5th instant is not entirely free from doubt in respect to the fees of Attorneys for the Commonwealth in misdemeanor cases.

After careful consideration, I have already given the opinion that Commonwealth's Attorneys could receive no fee from the Commonwealth in a felony case unless the case was "*tried;*" and I am also of the opinion that under section 3,527, as modified by section 3,528, he could receive no fees in a misdemeanor case unless it was prosecuted to judgment for the Commonwealth.

To entitle him to half fees in any case, the language of section 3,527 will have to be more explicit than it is. You will observe that the provisions of section 3,527 are qualified by the proviso that "nothing in this section shall be construed as allowing fees in any case which are not now allowed by law," and at the date of the approval of that Act, March 3, 1898, Commonwealth's Attorneys were only allowed fees in felony cases which were actually tried and misdemeanor cases prosecuted to judgment for the Commonwealth.

Very sincerely yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO LICENSE TAX ON OWNERS OF PATENTED ARTICLES.

February 10, 1902.

Mr. O. V. CARSON,
Staunton, Va.:

MY DEAR SIR:

Your letter of February 8th has just been received.

In reply thereto, I would say that I think sections 34, 35, 108 and 109 of chapter 244 of the Acts of 1889-90, as amended by chapter 393, chapter 464, Acts of 1893-'4, answer your inquiries as clearly as I could possibly do.

I am inclined to think, however, that under sections 34 and 35 the patentee himself, if a citizen of the United States, may sell anywhere in this State the right to manufacture or use machinery or other thing patented without paying the license therefor, but if he wants to sell such right to manufacture or use, etc., through agents, he should pay the license required by section 34, and furnish his agents with a copy of such license. Under sections 108 and 109, I am inclined to think that any person, whether an agent or an assignee of the patentee who sells the patented article itself, must pay the license required by these sections. I advise that you see your Commissioner of Revenue on this subject, as it is not within the scope of my official duties to answer such inquiries.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO QUARANTINE OF CATTLE, &C.

February 10, 1902

CHARLES H. DANN, *Esq.*,
Town Clerk, Shenandoah, Page County, Va.:

DEAR SIR:

Inclosed please find copy of proclamation by the Governor containing the latest regulations by the Board of Control of the Experiment Station of the Virginia Agricultural and Mechanical College in reference to the quarantining of cattle diseased or brought into the State from infected districts.

The regulations are very disappointing, because they do not cover the point of inquiry of your letter.

The original law in regard to this subject is found on page 387, etc., of the Acts of 1895-'6. The 8th, 9th, 10th, 11th and 13th sections of that Act were amended by the Act of March 16, 1900, which you will find at page 913, etc., of the Acts of 1899-1900.

The law is obviously defective in several particulars, and is cumbrous and inconvenient of execution.

The 7th section makes it the duty of the owner or person in charge of an animal, which he suspects or has reason to believe is affected with any contagious or infectious disease, to immediately report such fact or suspicion to the Board of Control of the Experiment Station of the Virginia Agricultural and Mechanical College at Blacksburg, and also the Chairman of the Board of Supervisors of the county in which such animal is found.

While the law does not make it the duty of any other person to report such fact, if you are, or if any other citizen is, satisfied that there are animals which have any disease in your vicinity, I would suggest that you at once notify the Board of Control and also the Chairman of the Board of Supervisors of your county and request that immediate action be taken, in accordance with the law, to protect the people of your county from a spread of the disease.

The statute is so voluminous, however, and I know so little as to the facts, that the best thing for you to do is to confer at once with the Chairman of your Board of Supervisors and with your Commonwealth's Attorney, and act under the advice of the latter.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney General.

AS TO RIGHT OF A LICENSED LIQUOR DEALER TO TAKE ORDERS IN LOCAL OPTION DISTRICTS.

February 10, 1902

BARNES GILLESPIE, *Esq.*,
Commonwealth's Attorney, Tazewell, Va.:

MY DEAR SIR:

Your letter of February 7th has just been received. In answer thereto, I would say that I am of opinion that it is no violation of the local option law

for the licensed liquor dealers of Pocahontas to solicit orders in the town of Tazewell, the delivery of the liquors sold to be made to the carrier in the town of Pocahontas. The current authority seems to be that the sale is treated as made at the place where the liquor is segregated from the common stock and delivered to the carrier, who is held to be the agent of the consignee.

It seems to me that under section 24, Act of 1895-'6, page 762, parties who have a retail license in Pocahontas have no right to sell by sample or other representation in the town of Tazewell without paying the tax required of a sample merchant, and even under such license they can only sell to some person, firm, club or corporation having a liquor license in some form authorized by law.

The privileges of a retail license are very vague and, on the whole, I am loth to give a positive opinion on this subject. It is my impression that retail liquor dealers have always claimed and exercised the right to solicit orders for the sale of liquor anywhere in the State, to be filled from the place where their license obtains, claiming that the provisions as to sample liquor merchants did not apply to them.

It has been the practice of liquor merchants whose place of business is in a city or town where licenses to sell liquor are granted, to take orders for liquor from persons living in local option districts and ship the same by freight or express, the delivery being to the common carriers in the "license" community, who is treated as the agent of the consignee in the no license district.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General.

NOTARY PUBLIC FOR CITY MAY ALSO ACT IN COUNTY, AND VICE VERSA.

February 10, 1902.

HON. A. J. MONTAGUE,
Governor of Virginia:

DEAR SIR:

Referring to Mr. A. Blair Antrim's letter to you of the 24th ultimo, referred by you to me, and this instant received and herewith returned, I beg leave to say that under the Act of March 3, 1898, Acts of 1897-'8, page 928, a Notary Public resident in either the city of Roanoke or the county of Roanoke would have authority to act as such in either locality.

Out of abundant caution, it might be well in the order of appointment to state that the appointee shall have authority to act as Notary either in the city of Roanoke or the county of Roanoke, in accordance with the provisions of Chapter 879 of the Acts of 1897-'8.

Yours very truly,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO TAX TO BE CHARGED BY CLERK ON WRITS OF ERROR

February 14, 1902

THOMAS C. VALENTINE, *Esq.*,
Clerk of Circuit Court, Bowling Green, Va.

MY DEAR SIR:

Your favor of the 11th instant has been received, and in reply I would say that I am of opinion that under sub-section 2 of section 14 of the Tax Law (Acts of 1889-'90, as amended) a tax of $3.00 should be charged and collected by the Clerk on every writ of error, whether civil or criminal. This view is strengthened by sections 3475 and 4059 of the Code of 1887.

I therefore think your conclusion is correct.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney General.

AS TO CONTRACT FOR HIRE OF PENITENTIARY CONVICTS TO DAVIS BOOT AND SHOE COMPANY

February 15, 1902

Hon. A. J. MONTAGUE,
Governor of Virginia.

SIR:

As requested by yours of the 12th instant, I have examined the contract between the Superintendent of the Penitentiary and the Davis Boot and Shoe Company, of date October 30, 1899, which contract is herewith returned to you.

The only authority that I find for making any such contract is section 4172 of the Code.

That section confers a very broad authority upon the Superintendent, acting by and with the advice and consent of the Governor.

It does not appear from that section, or from any other statute, that there is any limit upon the power of the Superintendent, acting with the concurrence of the Governor, either as to the terms upon which, or the time for which, any such contract may be made.

While I have been unable to find any express authority upon the question, it would seem to me, upon general principles, to be extremely doubtful whether even so broad a grant of power as is expressed in section 4172 of the Code would authorize the Superintendent of the Penitentiary to make a contract of indefinite duration, to continue long after the expiration of his term of office, or that of the Governor.

For instance, I would say that a contract for the employment of convicts in the Penitentiary for a period of thirty years would be one not contemplated by this law, and would transcend the authority of the Superintendent. If this is not so, it would be competent for him to make a contract covering a period of one hundred or five hundred years.

Just where the limit of his power is, I would be unable to say, nor am I prepared to say that the contract of October 30, 1899, was *ultra vires*. I would say that it strained the power of the officials who made it to the utmost, particularly as it appears that a contract was already in existence with the same lessee and hiree for the employment of convicts in the penitentiary running until 1906.

I doubt exceedingly whether it would have been competent for the Superintendent, with the approval of the Governor, to have made such a contract for the employment of convicts in the penitentiary to take effect in future, seven years after the date thereof.

The contract in question goes into immediate effect, although it supplants and takes the place of the contract of 1897, which, by its terms, did not expire until 1906.

It appears from the Journals of the Senate and House of Delegates, Session 1899 and 1900, that the attention of the General Assembly was called to this contract by resolution adopted on 21st of December, 1899; that a joint committee was appointed to ascertain and report, among other things, whether such contract "is by authority of law"; and that this committee made a report on the 3d day of March, 1900, which, though silent upon the legal question presented by the resolution, does not condemn the contract made by the officials of the State.

While no action was taken by the General Assembly upon this report, the fact that its attention was called to the contract, and that it failed to take any action, is a circumstance worthy of consideration in passing upon the question whether the State is now bound by it.

In view of the fact stated in said report, that it had been the practice to make new contracts for the employment of these convicts from three to seven years before the expiration of the old contracts, and of the further fact that this practice has been continued without objection through a series of years, I am strongly inclined to the opinion that, upon the facts so far as they are presented to me, the contract of October 30, 1899, is now binding upon the State.

Respectfully submitted,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO SHERIFF'S FEES.

February 17, 1902.

Hon. R. S. PARKS,
Commonwealth's Attorney of Page county, Richmond, Va.:

MY DEAR SIR:

Your letter of February 8th has been received and the questions submitted carefully considered.

As to the first inqury—namely, Sheriff's fees for summoning witnesses in misdemeanor cases—I would say that the Act of 1897-8, page 868, amending

section 3,527 of the Code of 1887, provides for the payment of one-half of such fees in misdemeanor cases when the same are to be paid out of the treasury. The Act of 1897-'8, amending section 3,531, provides that not more than 45 cents shall be allowed out of the treasury for summoning witnesses in the case of a misdemeanor nor more than $1.00 in a case of felony, unless the Justice shall certify that the witnesses in a case of felony in excess of five were examined on the trial and were material witnesses. You will note that no certificate of the Justice is required in misdemeanor cases, as was provided by the original section 3,531 of the Code.

It seems to me, therefore, that the allowance of 45 cents for summoning witnesses in cases of misdemeanor, when payable out of the treasury at all, is absolute, whether the witnesses were summoned in such case before a Justice or in a prosecution in court. I have come to this conclusion with some reluctance, as I think the context shows that such a result was possibly not contemplated by the Legislature; but as the law stands I am forced to the foregoing conclusion.

The Act of 1897-'8, amending section 3,531, is ambiguous even as to Sheriff's fees in felony cases; but the limit of $1.00 seems to apply to such cases in proceedings before a Justice, and is so construed by the courts, so far as I am advised. As the language of the original section, applying to both felony and misdemeanor cases, has been changed by the amendment and the requirement of a certificate from a Justice in misdemeanor cases omitted, the same construction cannot be given without doing violence to the plain letter of the law.

As to your second inquiry, I would say that section 4,025 does not provide for payment out of the treasury of the Board of the Sheriff or his deputies when a jury is kept together; only $1.00 per entire day for each juror is allowed. I am, therefore, of opinion that the Auditor's ruling on each point submitted is correct.

Very truly yours,

WILLIAM A ANDERSON,
Attorney-General

AS TO "AIDING PRISONERS TO ESCAPE."

February 20, 1902

Mr. W. W. G. DOTSON,
Wise, Va.:

DEAR SIR:

Yours of the 14th instant has been received. I am of opinion that section 3,751, Code of 1887, does apply to a prisoner in jail aiding another prisoner to escape. The section is very broad, and I think was intended to cover and does cover "any person" aiding escape of a prisoner, whether the person aiding etc., is *in or out of jail.*

I can find no authority on this subject other than a reasonable construction of section 3,751.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO CONTRACT WITH THE MICHIE COMPANY.

February 20, 1902.

Hon. D. Q. EGGLESTON,
Secretary of the Commonwealth and General Librarian,
Richmond, Va.:

SIR:

Your favor of the 11th instant, and a copy of the contract between the Library Committee of the General Assembly of Virginia and the Michie Company, of date February 21, 1900, enclosed therein, have been carefully considered.

I find no authority of law for the making of said contract.

Sections 253, 254 and 255 of the Code, which prescribe the powers and duties of the Library Committee, do not confer upon it, either expressly or by implication, any such power.

Section 252 of the Code, among other things, expressly devolves the matter of the sale of the reports of the decisions upon the Librarian under the restrictions and limitations therein prescribed, and he alone, under the law, had any authority to make any contract for the sale of the Virginia Reports.

I am, therefore, of the opinion that the contract with the Michie Company was *ultra vires* and is not binding upon the Commonwealth.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO FEES OF COMMISSIONERS OF REVENUE.

February 22, 1902.

W. S. GOODE, *Esq.*,
Commissioner of Revenue, Powhatan, Va.:

DEAR SIR:

Your letter of February 21st just received. In reply I will say that it is my opinion that you are only entitled to a fee of one dollar for transferring to five tracts of land conveyed by A to B in the same deed. Section 524, which provides "for making an entry transferring to one person lands before charged to another, one dollar, which shall be charged to the person to whom the transfer is made, and be a compensation for all the tracts in the Commissioner's county, district or city, conveyed by the same deed," covers the case you submit.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO PAYMENT OF EXPENSES OF STATE TROOPS WHEN CALLED OUT

February 21, 1902.

Gen. WILLIAM NALLE,
Adjutant-General of Virginia, Richmond, Va.:

SIR:

I have examined the several accounts of expenses incurred in transporting members of the Monticello Guards, Captain Peyton, and of the Staunton Rifles, Captain Bumgardner, to and from the armories and homes of the respective companies at the time said companies were ordered to proceed to Lynchburg on the 22d ultimo, as requested by your favor of the 11th instant.

Section 305 of the Code, which contains the law governing the subject, provides that "such compensation and the necessary expenses incurred in subsisting, quartering and transporting troops shall be paid by the Treasurer of the State out of any moneys not otherwise appropriated"—"whenever called out in aid of the civil authorities."

This language is very broad, and yet very indefinite.

I would say that it was broad enough to cover all reasonable and necessary expenses incurred in executing any lawful order of the authorities of the State under which troops are called out "in cases of riot, tumult, breach of the peace, resistance to process," or "in aid of the civil authorities."

The question as to what expenses are necessary and reasonable is one which the military authorities are much more competent to decide than I am. It would seem to me, however, that it would not be necessary to bring a member of a company who was temporarily or permanently absent from his home, or the place of the company's domicil, from such distance that a considerable expense would have to be incurred in order to bring him to the place of the company's rendezvous.

As to what expenses shall be incurred in such cases by company officers is a matter which can be readily regulated by general or special orders from your department.

I regret that I cannot make a more definite answer to the inquiry submitted in your letter, but the indefiniteness of my response arises from the general character of the provisions of the statute.

I herewith return the accounts and the accompanying papers which were inclosed in your letter.

I have the honor to be

Very truly and respectfully,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO FEES OF A JUSTICE OF THE PEACE.

February 27, 1902.

Hon. S. L. LUPTON,
State Senate, Richmond, Va.:

MY DEAR SIR:

Referring to the matter of the claim of Mr. D. H. Bragonier against the Commonwealth to which you called my attention; I beg leave to say that I have examined the said claim and the papers submitted therewith, and I am of opinion that the Auditor's action in declining to pay this claim is proper, and that he has no authority under the law to do otherwise.

Section 3533 of the Code of 1887 provides that "No justice, constable, etc., who receives a salary or allowance for general services out of the Treasury of his county, city or corporation shall receive any fees for services in a criminal case from the State, city or county, but all such fees to said officers shall be paid by the party against whom judgment is rendered." This section is still the law, and, I think, covers the case in hand. In coming to this conclusion, I do not think it necessary to pass on the validity of the ordinance of the city of Winchester (a copy of which you furnished me), for it cannot change the status of the justice, whether valid or invalid. His account is for services rendered the State as a justice in criminal cases, and the law provides that no justice who receives a salary or allowance for general services out of the Treasury of his county, city, etc., shall receive any fees out of the State Treasury in criminal cases.

I think this positive provision of the law is not changed by the ordinance of the city of Winchester in force when the service was rendered by Mr. Bragonier. I may also add that the account as rendered is not sufficiently explicit. The term "misdemeanor" only is used when the nature of the misdemeanor should be briefly stated, as fees in all misdemeanor cases are not payable out of the State Treasury.

I am

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO CHARTER TAX ON CORPORATIONS.

March 3, 1902.

Col. M. M. GREEN,
Member of House of Delegates:

DEAR SIR:

By chapter 814, Acts of the General Assembly of 1899-1900, pages 883-4, it was, in my opinion, clearly intended to impose the charter tax therein prescribed upon any corporation organized beyond the jurisdiction of this State

and proposing to transact its business in this State. The tax imposed is a graduated one, according to the maximum capital of the company, as you will find it prescribed in said Act.

While the Act referred to, imposing this charter tax, does not expressly specify the case of the grant of franchises and corporate powers to a foreign corporation by the Legislature, I think it is clearly provided by the Act that a corporation, whether organized without or within the jurisdiction of Virginia, should pay the tax therein prescribed. I think this is the effect of the Act. If it is not, it would make an unjust discrimination against Virginia corporations, which I have no idea the General Assembly ever proposed to make.

To avoid any possible question or cavil about this, I would suggest that the proposed Act "To permit the Queen Anne's Railroad Company," etc., be amended so as to require that company to pay into the Treasury of the State the tax prescribed by section 1 of chapter 814, Acts of the General Assembly of Virginia of 1899-1900, approved March 6, 1900, and to file with the Secretary of the Commonwealth the receipt of the Auditor of Public Accounts showing the payment of such tax, and to obtain from the Secretary of the Commonwealth a certificate, which he should be authorized to give, showing that it has complied with the law in the matter of paying said charter tax, before the Act shall take effect.

It is usual to provide in the Act granting such a franchise to a foreign corporation, that the company shall, to all intents and purposes, be, as to all of its property rights, corporate rights, and as to all cause of action in this State, a domestic corporation. I take pleasure, by way of suggestion, in inclosing the draft of two sections which would protect the State. It is in large part taken from the Act to enable the Louisville and Nashville Railroad Company to build and operate an extension of its line in Virginia. Acts, 1887 (Extra Session), page 19.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney General.

AS TO RESIDENT ATTORNEYS IN FACT FOR FOREIGN CORPORATIONS.

March 11, 1901.

J. B. MOORE, *Esq.*,
Richmond, Va.:

DEAR SIR:

In response to your inquiry of this instant, I beg leave to say that in my opinion, the powers and duties of an agent and attorney in fact, appointed under section 1266 of the Code, continue as long as there may be a cause of action in the State of Virginia against the company appointing such agent, unless sooner terminated in the manner prescribed in section 1267 of the Code.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney General.

AS TO FEES OF A JUSTICE OF THE PEACE.

March 12, 1902.

Mr. MORGAN MULLEN, J. P.,
Clintwood, Dickenson County, Va.:

DEAR SIR:

Your favor of the 4th instant has been received.

Section 3500 of the Code expressly limits the entire compensation which a Justice of the Peace is entitled to charge or receive on the trial of any civil case to the sum of fifty cents, for *all* services, including the issuing of warrants and subpœnas, swearing witnesses, taxing costs, and issuing executions. This allowance is for everything down to and including the issuance of execution. He has no right to make any charge for entering up the judgment in the record book which he is required by section 2944 to keep. That record is absolutely necessary in order to preserve properly the evidence of his official acts, and can by no means be classed with "Judgment Dockets," which are solely for the protection of judgment creditors. You have the right to charge the same fee that a Clerk charges for making abstracts of judgments.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO QUO WARRANTO PROCEEDINGS AGAINST BANKS.

March 13, 1902.

Hon. A. J. MONTAGUE,
Governor of Virginia, Richmond, Va.:

SIR:

If the facts stated in the accompanying petition, addressed to you by the People's Bank of Floyd county, are true and can be established by legal proofs, I think that *quo warranto* proceedings could be maintained against the Farmers' Bank of Floyd, under chapter 145 of the Code, for the misuse of its corporate privileges and franchises. Of course, such proceedings would, under section 3023 of the Code, have to be instituted and prosecuted in the Circuit Court of Floyd county, and the Attorney for the Commonwealth of that county would, before proceeding in the case, have to be satisfied that the facts charged exist and can be proved.

I have the honor to return herewith the papers submitted to me.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO CHARTER TAX ON CORPORATIONS.

March 14, 1901.

Hon. D. Q. EGGLESTON,
Secretary of the Commonwealth, Richmond, Va.:

DEAR SIR:

As soon as I could give the requisite attention to the subject, I examined the papers and Acts of Assembly inclosed, or referred to, in yours of the 5th instant, and have considered the question therein submitted.

If it is necessary for the Cumberland Valley and Martinsburg Railroad Company to execute the power of attorney, which has been sent to you for recordation, and to have it and the accompanying papers recorded in the Clerk's office of the Corporation Court of the city of Winchester and in your office, under section 1104 of the Code, I would say that, before you can admit these papers to record, the company must first pay the tax imposed by section 2 of chapter 614, Acts of 1899-1900, page 864.

If said company is a Virginia corporation, it would be necessary for it to have an office in this State at which all claims due to residents of Virginia may be audited, settled and paid, as provided by the first sentence of section 1104 of the Code. It is not necessary for a Virginia corporation to execute and record a power of attorney and copy of its charter, as provided in the subsequent portion of said section.

It is probable that it was the purpose and effect of section 5 of the Act of the General Assembly of Virginia, entitled "An act to authorize the merger of the Martinsburg and Potomac Railroad Company," etc. (approved December 19, 1889, Acts 1889-1890, page 15), to make the Cumberland Valley and Martinsburg Railroad Company a Virginia corporation as to its property rights, transactions and as to causes of action arising for or against it in this State. The Act of December 19, 1889, does not, however, so expressly declare; and I am not prepared to say that such is its status in all respects and for all purposes.

I am clearly of opinion that section 2 of the Act of March 6, 1900 (chapter 814, Acts 1899-1900, pages 883-885), requires the fees prescribed therein to be paid by every company "organized under the laws of a jurisdiction beyond this State, and proposing" thereafter "to transact business in this State, under the requirements of sections 1104 and 1105 of the Code of Virginia."

If, as I presume is the case, the Cumberland Valley and Martinsburg Railroad Company is a corporation organized under the laws of the State of West Virginia, it would plainly come within the terms of the statute just recited.

I return herewith the letter of Holmes Conrad, Esq., and the power of attorney and accompanying copies of charters received under cover of your favor of the 5th instant.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO LICENSE TAX ON MANUFACTURERS.

March 15, 1902.

Mr. J. W. DENNIS,
703 Brambleton Avenue, Norfolk, Va.:

DEAR SIR:

Replying to yours of the 11th instant as soon as I could give the matter my attention, I beg to say that there is no license tax or other tax imposed by the State of Virginia upon a manufacturer for the privilege of selling any article of his own manufacture, except the tax upon a distiller of ardent spirits.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO ALLOWANCE TO JAILORS.

March 15, 1902.

Mr. J. M. STREET,
Sheriff of Middlesex, Saluda, Va.:

DEAR SIR:

Your letter of the 27th ultimo was handed me by Judge G. T. Garnett about a week ago, and I reply to it as soon as I could give the matter my attention.

The question you present had been submitted to me a short time ago by the Auditor of Public Accounts, and, after examining it carefully, I advised him, as I now advise you, that in computing the time for which a jailor is entitled to charge for a prisoner, following the analogy of the law in other cases, as well as the plain meaning of the statute as I understand it, you cannot count as a day both the day on which the prisoner was put in jail and the day on which he is discharged. If you did, the Commonwealth would pay for one day more than the man was actually in jail. For instance, if a prisoner were put in jail on the 1st and discharged on the 2d of the month, you will see at once that it would be wrong to charge the Commonwealth for two days, for the prisoner has been there only one day. In other words, a day is twenty-four hours. If a hotel-keeper charged a guest both for the day he came into the hotel and the day he went away, he would, as a rule, make his guests pay for a day too much. The safe rule, if it could be adopted, would be that adopted by some hotels—to charge for a day only when the man has spent a night, and to treat two meals and a lodging—that is, supper, lodging and breakfast—as a day.

You are mistaken in your information that the Auditor requires a prisoner to have been in jail twenty-four hours and to have eaten three meals to entitle the jailor to an allowance of one day's board and lodging. As I have learned from the Auditor's practice, in repeated instances, this is not

the case. Indeed, as I understand it, as a rule only two meals a day are given in the jails; and, if a man is put in jail and discharged on the same day, the Auditor makes no inquiry as to whether he got one, two or three meals, but allows for a whole day, even if he has been in jail only for an hour or two; or, if a prisoner is put in jail at 6 P. M. one day and discharged at 8 o'clock the next morning, the Auditor allows for one day, but in the latter case he will not allow for two days, nor will he allow the jailor for two days if the prisoner is not discharged until 6 o'clock the next evening. It is really a question of computation, and in it I think the Auditor is right. If there is any doubt about it, he has given the jailor the benefit of the doubt, and allows him a full day for any fraction of a day when the prisoner has been in jail less than a day.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO LICENSE TAX ON PEDDLERS, &C.

March 17, 1902.

EDWARD R. TURNBULL, *Jr., Esq.*,
Lawrenceville, Va.:

MY DEAR SIR:

Your favor of the 10th instant was duly received, and it gives me pleasure to reply to it as soon as I could give the matter my attention.

The law regulating the licensing of peddlers, the terms of which are broad enough also to include hucksters, was amended by chapter 201, Acts 1897-'8, and by chapter 767, Acts 1899-1900, and last amended by chapter 185, Acts of Special Session of 1901, which latter Act gives the present law upon this subject. You are, doubtless, familiar with these Acts, but I call your attention to them, as by reading the last sentence of section 32 as amended by these several Acts you will see the changes that have been made in the law, and get at a glance the history of recent legislation upon this subject.

If B lives outside of the town, he will have a right to sell "meats * * * grown or produced by him," in the town, without any license, unless there is some special provision in the charter of the town which gives the town authorities the right to impose such a license tax.

As a rule, town and city authorities can levy a license tax only in cases where such a tax is imposed by the State. See section 1042 of the Code. And I recall no case in which the power to levy any other license tax has been granted by special charter provision.

Knowing nothing as to the charter and ordinances of the town to which you refer, I cannot answer your question as positively as I would like to; but, upon the case which you state, B having, as I understand, a peddler's or huckster's license, he would have a right to sell and deliver meats, etc., anywhere in said town without having a place of business therein.

I do not find anything in the general law of the State authorizing a license tax to be charged for the business of a butcher, but I infer from your letter that there must be something in the charter of the town to which you refer which authorizes a license tax to be charged in such case.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO LOCAL OPTION IN TOWN OF MARTINSVILLE.

March 19, 1902.

J. M. SMITH, *Esq.*,
Martinsville, Va.:

DEAR SIR:

As soon as I could give the matter mentioned in your letter of the 12th instant my attention, and get a copy of the Act to which you refer, which did not become a law until the 15th instant, I considered the question submitted by you.

In my opinion, the effect of this Act is to practically repeal the local option law, so far as the town of Martinsville is concerned, in the event that a majority of the voters shall vote in favor of establishing a dispensary in said town at the election provided for in said Act. However, I have a message from Mr. Gravely, the patron of this law, to the effect that he has already introduced, and will press through as rapidly as possible, a bill providing that the election to determine the establishment of a dispensary shall take place on the 24th of April, next, and that if, in the meantime, the people of Martinsville shall vote in favor of local option, then this dispensary Act shall no longer be of any force or virtue.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO LICENSE TAX ON "COMMERCIAL BROKERS."

March 20, 1902.

Mr. B. F. WINN,
Commissioner of the Revenue, Martinsville, Va.:

DEAR SIR:

Your letter of the 17th instant received. If the man you speak of is transacting the business of a "commercial broker," he is liable to be assessed with and have to pay a license tax of one hundred dollars, under section 64 of the tax law of this State, provided he represents or sells the goods only of *Virginia* merchants, millers, etc. It would be well for you to confer with your Commonwealth's Attorney, and he will advise you how to proceed.

It is difficult to distinguish between a "commercial broker" and an ordinary agent for the sale of merchandise, like what is generally known as a commercial traveler or drummer. If the man you speak of is doing the business of an ordinary commercial traveler or drummer, I understand that he does not come within the definition of a "commercial broker," and is not liable to a license tax.

If section 64 by its terms applied only to a person *who had a fixed place of business*, where he carried on the business of a "commercial broker," that would distinguish him, of course, from a commercial traveler, and I would suppose that the difference between the business of a "commercial broker" and the business of an ordinary commercial traveler would be that one had an office or some permanent place of business in some town, city or county, and the other has no permanent place of business.

So far as I can learn, no license tax has ever been required of or enforced against commercial travelers, for the reason that they could not be required to pay such tax by the State if they were engaged in selling goods for houses outside of the State, under decisions both of the United States and State Courts; and it would be very unfair to the merchants and commercial travelers of Virginia to collect a tax from them when drummers representing houses outside of the State, engaged in the same business, could not be required to pay any tax.

This, I apprehend, will be the difficulty in the case you mention. If the man to whom you refer represents manufacturers, millers, merchants or others outside of the State of Virginia, the State cannot, under the Constitution of the United States as construed by the United States Courts, lay a tax upon his business, for the reason, as assigned by the courts, that such a tax would be an interference with inter-State commerce.

In the case of Adkins v. Richmond (98 Va., page 92), the Supreme Court of Appeals of Virginia decided that a "commercial broker" who was engaged in the business of selling goods in Richmond for non-resident merchants could not be required to pay a license tax in this State.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO CHARTER GRANTING FISHING PRIVILEGES.

March 11, 1902.

Hon. T. R. B. WRIGHT,
Tappahannock, Va.:

MY DEAR JUDGE:

It gives me pleasure to reply to your very kind letter of the 10th instant as soon as I could give the matter my attention.

The question presented by your letter and that of Col. Lloyd T. Smith, which I herewith return, is to some extent, I think, relieved of difficulty by the plain terms of the Virginia law as set forth in sections 2085, 2095 and

2104 of the Code, and by the decision of the Supreme Court of the United States in McCready *v.* Virginia, 94 U. S., 391. I think that the statutes referred to entirely justify you in inserting in every charter which you grant to companies to engage in the business of catching fish with pound net, purse net, fyke or weir, or to engage in the business of catching fish in the waters of the Commonwealth for the purpose of converting the same into oil or manure, a provision to the effect that no non-resident of Virginia shall ever be a stockholder of said company or be engaged or interested in the business of said company, or share in the profits thereof.

Even if the charter of such company did not contain such a provision, I am strongly inclined to the opinion that any non-resident of Virginia who should acquire stock in a company engaged in any such business would make himself liable to the penalties of section 2104. The only possible uncertainty about the matter is as to whether the courts would hold that the individuality of a stockholder of a company was merged in the company, and that the company being a resident and citizen of Virginia, could lawfully engage in the above-mentioned business under the statute, notwithstanding the fact that some of its stockholders were non-residents of the State—in other words, that there could not be any criminal responsibility on the part of the individual non-resident stockholders for the act of a Virginia corporation in which they were shareholders.

The terms of the sections of the Code above recited are, however, so comprehensive and so explicit that, in my judgment, they would cover every possible character of interest, however acquired by a non-resident. At any rate, I think you are doing your duty to the Commonwealth in imposing conditions on these charters which will carry out the spirit and letter of the law of the State.

If the legislation of the State in this regard can be defeated by the formation of a corporation with non-resident stockholders, the whole purpose of the Act and the entire principle of the State's control over, and property in, the fish in the navigable waters of the Commonwealth will be rendered nugatory.

Very truly yours,

WILLIAM A. ANDERSON.

AS TO LEASE OF OYSTER GROUNDS.

March 22, 1902.

JAMES L. TALIAFERRO, *Esq.*,
Gloucester, Va.:

MY DEAR SIR:

Your favor of the 19th instant received and considered. If John Decker, the lessee of the oyster ground mentioned in your letter, was a non-resident, the assignment or lease to him of the said oyster ground was absolutely void, and, upon the facts stated in your letter, he was liable to the penalties imposed by section 10 of the Act approved February 25, 1892, as amended by

the Act approved February 12, 1896. The assignment being void *ab initio*, neither he nor his estate ever had any interest whatever in the oysters, and the ground can be re-assigned, in my opinion, just as though the former assignment to Mr. Decker had never been made. The oysters which Mr Decker planted there, in violation of the law, would go to the new assignee or lessee.

Such is my opinion upon the state of facts which you present, as I understand them.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

AS TO EMPLOYMENT OF CONVICTS IN MAINTAINING ROADS, &c

March 24, 1902

Messrs. LASSITER & MURRELL,
Patrons of House Bill No. 501:

GENTLEMEN:

I have examined House Bill No. 501, "To provide for the employment of certain convicts in building, improving and maintaining public roads," etc., and have also examined the contract made by the Superintendent of the Penitentiary with the Davis Shoe Company, with the approval of the Governor and the Directors of the Penitentiary, of date October 30, 1899, and beg leave to say that, in my opinion, it is entirely competent for the General Assembly to enact into law the provisions embodied in said bill, notwithstanding the said contract, and that such a law would not be in violation of the legal or constitutional rights of the Davis Shoe Company under said contract

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

IDEM.

March 27, 1902

Messrs. LASSITER & MURRELL,
Patrons of House Bill No. 501:

GENTLEMEN:

In the opinion expressed in my letter of yesterday, I did not, of course, intend, either by implication or otherwise, to embrace any conclusion as to the effects of House Bill No. 501 in any other particular than the one stated

On reading the bill over since I had the pleasure of seeing you, the point which I suggested to you as to the importance, if not the necessity, of expressly amending the sections of the Code which may be effected by the bill, if enacted, strikes me as worthy of grave consideration, and I deem it proper to call your attention to it.

Very truly and respectfully yours,

WILLIAM A. ANDERSON,
Attorney-General

AS TO TAXES FOR SUPPORT OF SCHOOLS.

March 26, 1902.

JOHN E. NOTTINGHAM, *Esq.*,
House of Delegates:

DEAR SIR:

Replying to your note, just received, I beg leave to say that, by the provisions of House Bill No. 437, which I am informed is now a law, the town of Cape Charles will, after the 1st of July next, be a part of Capeville School District.

By the operation of this Act, and under the general laws of the State, the town being after that period merged for school purposes into the larger school district, the Council of the town will have nothing whatever to do with the levying or appropriation of taxes for the support of the public schools, but said taxes will be levied and appropriated by the Board of Supervisors of the county of Northampton, in accordance with sections 58 and 60 of the School Law of the State.

It has given me pleasure to answer your inquiry as I understand it.

Very truly and respectfully yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO TAX ON DEEDS, &C.

March 28, 1902.

Hon. MORTON MARYE,
Auditor of Public Accounts, Richmond, Va.:

SIR:

I have examined the first mortgage of the Seaboard Air-Line Railway to the Continental Trust Company, of date April 14, 1900, and the indenture from the same corporation to the Continental Trust Company, of date December 31, 1901, and the letter addressed to you by Robert Gilliam, Esq., Clerk of the Hustings Court of Petersburg, of the 26th instant, and have considered the question presented in said letter. The last instrument, although it may be a cumulative security upon the same property, is a distinct and substantive conveyance of the property therein described, and is, in my opinion, subject to the tax imposed by chapter 784 of the Acts of 1893-'4 upon the recordation of deeds and other instruments.

It does not come within any of the exceptions of said Act, as this deed is not a re-execution of the former deed; nor is it a case of a re-recordation of the same instrument; which are the only exceptions in said Act which could, by any possibility, be construed as applying to this case.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO TAX ON SUITS.

March 31, 1902.

Col. D. H. LEE MARTZ,
Clerk Circuit Court of Rockingham, Harrisonburg, Va.

MY DEAR SIR:

Your favor of the 29th received. The tax on suits, under section 14 chapter 244, Acts 1889-1890, page 204, becomes due and payable at the moment of the commencement of the suits; and, in the case of a fifteen days' notice, is payable when the notice is filed in the Clerk's office.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO FISHING IN CERTAIN WATERS.

March 31, 1902.

WINFIELD LIGGETT, *Esq.*,
Attorney-at-Law, Harrisonburg, Va.

DEAR SIR:

The two Acts referred to in your favor of the 29th instant, just received, have certainly produced no little confusion as to what the law is in regard to fishing in the Shenandoah and its tributaries.

In so far as the provisions of chapter 545, Acts 1893-4, are in conflict or inconsistent with the provisions of chapter 679 of the Acts, passed at the same session, of course the provisions of the latter Act will prevail.

In so far as the provisions of said chapter 545 are reconcilable and not inconsistent with those of chapter 679, the provisions of the first-named Act will, I think, continue in force.

There are some particulars in which there does not appear to be any conflict between the two Acts; but it would require a more intimate and practical acquaintance with the subject than I possess to indicate just in what points the two Acts differ. If there is any difference between them, of course the courts will give effect to that which was last passed. (Winn v. Jones, 6 Leigh, 74.)

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING CONSERVATORS OF THE PEACE.

April 4, 1902.

Mrs. GEORGE W. BAGBY,
Chairman of Jamestown Committee of
Association for the Preservation of Virginia Antiquities:

DEAR MADAM:

I have examined the Act "to invest the manager or other person in charge of the property of the Association for the Preservation of Virginia Antiquities at Jamestown, Va., with constabulary powers," approved January 16, 1902, and have considered the question submitted to me in regard to it. The Act does not make the manager or other person in charge of the property of the Association at Jamestown a constable—a thing which it was not competent for the Legislature to do under the Constitution of the State; but merely confers upon him the duties, responsibilities and authority of a constable for the purpose of maintaining order and enforcing the criminal and police laws of the State and of the town of Jamestown.

This law is silent as to how this person shall be appointed or designated, and as to whether or where any record shall be made of his appointment, and as to whether he shall take any oath of office, or give any bond.

So far as my observation or information extends, I know of no similar statute; and the general law of the State does not supply the above omissions.

I suppose the purpose of the law was to confer upon the custodian of the property of the Association at Jamestown such powers as a special conservator of the peace as are provided for by sections 3929, 3930 and 3931 of the Code.

In view of the above omissions in the Act, I would suggest that your Association proceed, under section 3931 of the Code, to have the said custodian appointed a policeman, so that there may be no question as to his authority to act. Such appointment can be made either by the County Court of James City county, in term, or by the judge of the Circuit Court of said county, in vacation.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO FEES OF CORONERS.

April 5, 1902.

Dr. JOHN W. BROWN,
Coroner for Elizabeth City County, Hampton, Va.:

DEAR SIR:

Your favor of the 2d instant has been received.

The case stated by you is not covered by any provision of the Code. Section 3950 of the Code prescribes a fee of five dollars to a coroner, who is

a physician, who makes an examination of a dead body; but that refers to cases where an inquest is held. I do not find that any compensation is provided for by law for a post mortem examination where no inquest is held.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

AS TO PAYMENT FOR CLOTHING AND MEDICINES FURNISHED PRISONERS IN JAIL.

April 9, 1902

Hon. MORTON MARYE,
Auditor of Public Accounts, Richmond, Va

SIR:

In reference to claims of county of Augusta for clothing and medicine furnished prisoners in the County Jail.

The statutes prescribing the allowances and costs which may be paid out of the State Treasury on account of the support of prisoners in jail—sections 3532 and 4079 of the Code—make no provision for paying for medicine

Only the care and nursing and medical attendance for prisoners seem to be covered by the terms of sections 928 and 3532; and the only allowances provided by law for keeping and supporting prisoners in jail and for medical attendance are those allowed to the jailor and the physician by those two sections.

The allowances for necessary clothing, provided for by section 4079, can only be paid upon accounts authenticated and certified according to law

To conform to the terms of section 4079, these accounts should show that the clothing was necessary; that each prisoner to whom the same was furnished was unable to provide himself with the same; that the amount paid for such clothing did not exceed ten dollars in any one year for any one prisoner, and that such prisoner was not worked upon the chain-gang of any county, city or town, and was a State prisoner, and not confined in jail for violation of the ordinances of any city or town. (Price, Auditor, v Smith, 93 Va., 14.)

I find no statute which makes the accounts referred to payable out of the State Treasury, except as to items of clothing, and only then when they are shown to have been such items as are authorized to be paid by section 4079.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING EXPRESS COMPANIES.

April 23, 1902.

Gen. J. C. HILL,

Railroad Commissioner, Richmond, Va.:

DEAR SIR:

Your favor of the 15th instant and accompanying papers (the latter herewith returned) have been considered.

According to the current of authority, it is, I think, the duty of a railroad company to provide all reasonable facilities for receiving and transporting upon its passenger trains and delivering at points reached by its line all such articles as are usually carried by express.

Such traffic has become as much a necessary part of the business of a railway company as is the transportation of goods upon its regular freight trains.

Section 1215 of the Code is in part declaratory of the common law right of any such company to conduct the business of express transportation, but the chief objects of this enactment seem to have been (1) to limit the quantity of goods which the company is bound thus to carry by express to not exceeding fifteen thousand pounds on any one passenger train; (2) to prescribe the maximum rates to be charged for such service; and (3), by implication, to authorize a railroad company to sub-let the business of conducting the express traffic upon its line to some other company or person, and to fix the maximum rates to be charged by such licensee or employee of the railway company.

I do not think section 1215 was designed to relieve or release railroad companies from their duty to afford reasonable and proper express facilities to the general public along their lines, except to the extent that these common law obligations of a common carrier are expressly or by necessary implication modified by the terms of this section.

While the railroad company may, under this law, in Virginia sub-let the express business upon its passenger trains, it cannot thereby relieve or excuse itself from the duty of providing necessary, proper and reasonable facilities for receiving and forwarding by express such goods as are usually carried in that manner, and as may be tendered for transportation, if its licensee fails to provide them.

In other words, if it sub-lets this portion of its business, it must sub-let it to a company or person who will furnish a reasonable service to the general public, and if its licensee or employee fails to furnish such service, then the railroad company must supply the deficiency.

Such, it seems to me, are the obligations and duties of railroad companies in this regard in Virginia.

In this case, inasmuch as the Adams Express Company fails to afford proper facilities at a large number of stations on the lines of the Chesapeake and Ohio Railway Company in this State, it immediately, upon such failure, becomes the duty of the railway company itself directly to provide such deficiencies.

Very truly yours, WILLIAM A. ANDERSON,

Attorney-General.

OFFICES OF SCHOOL TRUSTEE AND MEMBER OF COUNTY ELECTORAL BOARD NOT INCOMPATIBLE

April 28, 1902.

Dr. W. L. Williams,
Chairman Electoral Board of Campbell County
Brookneal, Va.

DEAR SIR:

Your favor of the 24th instant received.

I know of no law that disqualifies you from holding the position of School Trustee and being at the same time a member of the Electoral Board of your county.

Very truly yours,

WILLIAM A. ANDERSON
Attorney-General.

CONCERNING "ACT TO PROTECT SHEEP, &c."

April 30, 1902.

W. A. ROSE, *Esq.*,
Commonwealth's Attorney, King George C. H., Virginia.

MY DEAR SIR:

Yours of the 29th received.

I send you by this mail a copy of the Act to protect sheep, by imposing a license tax on dogs, from which you will see that it is purely a county law.

The tax goes into the County Treasury, and it is a matter which the State and State officials have, under the law, nothing to do with.

It is not, therefore, a case in which the Attorney-General is authorized to give an official opinion.

I will say, however, that the Act went into effect on the 29th of March and its provisions became operative from that date.

The list of dogs upon which the tax imposed by this law is to be levied will have to be a separate list. The County Treasurer collects it, not as a State officer, but as a county officer, and his settlements will have to be made with the Board of Supervisors.

However unreasonable its provisions may be, the Act seems to require such a list to be made by the Commissioners of the Revenue in the counties of the State for the present year.

The provisions of the Act are very plain, and you will need no assistance from anyone in interpreting them.

Very truly yours,

WILLIAM A. ANDERSON
Attorney-General.

AS TO CHARTERS OF "BENEVOLENT" COMPANIES.

May 1, 1902.

Hon. D. Q. EGGLESTON,
Secretary of the Commonwealth, Richmond, Va.:

DEAR SIR:

Your favor of this date, with enclosures of charter of the Lynchburg Mutual Benefit Benevolent Society and correspondence with J. E. Edmunds, Esq., in reference thereto, has been received and considered.

I do not think the proposed corporation is a "benevolent" company, in the meaning of the Act approved March 6, 1900 (Acts 1899-1900, p. 884), or that it is proposed to be organized for strictly benevolent or charitable purposes. Its purpose seems to be to provide a fund for giving aid to its members during sickness, and to assist their families after death—that is to say, its benevolence, if it may be so termed, is not intended for others, but for the members of the association.

It seems, therefore, that this company is liable to the charter fee of $25.00 imposed by the Act referred to upon "mutual insurance companies and other mutual companies not organized for strictly benevolent and charitable purposes."

I understand that a bill introduced at the last session of the General Assembly was passed which amends the Act of March 6, 1900, but does not alter its effect in the particular now in question. I have not yet received the printed Act.

It will be necessary also, it seems to me, under section 1148 of the Code, as amended by the Act of 1889-1890, page 56, that such a company as is proposed to be incorporated under this charter should have a minimum capital of $500.00.

Very truly yours, WILLIAM A. ANDERSON,
Attorney-General.

NOTE.—The benefits contemplated in the scheme of the proposed company cannot be considered charitable, for *they are to be paid for* by assessment.

It is in the nature of a purely life insurance company, with the differences that the plan upon which it is projected includes a sick benefit, and that the benefit, after the death of the member, enures to his family only.

MEMBER OF A CITY COUNCIL MAY ALSO BE A MEMBER OF STATE LEGISLATURE.

May 3, 1902.

J. W. MORT, *Esq.*,
Bristol, Va.:

DEAR SIR:

Your letter was received some days since.

In reply to the question you propound, I beg leave to say that I know of no provision of the Constitution or laws of Virginia which renders a mem-

ber of the Council of any city ineligible to a seat in the Legislature. So far as I know, there is no incompatibility between any persons holding both offices at the same time.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

ELECTIONS WHERE NEITHER POLITICAL PARTY HAS NOMINATED CANDIDATES.

May 12, 1904.

WILLIAM MADISON PEYTON, *Esq.*,
Martinsville, Va.:

DEAR SIR:

Your favor, without date, duly received.

The 20th section of the Act to provide for a method of voting by ballot approved March 4, 1896, chapter 700 of the Acts of 1895-'6, commonly known as the "Walton-Parker Election Law," expressly provides that "In any county or corporation where no political party nominates candidates for county or corporation offices, the above provisions of this Act shall not apply, but in such cases every elector shall vote by ballot, which he himself shall provide, and each person offering to vote shall deliver a single ballot to one of the judges in the presence of the other two judges," etc.

If, in the case you mention, no nomination has been made by any political party for the offices of Mayor and members of the Town Council, then, by the express terms of the Act referred to, the election will be conducted in the manner therein prescribed.

The mode in which the election shall in such case be conducted is substantially that in force for twenty years before the enactment of the "Walton Parker Election Law"—indeed, ever since the re-organization of the State government in 1870.

It will not be conducted under the so-called "Anderson and McCormick Law," because that law has nothing in the world to do with elections, but merely provided for the mode in which the officers of election should be appointed.

Very truly yours, WILLIAM A. ANDERSON,
Attorney-General.

1. CONCERNING EXTRADITIONS. 2. CONCERNING FEES OF CITY SERGEANTS.

May 12, 1904.

CARTER BRAXTON, ESQ.,
Commonwealth's Attorney, Staunton, Va.:

MY DEAR SIR:

Under the press of other duties, a reply to your favor of the 18th ultimo had to be postponed until I could give the matters referred to the consideration which they deserve.

1. In reference to the case against John U. Shepherd, for obtaining goods upon false pretences, a prosecution would, in my opinion, lie against him in the city of Staunton, the place of the residence of the person who received the letters from him containing the false representations upon which the goods were shipped. I apprehend, however, that Shepherd could not be extradited for such an offence, for the reason that he is not, as I understand the facts of the case, "a fugitive from justice." In order to prosecute him effectually, it would be necessary to arrest him in Virginia. Under the Constitution of the United States, it is only "one who shall flee from justice and be found in another State" who shall be delivered up or removed to the State having jurisdiction, on demand of the executive authority of the State from which he fled (Article 4, section 2, Constitution of the United States); and the Act of Congress is based upon the same condition of things. (Revised Statutes of the United States, section 5278).

There would be a practical difficulty, perhaps, about maintaining the prosecution in such a case, even if you had the accused in custody, for it would be necessary to make out a prima facie case of false pretence by proving that he did not own the property which he represented to Mr. Heydenriche that he did own, and on the faith of which the credit was extended to him.

The facts necessary to constitute such approximate proof could only be shown, probably, by witnesses from Philadelphia, whose attendance the Commonwealth could not compel.

But whether there would be such difficulty in obtaining the necessary evidence at Staunton is, of course, a matter of surmise with me. The difficulty of extradition is a more serious one.

I send you herewith the "Rules of Practice and Forms to be Observed and Used in Making and Granting Requisitions for Fugitives from Justice," assented to by the Governors of twenty-four States, which may be of service to you in some future, if not in this, case.

2. In reference to the account of the City Sergeant of Staunton for services in executing a capias, mentioned in your favor to the Auditor of Public Accounts and referred to in your letter of the 18th ultimo, I have to say that if you will examine section 3533 of the Code, I feel sure that you will agree with me that the Auditor is absolutely precluded by the terms of that section from paying anything for such services. The Sergeant is expressly mentioned as one of the officers who shall not receive any fees for services in any criminal case, from the State, city or county, if he receives any salary or allowance for general services out of the Treasury of his city or corporation. The State makes a most liberal provision for all services rendered her in the matter of the services of officers in executing all processes in criminal cases, in the allowance provided for in that section of $200.00 apiece per annum to two constables or sergeants or policemen of such city or corporation, making $400.00 a year to two such officers in the city of Staunton—the same, precisely, that she pays for similar services in the cities of Richmond and Norfolk and the other large cities of the Commonwealth.

I agree with you that the City Sergeant is not a policeman, within the meaning of chapter 292, Acts of 1897-'8, page 321. Indeed, in Burch *v.* Hardwicke, 30 Gratt., 34, a City Sergeant is held, as to his more important func-

tions, to be to all intents and purposes a State officer. I think section 3533 of the Code, however, is conclusive as to the correctness of the Auditor's position.

Hoping that no one has suffered any inconvenience by reason of my enforced delay in responding to your letter, I am

Very sincerely yours,

WILLIAM A. ANDERSON,
Attorney General.

CONCERNING VIRGINIA-TENNESSEE BOUNDARY LINE.

May 15, 1901.

J. B. BAYLOR, *Esq.*,
Virginia-Tennessee Boundary Commissioner,
Washington, D. C.

DEAR SIR:

Your favor of the 6th instant, with the accompanying papers, have been carefully considered, and I shall endeavor to arrange with the Attorney-General of Tennessee to obtain from the Supreme Court rulings upon the points you mention. As soon as I hear from him, will inform you. I fear that the time is too short now before the adjournment of the court for the summer vacation to have the matter acted upon, unless we can agree upon a consent decree in the case.

I wish very much, indeed, that the palpable wrong which will be done to Virginia and to a number of individuals and families, if the arbitrary line between what you mark as the Tennessee corner and Denton Valley is established, could be righted. That set-off and the land between the points referred to is so palpably a violation of the rights of Virginia that I am at a loss to know why and how the line was ever run in that manner, and am unwilling to believe that the State of Virginia ever intended to acquiesce in the establishment of any such line.

As the case is entirely new to me, I shall be greatly obliged to you if you will give me any suggestions you can in regard to this matter, or refer me to anyone who can give me information on the subject.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney General.

IDEM.

May 15, 1901.

J. B. BAYLOR, *Esq.*,
Virginia-Tennessee Boundary Line Commissioner,
Washington, D. C.

DEAR SIR:

I am inclined to think that, in order to have any question of difference in the findings of the members of the Commission settled, it would be best that separate reports be presented to the court upon those questions.

I hope that in this way we may be able to get the question as to the true location of the line between Denton Valley and the White Top reopened, and justice done to Virginia and her citizens living in the disputed territory.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING PENSIONS.

May 20, 1902.

Capt. ROBERT D. FUNKHOUSER,
Chairman of Pension Board of Shenandoah County,
Maurertown, Va.:

DEAR COMRADE:

Your favor of the 14th instant received.

The Pension Law approved April 2, 1902, empowers your Board to pass upon new applications and upon the list of pensioners whose applications were filed under the Act of March 7, 1900. It is not your duty, as I understand the Act, to revise the list of pensioners whose claims have been allowed under the Act of 1888, though I think it would be entirely proper for you to report to the Circuit Court the names of any pensioners under that Act who have died or removed from the State, or who have property of the assessed value of more than $1,000, or who have an income of $300 or more per annum.

Under the ruling of the Auditor of Public Accounts, which I think is entirely supported by the law, a county almshouse or poorhouse is a public institution, and by section 2 of the Act of April 2, 1902, it is provided that no inmate of any public institution shall be entitled to the benefit of this Act; so that the Confederate veteran to whom you refer as being in the almshouse of your county is not entitled to a pension under the Act of 1902.

If, however, his name is already on the pension roll under the Act of 1888, I am inclined to think that he would be entitled to continue to draw the pension provided for by that Act, notwithstanding the fact that he is in a public institution, because the Act of 1888 does not exclude the inmates of any institution except soldiers' homes.

Section 14 of the Act of 1902 expressly provides that soldiers who are on the pension roll under the Act of 1888 and March 5, 1892, amending the former Act, shall remain upon the pension roll until their names are removed therefrom for causes mentioned in this Act; and I find no causes prescribed in the Act of 1902 striking from the rolls pensioners placed there under the Acts of 1888 and 1892, unless the 12th section is intended to apply to persons improperly upon that roll, which seems to me to be very doubtful.

If the old soldier who is in your county poorhouse, and who has lost both of his feet from wounds received, is on the pension roll under the Act of 1888, I think he would still be entitled to receive a pension.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING TAXATION OF WATER-WORKS OF TOWNS

May 27, 1902

Hon. W. S. MATHEWS,
Big Stone Gap, Va.:

DEAR SIR:

Your letter of May 19th has been received, and the inquiry made carefully noted.

I am of opinion that the water-works owned by the town of Big Stone Gap is not subject to taxation.

I think such works exempt under section 457 of the Code of 1887, and such use thereof by the town, as set out in your letter, does not bring the case within the proviso of that section—i. e., "or for profit." The income derived by the town from the sale of water is not, in my opinion, such a profit as is contemplated by the statute, and, so far as I am informed, such property has always been exempt from taxation.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

CONCERNING ESCAPED LUNATICS

June 21, 1902

GEORGE M. HELMS, *Esq.*,
Superintendent State Penitentiary.

DEAR SIR:

Referring to the correspondence between R. S. Gillespie, Deputy Sheriff of Tazewell county, and Dr. W. F. Drewry, Superintendent Central State Hospital, and the letter of Hon. J. H. Stuart, Judge of the County Court of Tazewell county, to yourself, of recent dates, I beg leave to say that it appears plainly from this correspondence that Hy. Steele, the negro murderer has not been discharged from the Central State Hospital in the manner prescribed by law, and should be returned to that institution. If found to be sane, he can then be discharged only in the manner prescribed by law. It would appear, however, from this correspondence that the man is still suffering from homicidal mania; that he has terrorized the people of Tazewell county, and that it would be perilous to let him go at large.

If the authorities of the Central State Hospital decline to send for him and have him brought back to that institution as an escaped lunatic, which he seems to be, then, under section 1686, any justice of the county of Tazewell may issue his warrant to the Sheriff of that county, requiring him to arrest this escaped lunatic and return him to the asylum.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

CONCERNING LICENSE TAX ON STANDARD OIL COMPANY.

July 3, 1902.

BEN T. GUNTER, *Esq.*,
Attorney for the Commonwealth, Accomac, Va.:

MY DEAR SIR:

Enclosed please find my opinion in the case of Commonwealth v. Causey.

The question presented so strongly in your correspondence with me is one of such great importance, not only to the State, but to many of her citizens, that I have delayed coming to a conclusion upon it, so as to give the matter most thorough consideration.

If the Acts referred to impose a tax upon the Standard Oil Company for the character of business it is conducting, then, as I am informed by the Auditor of Public Accounts, with whom I have conferred fully in regard to this subject, there are a number of citizens of this State, manufacturers and others, who would be liable for a license tax for selling their products through agents and delivering the same throughout the country. There are, I understand from him, a number of manufacturers in this city, as well as in other parts of the State, who would be liable to such tax, which he thinks was never designed to be levied upon them, as it would in many cases be oppressive. It is a tax, of course, which we could not levy upon non-residents of the State without also levying it upon our own citizens.

I realize fully that the Standard Oil Company is transacting a business and earning a profit in Virginia from our people, which should be the subject of taxation, and that they should be made to bear, if possible, their due share of such burdens in Virginia, in proportion to the property interests which they have and the profits which they realize from their business in this State. It will give me pleasure to bring the matter to the attention of the chairmen of the Finance Committees of the two houses during the approaching session of the General Assembly, and I hope very much that some act can be devised that will be constitutional and which will attain the desired end.

It is with great diffidence, and after mature reflection, that I have differed from you in the conclusion that you have reached, and, but for the fact that the Legislature is soon to convene and may be able to remedy any defect in the present law upon the subject, I should be very much disposed to defer to your opinion, and to let the question be tested in the courts. I can see very well that much can be said in behalf of the views which you present.

I shall be greatly obliged to you for any suggestions that may occur to you as to new legislation which would be valid and which would reach the enormous business that the Standard Oil Company is conducting in this State and which in a large measure now escapes taxation.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

IDEM.

RICHMOND, VA., *July 3, 1902*

BEN T. GUNTER, *Esq.*,
Attorney for the Commonwealth, Accomac, Va.

COMMONWEALTH v. CAUBEY.

In the County Court of Accomac County, Va.

The prosecution in this case rests on the Act of 1901, page 198, and on the Act of 1899-1900, page 754, or, if that Act is inoperative because of its defective title, then upon section 33 of the Act of 1889-1890, pages 217-218.

I am strongly inclined to the opinion that the Act of 1899-100, page 754, would be held to be invalid, under section 15 of Article V. of the Constitution, and under the decision in Fidelity, &c., Co. v. S. V. R. R. Co., 86 Va., because of its defective title. The title to this Act not only fails to fairly express its object, but is misleading and inaccurate. If the title could be helped or its defect cured by the language of the act, of course it would be all right, but the title has to be sufficient independently of any information furnished by the Act itself as to its object. A similarly defective title was held to invalidate an Act in Gunter v. Texas Land, &c., Co., 82 Texas, 496. It is, however, I think, immaterial whether the Act of March 3, 1900, stands or not. If it falls, section 33 of chapter 244 of the Acts of 1889-1890 becomes the law, and, as I construe its language, it is in meaning and effect substantially the same with the probably abortive Act of March 3, 1900.

The proviso in the Act of March 3, 1900, is as follows: "But nothing under this or the preceding section shall be construed to require of any farmer or manufacturer a peddler's license for selling any commodity produced or manufactured by him, or for the privilege of selling or peddling farm products, wood or coal."

The proviso in section 33 of the Act of 1889-1890 is: "But nothing under this or the preceding section shall be construed to require of any farmer or other person a peddler's license for selling any commodity produced or manufactured by such person, or for the privilige of selling or peddling farm products, wood or coal."

If one Act exempts a person who sells articles manufactured by him from obtaining a peddler's license in order to sell such articles, the other Act does the same.

Both of these Acts are, I think, valid, and free from the vice of section 32 of the Act of 1889-1890, declared void by the Court of Appeals in the Myer case, 92 Va., 809.

The questions presented are: First, is the Standard Oil Company a manufacturer? and, second, can said company sell its oil through an employee or other necessary agency without a peddler's license?

I do not understand from your letters whether there were any proofs upon the trial as to whether the Standard Oil Company was the manufacturer of the oil which is being sold or delivered from its wagons.

From such general information as to its operations as I have derived from the current history of our times, I presume that said company is a manufacturer, in the generally accepted definition of that term, and is such a manufacturer as is contemplated by the Act aforesaid.

Secondly, Can said company sell its oil through an employee or other necessary agency without a peddler's license? If a manufacturer has a right to sell any commodity manufactured by him, I take it that he hs a right to sell it through an employee or other necessary agency, provided the ownership of the commodity sold remains in the manufacturer down to the time of the sale.

The decision of this case, then, as it appears to me, turns upon the question whether the Standard Oil Company is the manufacturer, and, as such manufacturer, owns the oil at the time it is sold and delivered to purchasers from its wagons.

There is nothing in the statute under consideration which requires the person who sells the commodity manufactured by him to sell or deliver it in person. As is the case with farmers and dealers in wood and coal, he may sell and deliver the commodity which he manufactures either in person or by his employees. Every person has the right to sell any article which is the subject of lawful trade, in person or by an agent or employee, and it is a right of which he cannot be deprived, certainly by implication.

The two Acts—section 33 of the Act of 1889-1890, page 217, and section 32 as re-enacted in 1901, page 198—are bunglingly drawn, and are somewhat contradictory and ambiguous in their terms; but a tax cannot be levied, or certainly a penalty imposed, by a law which is so ambiguous and uncertain in its provisions.

I do not think that the change of language in the Act of 1899-1900, page 754, as compared with section 33 of the Act of 1889-1890, page 217, is material, as it seems to me the terms "by him" and "by such persons" are substantially the same.

Very respectfully, WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING "CROP PEST" LAW.

July 5, 1902.

As to the validity of the Act of the General Assembly of Virginia, approved March 28, 1902, entitled, "An Act to amend and re-enact an Act entitled an Act to eradicate the San Jose, or pernicious, scale, a disease affecting fruit trees, and to prevent its spread, approved March 5, 1896, as amended by an act approved February 28, 1898." (Acts 1901-'2, page 378.)

Hon. G. W. KOINER,
Commissioner of Agriculture:

SIR:

The question presented in the minutes of the meeting of the Board of Supervisors of Frederick county, held on the 21st of April, 1902, and dis-

cussed in the opinion of R. E. Byrd, Esq., Attorney for the Commonwealth for said county, copied in said minutes, and reviewed also in the counter opinion of R. T. Barton, Esq., which papers were submitted to me by you upon the 1st instant, has received my careful attention.

The decision of the question involves the consideration of these two inquiries:

1. Has the Legislature the power to require the Boards of Supervisors of the counties to make an appropriation from county funds for any general public purpose, and consequently to make the necessary levy for such purpose?

And 2. Is the eradication of the San Jose scale from the fruit trees of a county a public purpose, for which a tax could be validly levied and an appropriation of public funds constitutionally made?

I.

The answer to the first inquiry is largely given by the Constitution of Virginia in force when this Act was passed.

In section 2 of Article VII. of that Constitution it is provided as follows

"The Supervisors of the districts shall constitute the Board of Supervisors for that county, whose duty it shall be to audit the accounts of the county, examine the books of the Commissioners of the Revenue, regulate and equalize the valuation of property, fix the county levies for the ensuing year, and *perform any other duties required of them by law*."

These Boards are thus made subject to the paramount control of the Legislature as to what they may be required to do.

That the power of the Legislature over these Boards is paramount, within the domain of valid, legislative action, and subject to such constitutional limitations as restrict legislative power, can hardly be questioned. It is fully recognized by the Court of Appeals of Virginia in Roper, &c., *v* McWhorter, &c., 77 Va., where the Court said: "The Board of Supervisors, like every other *quasi* corporate body, being the mere creature of the statute, it has only such powers as are expressely conferred upon it, or necessarily implied, in furtherance of the object of its creation."

These Boards in Virginia are the creatures of the Constitution, but their duties, except as to those prescribed in the Constitution, are such as have been or may be required by law.

The provision of the new Constitution, which will be in effect on the 10th instant, vests equal, if not greater, powers in the Legislature in reference to these Boards.

The following is the language of section 111 of the new Constitution in this regard:

"The Magisterial Districts shall, until changed by law, remain as now constituted; provided, that hereafter no additional districts shall be made containing less than thirty square miles. In each district there shall be elected by the qualified voters thereof one Supervisor. The Supervisors of the districts shall constitute the Board of Supervisors of the county, which shall meet at stated periods, and at other times as often as may be necessary, lay the county and district levies, pass upon all claims against the county,

subject to such appeal as may be provided by law, and perform such duties as may be required by law."

By section 1 of the Schedule, all of the statutes of the State, not repugnant to the new Constitution, are continued in force. So that the above Act of March 28, 1902, if it is a valid and constitutional enactment, is continued in force.

The question as to the limit of legislative power in such matters has most frequently arisen in respect to legislative control of municipal corporations. It will not, I am sure, be contended that the power of the General Assembly in such cases is less restricted than it is in reference to prescribing the duties and regulating the action of Boards of Supervisors. It may, indeed, be fairly claimed that the legislative power in reference to such Boards, which are held to be merely *quasi* corporate bodies, is broader and more complete than it is in regulating the affairs of a great city—for instance, a metropolis like the city of New York, or a great municipality like Chicago, Philadelphia or Indianapolis.

The exercise of such powers as to Boards of Supervisors, of County Commissioners, does not seem to have often been seriously questioned.

In his work on Constitutional Limitations, Judge Cooley says: "The Legislature has undoubted power to compel municipal bodies to perform their function as local governments under their charters, and to recognize and meet the duties and obligations properly resting upon them as such, whether they be legal or merely equitable and moral, and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed expedient." (Cooley's Constitutional Limitations, page 283.)

This strong statement of the law seems to be fully sustained by the cases of Guilford v. Supervisors of Chenango, 13 N. Y., 113, and Sinton v. Ashbury, 41 Cal., 530, cited by the learned author.

In his discussion of this subject, Judge Dillon says: "The legitimate authority of the Legislature over municipal corporations extends to *making provisions concerning their funds and revenues;* and the authority is not abridged because the purpose to which the revenue is to be appropriated is specified in the charter; and the ground for the doctrine is that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes." (1 Dillon's Municipal Corporations, sec. 62.)

If, in view of the language of the old and the new Constitutions, there could be any question as to the power of the Legislature to prescribe, direct and control the duties and actions of Boards of Supervisors, the authorities would settle that question in the affirmative.

II.

Is the eradication of the San Jose scale such a public purpose as will sustain an act requiring an appropriation of public funds of Frederick county, or the levy of a tax therefor?

It is upon the negative of this inquiry that I understand Mr. Byrd to chiefly rely in his criticism of the Act under consideration.

While there is, in my view, no question as to the power of the General Assembly to require the Boards of Supervisors to make an appropriation for a public object, I accord with Mr. Byrd's contention that it must be a *public* object. It must be an object of such general public interest as the General Assembly could make the subject of its own direct enactment.

Taxes, whether general or local, can be levied only for public purposes.

The question as to what is a public purpose has to be determined by the Legislature; and while "its determination on this subject is not absolutely conclusive," "the highest consideration" should be paid to its exercise of its legislative power.

"PRESUMPTION IN FAVOR OF LEGISLATION.—It is not inconsistent with this doctrine that in every instance the highest consideration should be paid to the determination of the Legislature that a tax should be laid. It is not lightly to be assumed that its members have come to the examination of the subject with any other than public motives, or that they have failed to give it due investigation or reflection. The presumption, on the other hand, must always be that they have considered it with honesty and fair purpose, and that their action is the result of their deliberate judgment. And with all these presumptions tending to support the legislative action, it would seem but reasonable and proper that the courts should support it when not clearly satisfied that an error has been committed. This is the general rule in constitutional law when the validity of legislation is involved, and it is applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid. For, in the first place, there is no such thing as drawing a clear and definite line of distinction between purposes of a public and those of a private nature. Public and private interests are so commingled in many cases that it is difficult to determine which predominates; and the question whether the public interest is so distinct and clear as to justify taxation is often embarrassing to the Legislature, and not less so to the judiciary." (Cooley on Taxation, pages 105-6.)

Judge Cooley lays down this rule:

"To justify the Court in ousting the proceedings and declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at first blush."

While qualifying this broad statement of the law, in its application in some cases, Judge Cooley's discussion of the subject does not weaken the doctrine as applied to this case. The criteria are that the tax or the appropriation shall be for a public purpose and promise benefit to the locality taxed.

At page 157 of his book on Constitutional Limitations, Judge Cooley says:

"Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where under pretence of a lawful authority, it has assumed to exercise one that is

unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives."

I beg leave also to call attention to the following decisions:

Dennis *v.* Maynard, 15 Ill., 477, where the Court said: "The public, county and township funds are under legislative control." See, in addition, 11 Ill., 202, and 12 Ill., 1. It was further decided in Dennis *v.* Maynard that the Legislature could require the building of a bridge by a general county tax or by a precinct or township tax.

Love *v.* Schenck, 12 Ire. Law, 304.
Love *v.* Ramseur, Id., 328.
Young *v.* Hall, 9 Nevada, 212.
People *v.* Ingersoll, 58 N. Y., 1.
People *v.* Fields, Id., 149.
Mayor *v.* National Bank, 111 N. Y., 446.

And, in the case of Indianapolis *v.* Home for Friendless Women, 50 Ind., 215, the Court said: "The Act concerning the application of certain fines, etc., collected in the enforcement of certain city ordinances in cities having incorporated homes for friendless women, applying such fines, etc., to the support of such institutions, is not unconstitutional. The Indianapolis Home for Friendless Women is so far a public corporation or institution that an appropriation by the Legislature of certain fines, etc., collected for the violation of certain city ordinances, to its support, is not the appropriation of money to a private purpose."

The considerations forcibly presented by Mr. Byrd would raise questions of no little difficulty but for the great weight that is given to the judgment and action of a Legislature in such cases.

Upon consideration of the principles and authorities mentioned above, I am forced to the conclusion that the destruction of the San Jose scale, which is said to threaten with ruin the orchards, fruit trees, and the principal fruit interests of Frederick county, is a "public object;" that the Act of March 28, 1902, is constitutional and valid, and that it will be the duty of the Board of Supervisors of Frederick county to comply with the requirements of that Act.

Of course, it will be for the Board of Supervisors to decide what amount will be necessary and proper to be appropriated "for the treatment and eradication of the above-named insect pest," but it will doubtless, as it ought to do, fairly exercise this discretion for the purpose of effectuating, and not for the purpose of defeating the objects of the Act.

Very respectfully,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING REMOVAL OF SCHOOL TRUSTEE FROM OFFICE.

July 25, 1902.

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

DEAR SIR:

In response to your inquiry, to-day submitted to me, as to the circumstances under which a district school trustee can be removed from office, I beg leave to say that, under the fourth clause of section 22 of the School Law, the School Trustee Electoral Board of each county has the power of removing any school trustee who fails to discharge the duties of his office according to law. The section referred to evidently contemplates that there shall be an investigation, of which, of course, it is due to the trustee that he should have notice, as well as of the charges preferred against him. In conducting such investigation and trying a school trustee upon any charge, the Board discharges a judicial function, and can only act upon legal evidence. Of course, the accused trustee should have notice of the charge or charges against him, and should be given a fair opportunity to defend himself against the same. I understand that this has been heretofore the ruling of the Superintendents of Public Instruction, in such cases, and it is certainly in accordance with the spirit of the law and legal precedent.

Very truly and respectfully,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING TRANSPORTATION OF CERTAIN OFFICERS.

August 2, 1902.

Dr. W. F. DREWRY,
Superintendent Central State Hospital, Petersburg, Va.

MY DEAR SIR:

Your favor of the 28th ultimo, forwarded from Richmond, has been received and considered.

Section 1306 of the Code is confined entirely in its provisions to contracts for the transportation of convicts, insane or other persons who are cared for by the State, and the Sheriffs and necessary guards to and from the Penitentiary and the several asylums.

It does not include or relate to the transportation of directors or other officers, or employees of any hospital, when traveling on business pertaining to the same, except when going for, or bringing patients to the hospitals.

I am very respectfully yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING FEES OF COMMONWEALTH'S ATTORNEY IN FELONY CASES.

August 1, 1902.

R. J. ROOP, *Esq.*,
Attorney for the Commonwealth, Christiansburg, Va.:

DEAR SIR:

Your favor of the 1st instant has reached me here.

The question you mention has arisen repeatedly, as I understand, both before and since I came into office; and it has been decided by the Auditor before my encumbancy, and, after consultation with me, since I came into office, that under sections 3527 and 3528, as amended by the Acts of 1897-'98, page 868, and 1895-'96, page 670, the Commonwealth's Attorney is entitled to only one fee of $10.00 for each case of felony tried by him, whether it be against one or any number of defendants jointly tried together. If there are separate trials, though one indictment, each trial, I would say, should be considered a distinct case, but where there is a joint trial there can only be one fee taxed for the Attorney for the Commonwealth. This has been the Auditor's ruling, and I think it is correct.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

COMPENSATION OF COUNSEL ASSIGNED TO DEFEND PRISONER.

August 12, 1902.

Mr. A. N. KILGORE,
Norton, Va.:

DEAR SIR:

Your favor of the 7th instant has been received. I know of no law which authorizes the court to allow, or requires the Board of Supervisors to pay, any fee to counsel assigned by the court to defend a criminal who is unable to employ counsel to defend himself.

It is certainly right and proper that reasonable and just provision should be made for the payment of a just compensation to counsel for services in such cases, but none is made by our present statute. I have known of a great number of cases in which counsel have rendered valuable services when assigned to defend pauper prisoners, but have never known any case in which any compensation has been made for such service.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

ALLOWANCE TO COUNTY TREASURERS FOR HANDLING SCHOOL FUNDS

August 14, 1902.

Hon. JOS. W. SOUTHALL,
Superintendent of Public Instruction, Richmond, Va.

DEAR SIR:

The question presented in the letter of Mr. F. H. Huffman, Superintendent of Schools of Craig county, to you, dated the 21st ultimo, and referred to me by you by your endorsement thereon, received since my arrival here from Richmond, is one which must have been acted upon very many times and long since settled, for there must have been several hundred settlements made with Treasurers of counties which involved the decision of this question. The decision of the question is determined by the provisions of sections 68, 69 and 70 of the School Laws, and not sections 64 and 65, as mentioned by Mr. Huffman.

By section 70 of the School Law it is provided that "the County Treasurer shall be allowed for his service in receiving and disbursing the county school levies, including all moneys collected by order of the county authorities for any purpose, the same rate of compensation allowed by the preceding section for receiving and paying over the revenues." * * * * * By the preceding section (section 69) he is allowed for receiving and paying over the State revenues in counties in which the revenue does not exceed $10,000 five per centum, *and three per centum* additional on all revenue remaining unpaid on December 1 and collected by him.

As I understand the facts as stated by Mr. Huffman, in Craig county the total county revenue, including school levies and all moneys collected by the county authorities for any purpose, does not aggregate $10,000. Under this state of facts, in my opinion, the Treasurer would be entitled to three per cent. upon all county revenues (including school levies) remaining unpaid on the first day of December, and thereafter collected by him, in addition to the five per cent., as prescribed in section 69.

The provisions of the law are not quite as clear and explicit as would be desirable, and I had hoped to have been able to have had a conference with you upon the subject, and to learn what rule had been adopted in regard to this matter in the vast number of settlements which must have made with such County Treasurers in the past; but as I understand the law the effect of it is as I have stated. It is a question as to which my opinion is, of course, only advisory, and subject to your own better judgment, fortified as it doubtless is by numerous rulings by yourself and your predecessors.

I have the honor to be

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING COMPENSATION OF DIRECTORS OF STATE HOSPITALS.

August 28, 1902.

JOHN G. OSBORNE, *Esq.*,
President of the Board of Directors of the Southwestern State Hospital, Radford, Va.:

DEAR SIR:

The question submitted to me by your favors of the 14th and 21 ultimo has been carefully considered.

The Act approved January 27, 1898 (Acts of that session of the General Assembly, page 137), provides: "That the Board of Directors of the several State Hospitals shall receive their actual expenses (itemized) incurred in the discharge of their duties in attending the meetings of said Boards or Committees;" but "That no mileage per diem, or other compensation whatever, shall be allowed."

The Act approved April 2, 1902, page 755 of the Acts of that session, authorizes the Board of Directors of the Southwestern State Hospital to audit claims for certain expenses incurred in conducting an investigation of certain charges made against the management of the institution that are not provided for in the general laws governing said hospital, and to pay them out of the funds of said institution in the same manner that other claims are paid.

The question referred to me is whether the last-named Act empowers the Board of the Southwestern State Hospital to allow members of said Board compensation for the time devoted by them and the extraordinary services rendered by them in connection with the protracted investigation which they conducted at the direction of the Governor.

After a consideration of the Acts just mentioned, in connection also with the provisions of the Act approved January 27, 1896 (page 177 of the Acts of that session of the General Assembly), I am forced to the conclusion that the Act of April 2, 1902, does not empower said Board of Directors to allow the members of the Board compensation in any sense, or for any service whatever, however meritorious or valuable.

In the Acts referred to, the General Assembly manifestly have drawn a distinction between "expenses" and "mileage per diem, or other *compensation.*"

The Act of January 27, 1898, in the most sweeping and comprehensive terms prohibits the Board of the State Hospital from allowing any "mileage per diem or other compensation whatever."

It will be observed that the Act of April 2, 1902, does not purport to be an amendment of the Act of January 27, 1898, nor does the Act of April 2, 1902, in my opinion, operate as an amendment of the former Act in the particular referred to.

In view of the explicit prohibition of the second section of the Act of January 27, 1898, it seems to me that the power to allow the Board com-

pensation could not be inferred or implied from a grant to the Board of the power to audit claims for certain extraordinary "expenses," and to pay same.

In order to obtain such remuneration as may be just and reasonable for the valuable, painstaking and laborious services which were doubtless rendered by the members of the Board in conducting said investigation, it will, I think, be necessary to obtain from the General Assembly an Act expressly authorizing or providing for such payment.

I have the honor to be

Very truly and respectfully yours,

WILLIAM A. ANDERSON,
Attorney-General

CONCERNING CERTAIN OYSTER GROUNDS.

September 1, 1902

HENRY M. TYLER, *Esq.*,
Member of the State Board of Fisheries:

DEAR SIR:

The inquiries which, acting on behalf of the State Board of Fisheries, you submitted to me for my opinion, have been carefully considered.

1. Upon the principal question presented, I understand the following to be the facts:

In July, 1900, W. T. Mayo, Robert Murphy, and Thomas B. Murphy, all residents of Virginia, applied, respectively, to J. H. Chandler, Oyster Inspector of Westmoreland county, each for the assignment and lease to him of 200 acres of oyster ground in Nomini and Curnoman Bays, designating in general terms the location of the bottoms for which they applied.

Their applications were, as you inform me, regularly made, and legal notice thereof was given and published by the Inspector, as required by section 2137 of the Code, as amended by the Acts of 1891-'2, page 596, and 1893-'4, page 842.

The Inspector reported the applications to the Board of Fisheries, and the Board, at its meeting on the 15th day of August, 1900, decided that no part of the ground applied for having been set apart and designated in the official report and survey made by J. B. Baylor, in pursuance of the Acts of February 29, 1892, and March 2, 1894, as "natural oyster beds, rocks and shoals," all of said grounds were open to location, assignment and lease under the Act of 1893-'4, page 842, and said Board instructed said Inspector to assign and rent out all of said grounds.

The Inspector thereupon directed the Surveyor, J. W. C. Davies, to survey for the applicants the several parcels of said oyster grounds applied for by them, respectively; and the Surveyor had commenced, but had not completed the survey, when, in September, 1900, his work was stopped by the injunction awarded in a chancery suit instituted in the Circuit Court of said county by Doleman and others *v.* said Inspector and said applicants.

While that injunction was still in force, the Act of the General Assembly of Virginia "To lay off, designate and survey the natural oyster rocks, beds and shoals in Nomini and Curtioman Bays," &c., became a law, by the approval of the Governor, on the 2d of April, 1902.

On the 28th of June, 1902, said injunction was dissolved, and the suit in which it had been awarded dismissed by a final decree, from which no appeal has been taken.

It is unnecessary to mention the recitals of the preamble, or the provisions of the Act of April 2, 1902, with which the members of your Board are familiar.

The principal question presented is: Whether said applicants have acquired such vested rights in respect to the parcels of said grounds embraced in their respective applications as to entitle them to have the survey and assignment and lease to them of said grounds completed under the Acts in force when their applications were made?

The question is by no means free from difficulty. I have been able to find no precedents in Virginia which shed light upon it; nor any decision elsewhere directly in point.

In a careful search, though, perhaps not an exhaustive one, I have found no authorities which discuss with any thoroughness the doctrine of inchoate rights in the phase of that question which is of interest to us in this inquiry.

Accepting the recitals of the preamble of the Act of April 2, 1902, as true, which we are constrained to do in considering such a measure, that law was clearly intended to be a *curative* enactment, and was, *upon that state of facts*, a valid and appropriate exercise of the legislative power, particularly as it contains this saving proviso: "That none of the provisions of this Act shall interfere with any vested rights in planting ground which any citizen of the Commonwealth may have acquired under laws now in force." If the applicants have acquired vested rights by reason of the transaction above detailed, their rights are expressly saved to them by the above proviso, as they would have been in respect to valid contractual rights, by the prohibition of the United States Constitution, had that clause been omitted.

The decision of the question turns upon whether a valid, complete, mutually enforceable and binding contract was entered into between the State and said applicants.

Two essentials to a valid and binding contract are a valuable consideration, and mutuality. If the status of a transaction is such that either party may withdraw from it, it is not such a contract. It is practically merely a negotiation, or a naked option, "*nudum pactum*," as, for instance, a mere license.

Now, in this case, I take it, that had any or all of these applicants decided not to take the lease and so notified the Inspector at any time before a survey was made they could have withdrawn their applications. At any rate, I am at a loss to know how they could have been required to go on and complete the business. The question is, When did the offer made by the State, and its acceptance by the applicants, become absolute and irrevocable?

However this may be, and my mind is by no means decided about it, I am strongly inclined to the opinion that, had the Act of 1902 been passed before the applicants had incurred any expense, or paid, or become responsible for, any expenditure, they would have had no vested rights in the premises. The

Inspectors would not, under such circumstances, have been justified in going on and having the grounds surveyed and allotted in the face of such an Act

But here, as I understand the facts, the survey, for the cost of which the applicants were liable, had been actually begun upon their account

This, it seems to me, constitutes a valuable consideration, which gives each of the applicants by whom this expense was incurred a right to have the contract thus confirmed carried out by the State or her agents

The insignificant value or amount of the consideration is, of course, immaterial. The fact that a man has, in pursuance to an offer made to him, and accepted and acted upon by him, in good faith, incurred an expenditure, or liability for an expenditure, however small, is sufficient to constitute a valuable consideration.

I answer the questions stated above, which includes both inquiries as formulated by you, affirmatively as to each of said applicants who sustain this relation to the transaction.

I beg leave to say, therefore, that, in my opinion, such of the applicants referred to as have, prior to the passage of the Act of April 2, 1902, paid, or become liable to pay, for the cost of the surveys of the grounds embraced in their respective applications, actually incurred, have acquired such vested rights in said planting grounds, that they have a contract right to have the assignments and leases to them, respectively, completed

This opinion is, of course, predicated upon the above state of facts, and upon the assumption, which I am informed is in accordance with the facts, that applicants were irrevocably bound to accept the assignment when surveyed by the Surveyor and allotted to them by the Inspector If the applicants have the right to decline to accept such assignment when made, the transaction remains *in fieri*, and there was, it would seem, no completed contract, and it is not certain that, under such circumstances, any vested rights were acquired thereunder.

The residue of the bottoms of Currioman and Nomini Bays, not embraced in such applications, and incomplete surveys, will, of course, be subject to the operation of the Act of April 2, 1902, and will not be open to location and assignment until after the survey provided in said Act shall have been made

Very respectfully and truly,

WILLIAM A ANDERSON,
Attorney General

NOTE.

Some of the authorities examined:

Addison on Contracts.
Wharton on Contracts.
Bishop on Contracts.
Cooley's Constitutional Limitations.
Merrill *v.* Sherburne (1 N. H., 199).
Rich *v.* Flanders (39 N. H., 304).
Franklin County Grammar School *v.* Bailey (10 L. R. A., p. 405)

English and . ·erican Encyclopædia of Law.

Antoni *v.* Wi'ght (22 Gratt., 833).

Roberts *v.* Cooke (28 Gratt., 207), and other Virginia cases. A number of cases reported in Lawyers' Reports, Annotated.

United States *v.* Mayor, etc., of New Orleans (103 U. S., 358).

Dartmouth College Case (4 Wheat, 518), and other cases decided by the Supreme Court of the United States.

CONCERNING TAX ON NOTARY'S SEAL.

September 17, 1902.

W. E. HOWLE, *Esq.*,
Notary Public, Fergusson's Wharf, Va.:

DEAR SIR:

Your favor of the 8th has been received.

Section 589 of the Code provides that "No tax shall be charged when a seal is annexed to any paper or document to be used in obtaining the benefit of a pension, revolutionary claim, money due on account of military services or land bounty under any Act of Congress, or under any law of this or any other State, or when a seal is annexed by a notary to an affidavit or deposition."

In all other cases, when a seal is affixed, the officer must affix the same upon the adhesive stamp provided for the purpose.

With the section above cited as his guide, he must determine whether the paper to which the seal is affixed comes within the exceptions named. If he is of opinion that no stamp is required, he must certify such to be the fact.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING TAX ON DEEDS, &C.

September 26, 1902.

Col. MORTON MARYE,
Auditor of Public Accounts, Richmond, Va.:

SIR:

I have examined the agreement, dated June 18, 1902, between the Virginia Passenger and Power Company, Virginia Electrical Railway and Development Company, and the Westhampton Park Railway Company, in reference to the question which you submitted to me, viz., whether that instrument is subject to a tax upon its recordation.

The Act of the General Assembly of Virginia, approved February 9, 1901, incorporating the Virginia Internal Improvement Company, authorizes *that* company to consolidate and merge with any other company, and provides that such consolidation shall take effect when the agreement therefor shall be lodged in the Clerk's Office of the Hustings Court of the city of Petersburg.

The agreement under consideration, however, is one for the consolidation and merger, not of the Virginia Internal Improvement Company, but of other companies not included in the terms or meaning of section 7 of the charter of the Virginia Internal Improvement Company.

This circumstance is, however, immaterial to the consideration and decision of the question you submit. Nor is it necessary to consider the various transmutations of the several companies mentioned in the letter of Mr. M. M. Martin, general counsel for the Virginia Passenger and Power Company.

Responding to the phase of the question as discussed by Mr. Martin, I beg leave to say that no tax is imposed, under the laws of Virginia, upon the filing or lodging of an instrument of this character with the Clerk of any court of record.

And now, answering the question propounded by you, I have to advise you that, on examination of this instrument, I find that it is not only an executory agreement as to some of its provisions, but as to others an absolutely executed agreement, and in effect a conveyance and grant of "all of the works, property, franchises, rights, privileges and immunities of each and all of said three companies" to the Virginia Passenger and Power Company, "without further act or deed." (See article 9 of said agreement.)

It will be thus found, on examination, that the instrument is far more than a mere agreement of merger and consolidation, but will operate as an actual conveyance of all of the property of the granting companies to the grantee company.

There is a tax, therefore, upon its recordation, and it is that prescribed by section 13 of the General Tax Law of the State, as amended by the Act approved March 7, 1894 (Acts 1893-'4, p. 903).

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General

CONCERNING LEE CAMP SOLDIERS' HOME.

October 2, 1902.

E. J. BOSHER, *Esq.*,
Chairman of Executive Committee
for the Board of Lee Camp Soldiers' Home.
Richmond, Va.:

DEAR SIR:

Your favor of the 1st instant, with enclosures, has been received.

I have examined the charter of the Soldiers' Home, and do not find that it confers upon the governing body of the Home the authority to establish a military government over its inmates, with the power of imprisonment for violating the regulations adopted by the Board of Visitors.

Such a power would have to be expressly conferred in unmistakable terms.

While it is true that under article 4 of the Regulations each inmate of the Home must have signed an "obligation to abide by and obey all rules made for its government and the order of all officers in authority over the Home, upon pain of dismissal for any violation of such rules or disobedience of such officers," it will be observed that this article prescribes the penalty, and limits it to dismissal." But a man cannot be kept in prison, even if he has agreed that he shall be imprisoned, unless he is confined by due process of law. A consent of that kind, even if given under the most solemn circumstances, is not binding, because a man cannot be deprived of his liberty except for some violation of law and under due legal process.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney-General.

CONCERNING SCHOOL TRUSTEES.

October 18, 1902.

Hon. JOSEPH W. SOUTHALL,
Superintendent of Public Instruction, Richmond, Va.:

DEAR SIR:

The questions submitted in the letter to you from Mr. W. F. Fox, Superintendent of Schools of the city of Richmond, dated the 15th instant, a. referred by you to me, have been considered in connection with the law, and after a full conference with Mr. Fox. In reply to your inquiry, I beg leave to say:

1. School Trustees of cities are, in my opinion, city officers.

2. Construing section 823 of the Code according to its punctuation as published in the authorized edition, all officers—certainly all city officers—are prohibited from contracting with the city or with any of its departments, or from furnishing supplies to the city or to any of its departments.

3. Responding to your endorsement upon the letter of Mr. Fox, I beg leave to say that section 109 of the School Laws (section 1472 of the Code) has no applicability, as I understand from Mr. Fox, to the case to which his inquiries relate, as the supplies in the case that he refers to were not furnished to the schools, but by a School Trustee of the city of Richmond to a department of the city government entirely disconnected from the schools.

I have the honor to be

Very truly and respectfully,

WILLIAM A. ANDERSON,
Attorney-General.

The mass of written opinions not embraced in the above compilation either relate to matters of casual interest, or are covered by those herein set forth.

Respectfully submitted,

WILLIAM A. ANDERSON,
Attorney-General.

November, 1902.