

ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1904

RICHMOND

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

1904



# REPORT.

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## COMMONWEALTH OF VIRGINIA, OFFICE OF THE ATTORNEY-GENERAL.

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

SIR:

The following report contains a synopsis of the more important transactions of this office during the year ending October 31, 1904, and is submitted as required by law.

The twelve months covered by this report have been somewhat eventful, on account of the extraordinary importance to the Commonwealth of some of the cases which have been decided during the year.

The most important of these were the two cases involving the validity of the Constitution of Virginia, and particularly of the provisions of the suffrage article therein, which cases, after full argument, were decided by the Supreme Court of the United States favorably to the State in April last.

The case next in importance, perhaps, was the "demurrage suit" of the Atlantic Coast Line Railway Company and other railroad companies against the Commonwealth, involving the jurisdiction, the powers, and, in a large degree, the practical usefulness of the State corporation commission, decided by the Supreme Court of Appeals of Virginia at its March term, 1904.

Another case of large interest to the State was the case of the People's National Bank of Lynchburg against Morton Marye, auditor of public accounts, pending in the Supreme Court of the United States, and involving a very large sum of money, and testing the validity of the State tax on the shares of the capital stock of national banks. This case, which had been argued in October, 1903, was decided, on November 30, 1903, adversely to the banks.

Another case of very great moment to the State was that of *Taylor vs. Commonwealth*, argued before and decided by the Supreme Court of Appeals of Virginia since my last report, in which case the title and ownership of the Commonwealth in and to the beds of all the tidewater streams and bays of the State is finally settled.

Another case of no little interest and importance was the appeal of the Old Dominion Steamship Company from the order of the State corporation commission, assessing that company with taxes upon its steamboats and other craft which are engaged exclusively in navigating the waters of this State, and, although belonging to a non-resident corporation and enrolled outside of Virginia, are actually domiciled within this State, or have their actual *situs* within her borders. This case was decided by the Supreme Court of Appeals of Virginia, at its last spring term, in favor of the right and power of the State to tax all such property. An appeal has been taken to the Supreme Court of the United States.

The State is to be congratulated that, in each of these cases, the courts have so far sustained the rightful powers and jurisdiction of this Commonwealth.

#### CASES IN SUPREME COURT OF UNITED STATES.

1. The People's National Bank of Lynchburg *vs.* Morton Marye, auditor (noted above). Decided November 30, 1903, in favor of the Commonwealth.

2. William H. Jones and others *vs.* A. J. Montague, governor of Virginia, and others, constituting the State board of canvassers. Prohibition case.

3. William S. Selden and others *vs.* same defendants. Injunction suit.

The two last named suits were brought to impeach, as invalid, the Constitution of the State, and particularly to attack the franchise article thereof as being in conflict with the Fifteenth Amendment to the Constitution of the United States. Pursuant to chapters 40 and 202 of the Acts of the General Assembly of Virginia, session of 1902-03-04, Mr. Frank W. Christian was retained as counsel with me for the State, and rendered most efficient services in the preparation of the defence to these suits and in their argument, both upon the motion to dismiss and upon the final hearing of these causes. Although these cases were decided upon a jurisdictional question, the decision effectually disposed of them and of any suits of like character.

4. The Douglas Company *vs.* Stone, late treasurer of Smyth county, Va., involving the right of the treasurer of Smyth county to sell the timber on a tract of land claimed by the appellant, to satisfy certain unpaid State and county taxes for which the land was returned delinquent. This case, which had been argued in October, 1903, was decided, in November, 1903, in favor of the Commonwealth.

5. Old Dominion Steamship Company *vs.* Commonwealth. This is an appeal from a recent decision of the Supreme Court of Appeals of Virginia, by which court it was held that water craft plying exclusively the waters of Virginia is liable to taxation in this State, notwithstanding the fact that it is owned by a Delaware corporation, and has been registered or enrolled, under the act of Congress, in a port outside of Virginia. This case will probably not be reached upon the docket of the Supreme Court of the United States before next spring. It involves directly a considerable sum, and a principle which, if decided adversely to the contention of the State, will mean a very large present and future loss of revenue to the State as well as to the cities of the State where such vessels are now subject to taxation like other personal property having its *situs* for taxation in cities of this Commonwealth; for, if the contention of the Old Dominion Steamship Company prevails, it will only be necessary for the owners of vessels plying Virginia waters to get a charter from Delaware or some State other than Virginia, and have their boats enrolled in a port of the State granting the charter, and they will escape all taxation in this State although they may be in fact located here, conduct their entire business here, and derive entirely from the people of Virginia the earnings they make for their owners.

#### SUPREME COURT OF APPEALS OF VIRGINIA.

Since my last report, the following cases have been *argued and submitted*:

1. Ellinger *vs.* Commonwealth. From circuit court of Accomack county. Affirmed. The decision of this case established the title of the Commonwealth to over two thousand acres of land and water, which Mr. Ellinger claimed had been vested in him.

2. *Commonwealth of Virginia and County of Amherst vs. Indiana F. Williams's Executor*. From circuit court of Amherst county. Reversed. The decision in this case determined that bonds, stocks and other evidences of debt of foreign corporations, owned by a citizen and resident of this State, are subject to taxation in the county or corporation of this State in which the owner resides, although the evidences of ownership be deposited for safe-keeping outside of the State; that, upon the death of the owner, the same are taxable in the county or corporation of this State in which the owner resided at the time of his death, although his executor does not get actual possession of them until after the first day of February in the year for which they are assessed; and, finally, that, until an estate is administered, it is assessed for taxation in the name of the executor, and, although the property of a legatee is exempt from taxation, this exemption does not attach to a legacy in the hands of an executor before the estate is administered and the legacy is paid over.

3. *Lewis vs. Commonwealth*. From corporation court of the city of Norfolk. The charge was keeping open a saloon on Sunday (but not selling liquor). The judgment of the corporation court, finding the defendant guilty, was *affirmed* by a divided court,—no opinion being delivered.

4. *Atlantic Coast Line Railroad Company and others vs. Commonwealth*. From State corporation commission. Affirmed. Appellants sought relief from the order entered by the commission, fixing demurrage rates, etc. They were represented by many of the ablest lawyers in the Commonwealth. The Norfolk board of trade employed Messrs. Jeffries & Lawless and A. C. Braxton to seek to have the order of the commission sustained. I desire to acknowledge the exceedingly valuable services rendered by these gentlemen. The case was one of the very greatest importance, in that it involved the question as to the power of the State corporation commission by a general act to regulate the storage, demurrage and car service charges which may be collected by transportation companies, or to be paid by them for failure to promptly deliver cars, or to promptly transport freight, and to prescribe rules and regulations governing the same generally. The decision in this case practically established the authority of the commission to reasonably control this entire subject.

5. *Taylor vs. Commonwealth*. From circuit court of the city of Richmond. Affirmed. This also was a case of very great importance, as it involved the title and dominion of the Commonwealth over the millions of acres of land underlying the bays, rivers, creeks, and estuaries of the tidal waters within her territorial boundaries. I wish to make acknowledgement to Isaac Diggs, Esq., counsel for the Colonial Water Company, which had an immediate interest in the case, for valuable assistance in its argument. The decision in this case established the title of the State to the navigable waters and the soil under them, beyond low-water mark, subject only to the public right of navigation.

6. *City of Petersburg vs. State Corporation Commission*. Petition for a mandamus to compel the commission to locate at the city of Petersburg, for purposes of taxation, certain railroad property the *situs* of which, for purposes of taxation, the board of public works (of which the commission was the successor) had fixed at the city of Richmond. Mandamus refused.

7. *American Surety Company vs. Commonwealth*. From State corporation commission. Affirmed. The decision in this case determined that appellant should pay a charter fee as a prerequisite to the right to do business in this State, whether or not the laws in force at the time when appellant began business in this State required such a fee.

8. *Johnson vs. Commonwealth*. From corporation court of city of Portsmouth. Reversed. The indictment charged accused with both forgery and uttering; and it was decided that the jury should have been kept together.

9. *Old Dominion Steamship Company vs. Commonwealth*. From State corporation commission. Affirmed. This case involved the right of the Commonwealth to tax a species of property important and steadily increasing in volume and value,—the vessels which ply its waters, receive the protection of its laws and conduct a business the profits of which are derived from the people of the State. It was decided that the vessels of a non-resident corporation, although enrolled under act of Congress at some port outside of Virginia, and engaged, in part, in interstate commerce, may be taxed by this State where it appears that they ply entirely between ports within this State, etc., though bills of lading and tickets are issued to points outside the State, etc.

10. *Pardee vs. Commonwealth*. From circuit court of Wise county. Reversed. It was decided that February first is the time for ascertaining the ownership and value of property for taxation in this State, and that this date is not changed as to mineral lands.

11. *Mitchell vs. Commonwealth*. From corporation court of city of Norfolk. Reversed. The accused was charged with forgery and uttering. This case was ruled by the decision in *Johnson vs. Commonwealth*, mentioned above; therefore, I confessed error.

12. *Agner vs. Commonwealth*. From corporation court of city of Buena Vista. Reversed. Accused was charged with selling liquor in a "local option" district.

13. *Immigration Society of Albemarle county vs. Commonwealth*. From corporation court of city of Charlottesville. Affirmed. Appellant was held to be liable for the payment of a license tax as a land agent.

14. *Bowles vs. Commonwealth*. From circuit court of Alleghany county. Reversed. Accused was charged with murder in the first degree.

15. *Burdett vs. Commonwealth*. From circuit court of Nelson county. Accused was fined and sentenced to jail for contempt of court. The case was argued at Staunton, in September, but has not yet been decided.

16. *Curtis, sheriff of Elizabeth City county, vs. Morton Marye, auditor of public accounts*. Petition for a mandamus to compel the auditor to issue a warrant in payment of an account of said sheriff, which had been approved by the judge of the proper court. This was a case to test the question whether the auditor had any discretion in the matter of paying accounts after the same had been approved by the judge of the proper court, provided he (the auditor) found the accounts to be incorrect. Mandamus refused.

This was an extremely important case. Hundreds of claims, approved by the judge of the proper court, are rejected every year by the auditor, either because the Commonwealth is not chargeable with them, or because they contain erroneous items. By rejecting such claims, or causing them to be decreased to the amount provided by law, the auditor and his efficient auditing clerks save the Commonwealth probably thousands of dollars. Had the mandamus been awarded in this case, it would have meant that not one of these claims could be rejected or diminished by the auditor. I do not intend any reflection on the judges of the Commonwealth when I say that accounts which they approve are often not chargeable to the Commonwealth at all, and, in other instances, contain items which exceed the sum allowed by law. It is probable that they expect these accounts to be reviewed by the

auditor's office; and, again, they may, and often do, differ with the auditor as to the correctness of many of these accounts. However this may be, it was fortunate for the Commonwealth's treasury that the mandamus was refused in this case. The auditor's finding is in no case final. If he disallows any claim which the claimant is legally entitled to be paid, a remedy is given by petition to the circuit court of the city of Richmond by section 746 of the Code.

THE CASES NOW PENDING IN THIS COURT ARE:

1. Lake Drummond Canal and Water Company *vs.* Commonwealth. From State corporation commission. Appellant company claims to be exempt from taxation. The case will probably be argued at the November term, at Richmond.

2. Norfolk and Portsmouth Belt Line Railroad Company *vs.* Commonwealth. From State corporation commission. Appeal from order of the commission fixing the sum which appellant might charge for weighing cars, etc. This case will probably be argued at the November term, at Richmond.

3. Jones *vs.* Commonwealth. From circuit court of Clarke county. Appeal from a judgment finding the accused guilty of house-burning. This case will probably be argued in January, at Richmond.

4. Interstate Coal and Iron Company *vs.* Commonwealth. From circuit court of Wise county. Appeal from judgment of the lower court, fixing the value of appellant's mineral lands, for purposes of taxation. This case will probably be argued in January, at Richmond.

5. Crall and Ostrander *vs.* Commonwealth. From corporation court of the city of Manchester. Appeal from judgment finding defendants guilty of peddling without a license. This case will probably be argued in January, at Richmond.

6. Kloss *vs.* Commonwealth. From corporation court of the city of Fredericksburg. The question involved in this case is somewhat similar to that presented by the appeal immediately preceding. It will probably be argued in January, at Richmond.

7. Virginia Passenger and Power Company *vs.* Commonwealth. From State corporation commission. Appeal from an order of the commission, requiring defendant company to issue transfers from certain of its lines to other lines operated by it. The case will probably be argued in January, at Richmond.

8. The Mutual Protective Association *vs.* Morton Marye, auditor of public accounts. Petition for a mandamus to compel the auditor to issue said association (the same having been chartered under the laws of Virginia) a license to do business in this State as an assessment insurance company, without first making the deposit of bonds with the State treasurer required by section 1271 of the Code, as amended by acts of 1904, page 317. This case will be submitted, at the November term of the court, on the petition, the demurrer and answer, and the briefs of counsel.

9. Crall *vs.* Commonwealth. From the circuit court of Chesterfield county. The question involved in this case is similar to that presented by No. 5 (above mentioned). It will probably be argued in January, at Richmond.

10. Hill *vs.* Haney. Petition for a writ of prohibition to restrain respondent, who is a justice of the peace in and for the county of Alexandria, from trying a warrant issued against relator, charging him with the commission of a misdemeanor in that part of said county which is within one mile of the city of Alexandria. Relator contends that exclusive jurisdiction for the trial of the said warrant is conferred by

law upon the authorities of the city of Alexandria. This case will probably be submitted, some time during the November term, on the petition, the demurrer thereto, and the briefs of counsel.

CIRCUIT COURT OF THE CITY OF RICHMOND.

*At Law.*

1. Commonwealth vs. Bennett Taylor, clerk Albemarle county. Suit instituted June, 1881.
2. Commonwealth vs. Joseph Mayo, Jr., late treasurer, *et al.* Suit instituted April, 1884.
3. Commonwealth vs. same. Another suit instituted April, 1884.
4. Commonwealth vs. John F. Jones, treasurer Craig county, *et al.* Suit instituted October, 1886.
5. Commonwealth vs. same. Another suit instituted October, 1886.
6. Commonwealth vs. Bennett Taylor, clerk Albemarle county. Suit instituted October, 1886.
7. Commonwealth vs. G. H. Baughman *et al.* Suit instituted November, 1886.
8. Commonwealth vs. John H. Sears, treasurer Mathews county. Suit instituted April, 1887.
9. Commonwealth vs. G. R. Barr, treasurer Washington county. Suit instituted April, 1887.
10. Commonwealth vs. C. H. Ingles, treasurer Henry county, *et al.* Suit instituted October, 1886.
11. Commonwealth vs. same. Instituted May, 1887.
12. Commonwealth vs. same. Instituted also May, 1887.
13. Commonwealth vs. O. B. Thomas, treasurer Fluvanna county, *et al.* Suit instituted February, 1888.
14. Commonwealth vs. W. M. Gray and J. J. Gusler, Washington county. Suit instituted February, 1889.
15. Commonwealth vs. O. D. Foster and R. W. Adams. Suit instituted March, 1892.
16. Commonwealth vs. A. K. Phillips, *et al.* Suit instituted March, 1892.
17. Commonwealth vs. Mary B. Randolph's administratrix. Suit instituted March, 1893.
18. Commonwealth vs. C. R. Randolph. Suit instituted March, 1893.
19. Commonwealth vs. C. H. Ingles, treasurer Henry county, *et al.* Suit instituted October, 1893.
20. Commonwealth vs. Board of Supervisors of Russell county. Suit instituted October, 1899.
21. Commonwealth vs. Board of Supervisors of Bedford county. Suit instituted October, 1899.
22. Commonwealth vs. H. L. Stone and sureties. Motion for judgment, which was duly docketed October 15, 1900.

NOTE:

Nearly all of these cases have been pending for years. Most of them involve matters of little or no moment,—some of them of no interest whatever to the Commonwealth; and in some of the cases the papers have been long since lost or misplaced and cannot be found. I will endeavor to have all or them in which the State has any interest disposed of during the winter session of the court.



The following cases have been instituted since July, 1903:

23. *Richmond, Fredericksburg and Potomac Railroad Company vs. Commonwealth.* Application for correction of an assessment of a franchise tax by the State corporation commission. By the charter of the company, its physical and tangible property and the earnings therefrom are claimed to be exempt from taxation. The company claims that it is thereby exempt also from any tax upon its franchise. The tax assessed amounts to over \$13,000 for 1903, and is likely to increase from year to year with the steadily increasing business of the company. This case will doubtless be disposed of during the winter term of the court.

24. *John A. Parker's administrator and Bernard P. Green's administrator vs. Morton Marye, auditor.* Suit under section 746 of the Code to recover \$172,586.26 from the Commonwealth on account of commissions claimed to be due the petitioners in the matter of the settlement of the claim of Virginia against the United States due for advances made the latter during the war of 1812-15. A demurrer and answer have been filed to the petition. The demurrer will be argued during the fall term of the court, and, if overruled, the testimony of witnesses will be taken in support of and against the claim, and the case gotten ready for trial as soon as practicable.

25. *Richmond Traction Company vs. Commonwealth.* Application for correction of an alleged erroneous assessment by the State corporation commission of the property of the petitioner.

26. *Richmond Passenger and Power Company vs. Commonwealth.* Application for correction of an alleged erroneous assessment of petitioner's property by the State corporation commission.

27. *Virginia Passenger and Power Company vs. Commonwealth.* Application for correction of an alleged erroneous assessment of petitioner's property by the State corporation commission.

28. *John Bailey, Jr., vs. Commonwealth.* Suit under section 746 of the Code to recover the amount of a fine imposed by and paid to a justice of the peace of Charlotte county, upon the alleged ground that the justice had no jurisdiction to try petitioner. A demurrer has been filed to the petition, upon which the case will doubtless be decided.

#### *In Equity.*

1. *Commonwealth vs. Samuel M. Page.* Suit instituted March, 1872.
2. *Commonwealth vs. Walter Millan.* Suit instituted April, 1872.
3. *Commonwealth vs. P. H. Huffman et al.* Suit instituted April, 1873.
4. *Commonwealth vs. J. W. Grantham.* Suit instituted December, 1874.
5. *Commonwealth vs. James Hilton's administrator.* Suit instituted April, 1879.
6. *Commonwealth vs. Martha Goode, etc.* Suit instituted April, 1879.
7. *Commonwealth vs. Spencer D. Ivey, etc.* Suit instituted April, 1879.
8. *Commonwealth vs. J. T. Young.* Suit instituted August, 1884.
9. *Commonwealth vs. A. A. Chapman.* Suit instituted February, 1893.
10. *Commonwealth vs. George Dusner's curator and administrator.* Suit instituted March, 1897.
11. *Commonwealth vs. B. Vandegrift et al.* Suit instituted February, 1898.
12. *T. H. Martin vs. Commonwealth et al.* Suit instituted January, 1902.

#### NOTE:

The same remark may be made as to these cases which was made as to certain of the cases at law which have been pending in this court for so long a time.

13. Richmond, Fredericksburg and Potomac Railroad Company *rs.* Morton Marye, auditor. This is a suit to enjoin the collection of the franchise tax assessed upon the complainant by the State corporation commission, the alleged ground being that the company is by its charter exempt from said tax, which question the court is asked to decide.

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### OPINIONS.

The correspondence of this office is quite large, owing to the numerous letters I receive requesting my opinion upon many different subjects. Even if the law authorized me to give an opinion to citizens and to county, city and town officers, it would be *impossible* for me to do so. Often the inquiries I receive relate wholly to some matter of private right, as to which, of course, it would be improper for me to advise. However, in addition to the opinions given to the officers and boards of whom the law makes me the legal adviser, it has given me pleasure (whenever I could possibly spare the necessary time and attention) to advise numerous other officials and citizens upon subjects which I could with propriety consider.

The following embrace the more important opinions on questions of *public* interest given in writing during the year. They do not embrace, or convey any adequate idea concerning the great number of, written and oral opinions and suggestions communicated, from day to day, to the officers at the seat of government as well as to many local officials and private citizens, concerning matters of transient or special interest and importance.

#### I. REGISTRATION, VOTING, ELECTIONS, ETC.

November 30, 1903.

J. E. CORRELL, *Esq.*,

*Commissioner of the Revenue,*

*Winchester, Va.:*

DEAR SIR:

Your favor of the 27th instant has been received.

The question you submit is answered by the clear and unmistakable language of section 22 of the Constitution, which is as follows:

"No person who, during the late war between the States, served in the army or navy of the United States, or the Confederate States, or any State of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote."

All other citizens have to pay a poll tax as a prerequisite to the right to vote.

No person who served in the Spanish-American war is exempted by the language above quoted. The exemption applies only to those who served during the civil war.

Very truly yours,

May 5, 1904.

F. A. GROSECLOSE, *Esq.*,  
Bristol, Va.:

DEAR SIR:

Your favor of the 3rd this instant received.

1. If you were *assessable* with a poll tax for the three preceding years in Bristol, Virginia, you may *now* go to the commissioner of revenue and get him to assess the same as *omitted* taxes, under section 508 of the Code; then get him to certify the fact of such assessment, take the certificate to the treasurer, and thereupon he will receive the money. This is in accordance with the instructions of the auditor of public accounts, after consultation with me.

2. A man coming of age at any time after February 1, 1903, and on or before February 1, 1904, should first be assessed (if not already so assessed) by the commissioner of revenue for his district with the poll tax for 1904, and, upon furnishing the treasurer with satisfactory evidence of such assessment, as stated above in connection with your case, he will receive the \$1.50, give a receipt therefor which will entitle the party to be registered, if otherwise qualified.

A man coming of age after February 1, 1904, and on or before February 1, 1905, is not assessable with a poll tax for 1904, but the first poll tax with which he is assessable will be the poll tax for 1905. This will have to be paid in advance, before he can register. Unfortunately, the Legislature failed to enact any law authorizing anyone to assess or receive this amount in such a case, and, this being so, it is a question for the courts rather than for the attorney-general. I beg to say, however, that the judge of the hustings court of the city of Richmond and the judge of the corporation court of the city of Portsmouth have both decided that mandamus would lie to compel the treasurer to receive this amount in such a case, on the ground that the Legislature could not deprive any one of his right to register, guaranteed to him by the Constitution, merely by failing to enact a law authorizing some one to receive the amount required to be paid. This amount need not be paid six months before an election.

Very truly yours,

W. H. GRAVELY, *Esq.*,  
Martinsville, Va.:

DEAR SIR:

The acts of Assembly, following section 122 of the Constitution, provide that the mayor and councils of cities and towns shall be elected on the second Tuesday in June.

See acts of 1902-03-04, page 506, section 98; page 923, section 109; page 419, section 1021; page 420, section 1028 a; page 423, section 1033 b; page 743, section 98 (amended); and page 889, section 1033 b (amended).

It seems to me that the provisions of section 109, at page 923 of said acts, in so far as they relate to the election of city and town officers, are *inoperative*, as there is no provision in either the laws or the Constitution requiring *any* officers to be elected at an election to be held on Tuesday after the first Monday in June. The statutes referred to, however, do require the mayors in some instances, and the mayors and councils in other instances, to be elected, as is provided in the Constitution, on the second Tuesday in June.

As there are no officers "required to be chosen" at an election on the Tuesday

after the first Monday in June, there are none to which the provisions of section 109, as amended by the act at page 923, can apply.

This is the only construction which reconciles the apparent conflict between the statutes referred to, and it seems to me to be entirely justified by the terms used in the several acts cited.

This response to your inquiry is given as a personal courtesy, as the attorney-general is not required or authorized (see section 3203 of the Code) to give opinions as to questions of local or municipal concern.

Very truly yours,

September 29, 1904.

Hon. D. Q. EGGLESTON,  
*Secretary of the Commonwealth:*

DEAR SIR:

As I understand the letter of Walter Christian, Esq., clerk of the hustings court of the city of Richmond, addressed to you, and by you referred to me, an answer is desired to the following question:

Can a citizen be required to pay *any* poll taxes *at least six months prior to an election*, before he may be *registered* as a voter?

The answer to this inquiry is furnished by section 20 of the Constitution, which is the supreme law upon the subject. The requirement of that section in this regard is that the citizen, before he shall be entitled to *register*, must have "personally paid to the proper officer all State poll taxes assessed or assessable against him under this or the former Constitution for the three years next preceding that in which he offers to register."

There is no requirement whatever prescribed in the Constitution that a citizen, as a prerequisite to the right to *register*, shall have paid these poll taxes six months prior to any election, or even at any fixed period of time prior to his application for registration. The only requirement is that he shall have paid them before he shall be entitled to be registered. He is, therefore, entitled to be registered, if otherwise qualified, whenever he shall furnish the registrar evidence that he has paid the poll taxes assessed or assessable against him for the three years next preceding that in which he offers to register.

There is an apparent conflict between the provision of the Constitution and the terms of section 73, chapter 346, pages 563-564, acts 1902-03-04. The act just cited does require these poll taxes to be paid "at least six months prior to the election," before the citizen shall be entitled to be registered. But, in such case, of course, the plain provision of the Constitution, being the organic and supreme law of the State upon this subject, must prevail.

It is manifest that the Legislature could not, if it so intended, prescribe conditions for registration and for the exercise of the right of suffrage other than as different from those prescribed in the Constitution.

If the Legislature could require these poll taxes to be paid six months in advance of the election, before the citizen might be registered, then it could require said poll taxes to be paid twelve months in advance of the election.

The provisions of the Constitution, being plain and explicit, must be obeyed and, by their express terms, any citizen who has, *at any time before he applies to be registered*, paid the poll taxes specified, shall be entitled to be registered, if otherwise qualified.

The only provision of the Constitution which requires poll taxes to be paid six months before an election is the provision of section 21, which section relates solely to the right to vote, and not to the right to register. The section just cited prescribes that, after the first of January, 1904, no person shall be entitled to vote in any election (except one who served in the civil war) until and unless he shall have personally paid, to the proper officer, "at least six months prior to the election, all State poll taxes assessed or assessable against him under *this* Constitution, during the three years next preceding that in which he shall offer to vote." In the present year (1904), this provision applies only to the poll tax for 1903, because that is the only poll tax assessed or assessable under the new Constitution for any year preceding 1904.

Very respectfully,

Hon. D. Q. EGGLESTON,

*Secretary of the Commonwealth*

*Richmond, Va.:*

DEAR SIR:

You submit to me the following question:

"A citizen's name is on the treasurer's list of persons whose poll taxes assessable under the present Constitution have been paid at least six months prior to the election. Such poll tax, however, was not in fact personally paid by said citizen. Can this fact be shown, and is it a legal ground for challenging and rejecting the vote of such citizen?"

In reply, permit me to say that section 38 of the Constitution declares that the treasurer's list "shall be conclusive evidence of the facts therein stated for the purpose of voting."

It will be observed that this list is made conclusive evidence as to the facts therein stated only; and the fact as to whether the poll taxes were paid personally by the citizen is not one of the facts required or authorized to be stated in said list.

I am of opinion, therefore, that evidence can be heard, upon the challenge of a vote, to show that the poll tax of the challenged person (though the payment is certified in the said list) was not paid by such citizen personally. If it was paid by him personally (that is, out of his own means), it is easy enough for him to show it, for he can be examined for that purpose under section 127 of the Code as amended and embodied in the present election law.

Fraud can always be shown; and if the poll tax in such case was paid by some person other than the citizen assessed therewith, for the purpose of evading the law and entitling such citizen to vote, such payment is plainly in fraud of the law, and a citizen whose poll tax was so paid is not a qualified voter under the Constitution.

While such is my view, I also am of opinion that the burden of showing that a person whose vote is challenged on this account has not personally paid his poll tax is on the challenger; but section 127 of the election law plainly requires that the judges of election shall explain to every person whose right to vote is challenged "the qualifications of an elector, and may examine him as to the same."

I beg leave to also call attention to section 126 of the election law, which provides that, "Any elector may, and it shall be the duty of the judges of election to, challenge the vote of any person who may be known or suspected not to be a duly qualified voter."

Very truly yours,

## II. SCHOOL LAWS, ETC.

August 22, 1904.

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

DEAR SIR:

The following is my response to the inquiry made in the letter of Mr. G. R. Hufford, superintendent of schools for Wythe county, dated the 16th instant, and referred by you to me.

1. By section 1515 of the Code as amended by the act of 1904, page 155-6, the compensation of each county treasurer "for receiving, collecting and disbursing" county and district school funds is fixed at the same "allowed him by law for receiving, collecting and disbursing county levies and for other ordinary purposes."

2. By section 614 of the Code as amended by the acts of 1904, page 311, the compensation of such treasurer "for receiving and disbursing county and school levies" is prescribed at the same rate allowed in the preceding section "for receiving and paying out the revenues," provided that in no case shall such compensation exceed 5 per cent. on all sums up to \$15,000.00 and 3½ per cent. on all sums in excess of \$15,000.00.

By the same section the incoming treasurer is to be allowed not more than 2 per cent. for receiving and disbursing all funds turned over to him by the outgoing treasurer.

3. By section 862 of the Code as amended by the acts of 1902-03-04, pages 621-622, the outgoing treasurer is required to turn all money belonging to the county over to his successor.

It will be observed that by the statutes referred to the compensation allowed the treasurer is specifically for "receiving, collecting and disbursing" the "county" or the "county and school" funds.

4. Section 853 of the Code as amended by the acts of 1902-03-04, page 620, and section 1515 of the Code as amended by the acts of 1904, page 155, define and prescribe how such disbursements of county and school funds shall be made, namely: upon "warrants in writing" signed by the proper officials. See also chapter 66 of the Code as amended by chapter 509 of the acts of 1902-03-04, pages 798 to 823.

It will be seen from an examination of the above acts, that no compensation is distinctly allowed the county treasurer for receiving, collecting and *paying out* county and school funds to his successor.

He is allowed the compensation prescribed by section 614 of the Code as amended by the act of March 15, 1904, for "receiving and *disbursing*," that is for receiving and paying out upon warrants, not for receiving and paying over to his successor.

How much of the commission prescribed was allowed for "receiving" or "collecting," and how much for disbursing, does not appear. There was no separation made on account of the two divisions or classes of service; but the entire compensation is by section 614 expressly limited to 5 per cent. up to \$15,000.00, and 3½ per cent. over \$15,000.00, and then the allowance which may be made to an incoming treasurer is limited to not more than 2 per cent. for receiving and disbursing the county and school funds turned over to him by his predecessor.

It seems to me that taking all of these provisions of the law together, the county school authorities, in settling with the outgoing and incoming county treasurers, should make an equitable apportionment of the prescribed commission between

them, and allow to each what they ascertain to be a just proportion of that compensation, provided that they can in no case allow the incoming treasurer more than 2 per cent. of the amount paid over to him by his predecessor.

The Legislature seems to have considered that two per centum of the sum received by the new treasurer from his predecessor would be as much as the incoming treasurer should be allowed in any case.

I find no authority in the statutes for allowing the outgoing treasurer full commission on sums paid over by him to his successor, and then allowing the incoming treasurer 2 per cent. commission on the sums so received by him.

Respectfully submitted,

Hon. JOSEPH W. SOUTHALL,

February 6, 1901.

*Superintendent of Public Instruction:*

DEAR SIR:

In response to the inquiries submitted to you by William M. Turpin, Esq., president of the board of aldermen of the city of Richmond, referred by you to me, I have the honor to say:

1. The trustees who have been chosen to fill unexpired terms in the office of school trustees in the city of Richmond for the terms beginning the first of April, 1903, will, by the provision of section 1528 of the Code, as amended by the act approved December 31, 1903, be in office until the expiration of the terms which they were elected to fill out,—unless they are disqualified by the second paragraph of section 1538, as amended by that act.

2. The second paragraph of section 1538 makes any member of the council incapable of being legally chosen, or of acting, as school trustee, during his term of office or for one year thereafter. By the express provisions of this clause, a man who has been within twelve months a member of the city council is incapable of acting as school trustee.

3. The second paragraph of section 1538 expressly renders any member of the city council incapable of acting as a trustee, which, in my opinion, is tantamount to vacating the office as trustee of any such member of the council.

Very respectfully yours,

### III. PENITENTIARY MATTERS.

April 25, 1904.

*To the Board of Directors of the Virginia Penitentiary:*

GENTLEMEN:

In response to your letter of inquiry of the 20th instant, permit me to say that, in my opinion, chapter 444, page 685, acts of 1902-03-04, approved December 12, 1903, does not repeal section 4163 of the Code as amended by the act of 1891-92, page 510. The only section repealed by said act of December 12, 1903, is "4163 of the Code of Virginia," which had already become inoperative by reason of its amendment by the act of 1901-02, page 510.

The act of 1901-02, referred to, changed the relative position and numbers of sections 4162, 4163 and 4164 of the Code; but it is unnecessary for me to say that the Legislature had ample power to do this; and thereafter the enumeration of those sections was as prescribed in the act of 1902.

In the act of December 12, 1903, the General Assembly plainly discriminates between the sections referred to as enumerated in the Code and as described in the act of 1901-02, and expressly repeals section "4163 of the Code" and amends section "4162 of the Code of Virginia as amended by the act of February 19, 1892," and as further amended by the act approved May 5, 1903.

It seems plain to me, therefore, that section 4163 of the Code, as amended by the act of February 19, 1892, remains unchanged and unaffected by the act of December 12, 1903, page 685, or by the act of May 5, 1903, acts of 1902-03-04, page 294.

The general rule governing every such question is that no statute will be construed to have been repealed unless such repeal has been expressly enacted by or is necessarily implied from some positive enactment of the General Assembly.

There has been no such express repeal of section 4163, as enacted by the act of 1891-92, nor can any such repeal be reasonably inferred from any subsequent act of the General Assembly.

It follows, therefore, from the above statements that section 4163, as amended and re-enacted in the act of February 19, 1892, is still in force.

Very truly yours,

October 1, 1904.

Messrs. JOHN C. EASLEY, A. C. HARMAN, MILTON E. MARCUSE and JULIAN BRYANT,  
Subcommittee of the Building Committee of the Virginia State Penitentiary:

GENTLEMEN:

In response to the request, communicated to me by your chairman, Mr. Easley, that I would advise your subcommittee as to what questions and under what circumstances Messrs. Alsop & Pierce could demand an arbitration under their contract with the Penitentiary Building Committee, acting for the State, I beg leave to answer as follows:

A careful examination of the contract and of the specifications will show that it was the intention and purpose of the parties to make the architect, Mr. P. Thornton Marye, the final referee and umpire in all cases and as to all matters and questions of difference which might arise with reference to the execution of the contract.

1. This appears from the following language on the first page of the contract, where the contractors bind themselves "to furnish all the labor and materials, and do and perform all the work required, in strict and full accordance with the requirements of the general drawings and such other detailed drawings as may be furnished to the party of the second part (the contractors) by the architect."

2. And by this farther stipulation, on the first page of the printed contract,— "that both the materials used and the work performed shall be to the complete and entire satisfaction of the said architect;"

3. And by these farther words, on the same page of the said printed contract,— "that all work called for by the drawings and specifications, though every item be not particularly shown on the first or mentioned in the second, shall be executed and performed as though such work were particularly shown in each respectively, unless otherwise specifically provided; that all materials and work furnished shall be subject to the approval of the said architect;"

4. And also by this language, on page 2 of the said printed contract, where it is covenanted "that the said party of the second part will make any omissions



from, or additions to, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials, if not agreed upon, to be determined on prevailing market rates, which market rates, in case of dispute, are to be determined by the said architect, whose decision with reference thereto shall be binding upon both parties; and that no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed;"

5. And by this further language, on said page 2 of said printed contract, where it is covenanted "that all materials furnished and work done under this contract shall be subject to the inspection of the architect, the superintendent of construction, and of the other inspectors appointed by the said architect, with the right to reject any and all material not in accordance with this contract; and the decision of said architect as to quality and quantity shall be final;"

6. And also by this language on page 3 of the printed copy of the specifications,—"Further Explanation: In case any part of the work is not clearly expressed in these plans and specifications, the contractor shall apply to the architect for additional drawings and explanations, and shall carry out the general design as directed by the architect in a thorough manner as part of the contract."

If the above constituted the only language relative to this subject contained in the contract and specifications, it is evident that the effect of the contract would be to make the architect the final umpire in all cases and of all questions that could by possibility arise under the contract.

The only language, either in the contract or the specifications, which can by possibility be construed as varying or qualifying the covenant iterated and reiterated in the contract, that the architect shall be in all cases the final judge selected by the parties as to any and every question which may arise under it, is the language found in the paragraph at the foot of page 3 of the printed copy of the specifications, which is as follows:

7. "Questions Arising: Any questions which may arise under this contract shall be referred to the architect for interpretation, whose decision shall be binding upon both parties, but there is reserved the right of final decision by two disinterested parties, one chosen by each party, and in the event of the parties so chosen failing to agree, they shall choose a third; the decision of two of said referees shall be final and binding upon both parties. But this clause shall not apply to or invalidate the provisions under the heading *Modifications* investing in the architect the sole right to fix valuations for all work and materials added to or deducted from the work as set forth in the drawings and specifications."

Taking the whole contract together, and treating the paragraph just quoted from the specifications (as it should be treated) as a part of the contract, it seems to me that there can be no shadow of a question that the decision of the architect is absolutely final and binding upon both parties in all cases of any question which arises in reference to any modifications or changes made either in the mode or plans of construction or materials used, or in reference to any other matter connected with the work.

Any question as to what the word "modifications" shall include is precluded by the language of the specifications, under that title, near the top of page 4 of the printed specifications. It includes all additions made to the work, and all omissions taken by the Building Committee from the work. It necessarily and plainly includes all extra work and all claims for extra work.

That the finding of the architect is final in respect to all such matters, is not only shown by the general provisions of the contract, already quoted, but by the stipulation relating specifically to this subject, to be found in the quotation which I have numbered 4.

It is not an easy matter, considering all the stipulations of the contract and specifications together, as they must be considered, to determine what questions, arising under the contract, may be referred to arbitrators, under the quotation which I have numbered 7. There is a general rule of construction, laid down by the courts, to the effect that, in such a case, such a construction (if reasonable) shall be placed upon all of the stipulations of a contract as will make all of them stand together,—“*ut res valeat, magis quam pereat.*” And, if it be practicable and reasonable to do so, such a construction should be placed upon the paragraph at the foot of page 3 of the specifications as shall not destroy the effect of the repeated covenants, both in the contract and the specifications, which make the architect the final judge, selected by the parties, of all questions which may arise as to the quality and quantity of materials furnished and as to the manner of the execution of the work.

This view is supported by the phraseology of the quotation which I have numbered 7, which would seem to limit the right of appeal to arbitrators to questions arising as to the “*interpretation*” of the contract,—in other words, questions as to the proper construction of the language of the contract;—and, even as to those matters, the right to appeal to arbitrators is expressly limited and qualified in the matters hereinbefore and hereinafter mentioned.

This view would shut out the idea that it was intended to allow an appeal to arbitrators from any findings of the architect upon any question as to the quantity, quality or value of the materials or work or any question arising in the *execution* of the contract. The language used would seem to limit the right to arbitrate distinctly to questions of *construction of language*.

It is perfectly clear from the language of the contract itself and of the specifications, not only that questions as to the execution of the work, but questions arising as to the interpretation of the contract in respect to the DRAWINGS AND SPECIFICATIONS, were by the agreement of the parties left to the final judgment and arbitrament of the architect. This is shown by the paragraphs already quoted from the contract, and still more unmistakably by the following paragraph from page 5 of the printed specifications, which I number 8,—

8. “*Drawings and Specifications:* These specifications and the accompanying drawings are to be interpreted to their full and evident intent and spirit, whether taken together or separately. Taken together they shall be deemed to mutually explain each other and to be descriptive of the work to be performed under the contract for the building. But should there be any discrepancy between the drawings and the specifications or between the drawings and the scale, or between larger and smaller drawings, or between the descriptive writing on the drawings and the descriptions in the specifications, the specifications shall in all cases take precedence and the interpretation of the architect in all cases shall be final.

The specifications and drawings referred to are intended to include everything necessary and requisite to the proper and entire finishing of the whole job, though every item necessarily required be not particularly mentioned.

All contractors employed on this work shall be sure that they understand the plans and specifications, for each one will be bound by all things appearing therein that in any way affects him, whether under one particular section or heading or not."

This stipulation, coming after the paragraph above quoted as 7 and also embraced in the specifications, was plainly intended to qualify that language.

It is manifest, from the carefully chosen phraseology of the paragraph just quoted as 8, that so far as the drawings and specifications were concerned, all questions arising under them, whether questions in reference to the execution or construction of the specifications and drawings, the interpretation of the architect should in all cases be final.

It will be observed that the language used in the specifications and quoted by me draws a clear distinction between questions arising under the contract and questions arising under the specifications or with reference to the drawings. It would seem to me, from as careful an examination as I have been able to give to the subject, that the only questions as to which there could be any arbitration would be some matter of disagreement, relating, for instance, to the times and mode of payment, the time within which the work was to be done, or damages for failure to do the work in the manner and within the time limited, or any other matter not involving the quantity, quality or value of the materials or labor.

So that I am forced to conclude that the only questions in reference to which a right to appeal from the judgment of the architect to the board of referees, provided for in the quotation numbered 7 above, are any such questions as may arise in reference to the construction and interpretation of the provisions of the contract itself, and not as to the valuation, quality or quantity of work or materials furnished, nor as to the interpretation or effect either of the drawings or specifications.

Respectfully submitted,

#### IV. MEDICAL EXAMINING BOARD.

October 26, 1901.

Doctor R. S. MARTIN,

*Secretary-Treasurer State Board of Medical Examiners,*

*Stuart, Va.:*

MY DEAR SIR:

Replying to your favor of the 22nd inst., just received, I beg to say that, by section 1747 of the Code, as amended by the acts of 1902-3-4, page 244, the Medical Examining Board of Virginia is vested with a "discretion" and "authority" to determine *what* "diploma or other satisfactory evidence" it will accept in lieu of the examination of an applicant for a certificate authorizing him to practice medicine in this State. Under the language of the statute, I think the board has power to determine the medical colleges the diplomas of which it will accept in lieu of an examination.

Of course, a graduate of any medical college or institution teaching the art of healing diseases, chartered by the State or Territory in which the same is situated, is entitled, upon producing before said board a diploma or other satisfactory evidence that he is a graduate therefrom, to be examined by said board; but the board can determine the colleges the diplomas of which it will accept in lieu of any examination.

Very truly yours,

## V. BOARDS OF HEALTH.

February 13, 1904

Doctor PAULUS A. IRVING,  
*Secretary and Executive Officer State Board of Health,*  
Richmond, Va.:

DEAR SIR:

In response to your inquiry, I beg leave to say that, by the provisions of chapter 1140 of the acts of 1899-1900, sections 5 and 7, the county board of health for each county in the State is primarily charged with the duty of providing for the prevention and restriction and cure of smallpox and other contagious and infectious diseases, by removal and quarantine of suspects, compulsory vaccination in cases of smallpox, etc., subject to the paramount control of the State board of health. The State board of health, or its executive officer acting under its control, is authorized to confer with the local boards of health and make such suggestions to them as it may deem proper. If these suggestions are not carried out, and the disease, in the judgment of the State board of health, is in danger of spreading to another city, county or town, the State board of health, or its executive officer, under its control, shall have the right to assume exclusive authority and control of the situation, and to isolate and quarantine suspects, and to have all such authority, under the circumstances, as is conferred upon the local boards of health, and said executive officer may make and enforce such regulations as he may deem proper, subject to the action of the said State board of health, to stamp out or prevent the further spread of such disease. The executive officer of the State board may also, subject to the action of his said board, appoint such officers or agents as he may deem proper to accomplish such end, and fix their duties and compensation. The officers and agents so appointed shall be duly sworn, and shall have power to make arrests, and to exercise all the other powers of policemen or constables.

Under these provisions of the law, you, as the executive officer of the State board of health, are empowered, acting under the control and authority of the State board, to take the action and adopt the measures above specified, for the purpose of preventing the spread of smallpox or any other contagious or infectious disease into another county, city or town from that in which it is already prevalent, in any case in which the local board of health fails to adopt and carry out the suggestions of the State board of health, or of yourself as the executive officer of such board. Under such circumstances, the State board of health is authorized to take entire control of the situation, and to carry out the law for the purpose of, as far as possible, eradicating and preventing the spread of such infectious or contagious disease into other counties, cities or towns.

Very respectfully and truly yours,

## VI. MERGER OR CONSOLIDATION OF CORPORATIONS.

Hon. BEVERLEY T. CRUMP,  
*Chairman State Corporation Commission,*  
Richmond, Va.:

November 14, 1903.

SIR:

Replying to your inquiry of the 11th instant, I beg leave to say that section 40 of the corporation law, (chapter 270, acts of 1902-3), as I understand it, provides that a merger or consolidation of any two corporations, organized for the purpose

of carrying on the same or a similar business under the laws of this or any other State, may be effected in either one of two ways—

- (1) By one corporation being merged in and absorbed by the other, or,
- (2) By the two corporations being united, consolidated, and forming a new corporation.

(a) If the consolidation is effected in the first way indicated, it seems to me that there will be no charter fee, unless the capital stock of the surviving corporation is increased, and, in that event, that the fee would be upon such increased authorized capitalization, to be ascertained as provided in the second paragraph of section 39 of the tax law, approved April 16, 1902 (acts of 1902-3, page 108); or unless by reason of such consolidation and merger, the surviving company acquires additional powers and privileges, or its character is changed, or the time limitation or territorial jurisdiction thereof is extended, in which case the amount to be paid upon the amended charter issued to such company by the corporation commission would be, by virtue of the section just referred to, the same which would have to be paid on the original charter.

(b) If the consolidation of the two companies is effected in the second way above indicated,—that is, by the formation of a distinctly new company, into which each of the old companies would be absorbed, under a new corporate name,—then it seems to me that the fee upon the charter issued to such new company would be the full fee prescribed by section 37 of chapter 148 of the acts of 1902-3, page 179.

This opinion is intended to apply to the case of the merger of two public service corporations, which I understand to be the class of corporations referred to in your inquiry.

It is not altogether clear to my mind what is the effect of the statutes referred to in the particulars discussed; but the above gives my interpretation of the meaning and intentment of the Legislature, as nearly as I can arrive at them.

This opinion has been written after a full conference with the auditor of public accounts, who, I regret to say, does not concur with me entirely as to my conclusions.

I have the honor to be

Very truly yours,

#### VII. FEES OF BAIL COMMISSIONERS.

April 16, 1904.

Hon. MORTON MARVE,

*Auditor of Public Accounts:*

DEAR SIR:

Your favor of the 15th instant received.

The fees of a bail commissioner for admitting a person to bail, under section 3960 of the Code as amended by the act approved May 9, 1903 (acts of 1902-3-4, page 317), are not required to be paid out of the State treasury. Such charges cannot, under the law, be regarded as proper charges against the Commonwealth. It is a matter of no interest whatever to the Commonwealth whether a prisoner is bailed or not. Such costs have always been and are now a part of the defendant's costs, and the Commonwealth has never paid any part of the defendant's costs in a criminal case; nor is there any law which would authorize you to pay the bail fees or any other part of the defendant's costs. The statute, it is true, provides that the fees of a bail commissioner shall be paid as those of a justice for a criminal trial are paid. The fees of a justice in a criminal trial for services rendered the Commonwealth are paid in the first instance by the Commonwealth, if not recovered

from the accused; but, for services rendered the accused in issuing subpoenas for witnesses or admitting the accused to bail in cases when the justices were authorized to admit to bail, such charges were and are not payable by the Commonwealth, but were and are payable in each case always by the defendant, the accused.

The language of the act is not as clear as would be desirable, and I can see very well how it could be construed as it has been by some lawyers to impose the charges on the State treasury; but I do not think that this is clearly its meaning, fairly interpreted in connection with the general rule and practice upon the subject of the payment of criminal charges for services rendered persons accused of crime. The general, indeed the universal, rule, embodied in the statutes and practice of the Commonwealth for generations, has been that no such charges should be paid out of her treasury, and you would not be justified in paying any part of the defendant's costs in any criminal case under a statute which does not plainly change this rule and in unequivocal terms place such charge upon the treasury.

Very truly and respectfully,

#### VIII. ENFORCING PAYMENT OF POLL TAXES.

Colonel MORTON MARYE,

January 9, 1904.

*Auditor of Public Accounts of Virginia:*

DEAR SIR:

In response to your request, communicated by Mr. C. Lee Moore, I beg leave to say that, by the terms of section 22 of the Constitution, the collection of the State poll tax assessed against anyone cannot be "enforced by legal process until the same has become three years past due."

The only poll taxes which are now "three years past due" are those for the years prior to 1901.

Very truly yours,

#### IX. OFFICIAL BONDS, HOLDING OFFICE, ETC.

Hon. MORTON MARYE,

*Auditor of Public Accounts:*

DEAR SIR:

In reference to the two bonds (one for \$7,500 and the other for \$2,500) given by \_\_\_\_\_, Sheriff-elect of \_\_\_\_\_ County, at the December (1903) term of the county court of that county, I beg leave to say that the statute (section 814 of the Code, as amended by the act of 1897-8, page 308, Pollard's Supplement, page 35) provides for the execution of a *single* bond in such case, and plainly contemplates that only one bond shall be executed. Therefore, I have to advise that Mr. \_\_\_\_\_ should execute another bond, in accordance with the statute, in order to properly comply with the law.

Neither of these bonds is, in my opinion, valid under the law, as two (2) bonds were taken contemporaneously. Uncertainty would result from any other rule than the one laid down above; for, if default should be made by the sheriff, it would be impossible to decide upon which bond suit should be brought. If it is lawful for an officer to give two bonds, then it is lawful for him to give any number,—even a dozen or more.

The bonds are herewith returned.

Very truly yours,

January 11, 1901.

Hon. A. R. HOBBS,

*Virginia Senate Chamber,**Richmond, Va.:*

MY DEAR SIR:

In accordance with the general rule recognized in Virginia, the incumbent of any office in this State who has qualified and given bond according to law continues in office until his successor has been duly elected and has qualified according to law.

This rule is recognized and sanctioned by section 17 of the schedule to the Constitution, and applies as well to officers whose terms were extended by the Constitution as to those cases in which the terms for which the officers were originally elected have expired by limitation.

I would say, therefore, that a county superintendent of the poor and a county surveyor, whose terms of office were extended by the schedule to the Constitution until January 1, 1904, will hold their offices until their successors have been duly chosen and have qualified in the manner which may be prescribed by law.

Very truly yours,

February 27, 1901.

Hon. A. J. MONTAGUE,

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

SIR:

The question submitted in the letter of Hon. J. O. Shepherd (herewith returned) dated the 12th instant, addressed to you, and referred by you to me, is one of such novelty that I have been unable to find any precedent to aid me in reaching a satisfactory conclusion in regard to it.

The right to hold office, like the right to vote, is a privilege conferred by the State upon those deemed qualified to exercise it. In a number of States, the right to vote in all school elections has been conferred upon women over twenty-one years of age, and in one or two States, as in Wyoming, they are authorized to vote in all elections. It has never been held that marriage deprives them of the exercise of the right thus granted.—See 23 Am. and Eng. Ency. of Law, 2nd Ed., page 332, and cases cited.

The right to hold the office of notary public is conferred upon women in Virginia by the following provision of section 32 of the Constitution:—"Men and women eighteen years of age shall be eligible to the office of notary public, and qualified to execute the bonds required of them in that capacity."

Under my construction of this provision, it makes any woman eighteen years of age or more, whether married or single, eligible to the office of notary public.

A difficulty, however, is occasioned by the marriage of a woman who is a notary public, but in that case only where she changes her name in taking a husband of a different surname. The only difficulty in such case, in my opinion, is occasioned by the *change of name*, and that is not remedied or provided for by the Constitution or by any statute. Until such statute shall be passed, it can best be remedied, in my judgment, by the reappointment of the married woman, as suggested by Judge Shepherd.

I have the honor to be

Very truly and respectfully,

## X. CONTRACTS WITH HOSPITALS, ETC.

April 25, 1904.

Colonel L. W. LANE, JR.,  
*Commissioner of State Hospitals, etc.,*  
*Williamsburg, Va.:*

SIR:

Responding to the resolution of the General Board of State Hospitals. communicated in your favor of the 15th instant, it is only necessary to refer you to section 1710 of the Code, not as found in the Code, but as amended and re-enacted by chapter 139, page 121, acts of 1902-3-4, approved April 7, 1903, which expressly prohibits "any director, officer or employee" of a hospital from being personally interested in any contract in relation to said hospital or its support.

By section 1662, every member of every board of directors is made a member of the general board of directors of all the hospitals of the State, so that each one of such members is a director of each and every hospital in the State.

Even without the re-enactment of section 1710, it would be a gross violation of the spirit, if not also of the letter, of the law as contained originally in the Code for any director of any asylum in the State to be in any way personally interested in any contract in connection with such asylum.

Very truly yours,

## XI. LEASING OYSTER BOTTOM.

RICHMOND, VA., October 7, 1904.

Attorney-General WILLIAM A. ANDERSON:

DEAR SIR:

Application has been made for certain bottom on the ocean side of Accomac county, which bottom is similarly colored brown as other natural oyster rock is on the Baylor Survey, but is not otherwise designated or defined as public oyster ground; nor is the area, course or distances noted on the survey, nor is the same mentioned or referred to in the Baylor notes.

The State Board of Fisheries, by resolution, desires your opinion for their guidance as to whether such bottom should be rented or not.

The board further desires your opinion for its guidance as to whether or not certain bottom, embraced in the area colored white on the chart, but which is in point of fact so covered with water that oysters may be propagated thereon, can be rented or not.

Respectfully submitted.

STATE BOARD OF FISHERIES.

By J. W. BOWDOIN, Chairman.

October 13, 1904.

Doctor J. W. BOWDOIN, Chairman,  
*State Board of Fisheries of Virginia,*  
*Bozom, Accomac County, Va.:*

DEAR SIR:

I have the honor to submit the following as my response to the two inquiries propounded in your favor of the 7th instant, a copy of which is hereto annexed for convenient reference.



The answer to both questions must be determined by the provisions of the acts of Assembly under which what is known as the "Baylor Survey" was made, which are contained in the sections copies of which are hereto annexed.

#### CONSIDERATION OF FIRST QUESTION.

The manner in which the natural oyster beds, rocks and shoals of the Commonwealth shall be located, determined, and their boundaries ascertained, is prescribed in section one of the above-mentioned act.

It is provided that this shall be done by "a true and accurate survey \* \* \* \* to be made with reference to fixed and permanent objects on the shore, giving courses and distances to be described in the written report of said survey hereinafter required." "And a true and accurate delineation of the same" (that is, of said survey) "shall be made on copies of the published maps or charts of the United States Coast and Geodetic Survey. \* \* \* And the said board shall further cause to be delineated on a copy of the published maps and charts of the United States Coast and Geodetic Survey, of the largest scale for each of the counties of the Commonwealth in the waters of which there are natural oyster beds, rocks, or shoals, all the natural rocks, beds or shoals lying within the waters of each of said counties."

The manner in which said survey shall be made and delineated, and the location and boundaries of the natural oyster grounds determined, is further prescribed in section two of said act, as follows:

"Said commissioner shall cause to be marked and defined as accurately as is practicable the limits and boundaries of the natural oyster rocks, beds, and shoals as established by said survey; and he shall take true and accurate notes of said survey in writing, and make up such an accurate report of said survey, setting forth a description of the lines with courses and distances, and a description of the landmarks, as may be necessary to enable the oyster inspector to find and ascertain the boundary lines and limits of said natural oyster rocks, beds, and shoals, as shown by the delineation on the maps and charts provided for in section one of this act."

The force, meaning, and effect of the survey and report thus made, are prescribed in said section two in the following words:

"And the said survey and report, when so filed, shall be, and be construed to be, in all of the courts of the Commonwealth, as conclusive evidence of the boundaries and limits of all of the natural oyster beds, rocks, and shoals lying within the waters of the counties wherein such survey and report are filed, and shall be construed to mean in all of the said courts that there are no natural oyster beds, rocks, or shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey authorized by this act."

It will be observed that the survey is required to be made by "lines and courses and distances," and with reference to "fixed objects" and "landmarks," and that the survey shall be "marked and defined" accordingly.

The description and record of the survey is to be given in "the true and accurate notes thereof in writing," which are to be embodied in the accurate report of the survey.

The lines are also to be indicated upon the copies of the maps or charts of the United States Coast and Geodetic Survey; but, under the provisions of the statute as I construe it, as well as by the law of survey as applicable to such a question, the location and boundaries of the natural oyster grounds as thus surveyed must

be determined with reference to the notes of the survey, and these, in turn, must be determined with reference to the fixed objects and landmarks called for in the survey.

The map is intended to be a picture or representation of the survey as made upon the ground, or upon the waters and the ground; and, when there is any variation between the delineation as indicated upon the map and the lines and boundaries as determined by the notes of the survey and the fixed objects called for, the evidence furnished by the notes and the description given in the report will be conclusive; and the location, lines, limitations, and boundaries of the natural oyster grounds will be determined by the lines as so described and as determined with reference to the fixed objects.

It will be further observed that the requirement of the act as to the manner in which the survey shall be made and defined, makes no mention as to a designation by colors; nor is there anything in the notes of the survey of the areas in question which refers to any designation by colors.

The law distinctly requires the designation to be made "with reference to fixed and permanent objects on the shore, giving courses and distances."

ANSWER TO FIRST INQUIRY.

I am, therefore, compelled to conclude, and so advise your board, that the bottom referred to in your first question (which is not described by courses and distances or acreage noted on the survey, nor designated, mentioned or referred to in the notes of the "Baylor Survey" nor in any other part of the report thereof, but is nevertheless colored brown upon the chart returned with the survey, in like manner as are other natural oyster bottoms) is not included in the "Baylor Survey," and may be leased as other bottom outside of said survey.

ANSWER TO SECOND INQUIRY.

By the express terms of the act, it is provided that the survey shall be construed to mean "that there are no natural oyster beds, rocks and shoals lying within the waters of the counties wherein such report and survey are filed other than those embraced in the survey."

As all of the areas which are left upon the chart in white are outside of the "Baylor Survey," it is manifest that any bottoms which may be found within said areas so colored white are not natural oyster beds, rocks or shoals, within the meaning of the act, and may be leased accordingly.

Respectfully submitted,

AN ACT

*To protect the oyster industry of the Commonwealth.*

Approved February 29, 1892.

1. Be it enacted by the General Assembly of Virginia, That the board of the Chesapeake and its tributaries shall, as soon as possible after the passage of this act, cause to be made a true and accurate survey of the natural oyster beds, rocks,

and shoals of the Commonwealth,—said survey to be made with reference to fixed and permanent objects on the shore, giving courses and distances, to be described in the written report of said survey hereinafter required. And a true and accurate delineation of the same shall be made on copies of the published maps and charts of the United States Coast and Geodetic Survey, which said copy shall be filed in the archives of the State in the capitol at Richmond. And the said board shall further cause to be delineated, on a copy of the published maps and charts of the United States Coast and Geodetic Survey, of the largest scale for each of the counties of the Commonwealth in the waters of which there are natural oyster beds, rocks, or shoals, all the natural rocks, beds, or shoals lying within the waters of each of said counties, which said maps shall be filed in the clerk's office of the county court of the county wherein may be the grounds so delineated. For example, the map delineating the grounds lying in the waters of the county of Accomac to be filed in the clerk's office of the county of Accomac, and so on.

(Acts of 1891-2, page 816; section 2138 *a*, Pollard's Supplement; page 28, Compilation of Virginia Oyster Laws.)

2. (As amended by act approved March 2, 1894.) And the said board of the Chesapeake and its tributaries, in order to carry into execution this law, shall direct the fish commissioner, who is hereby appointed a shell-fish commissioner, whose duty it shall be to direct and control the survey herein provided for. Said commissioner shall cause to be marked and defined, as accurately as is practicable, the limits and boundaries of the natural oyster rocks, beds, and shoals as established by said survey; and he shall take true and accurate notes of said survey in writing, and make up such an accurate report of said survey, setting forth a description of the lines, with courses and distances, and a description of the landmarks, as may be necessary to enable the oyster inspector to find and ascertain the boundary lines and limits of said natural oyster rocks, beds, and shoals, as shown by the delineation on the maps and charts provided for in section one of this act. Said report shall be completed and transmitted to the board of the Chesapeake and its tributaries within three months after the completion of the said survey. The said board shall cause the same to be published in pamphlet form, and transmit copies of the same to the clerk of the county court of the counties where the charts have been filed, or directed to be filed, as hereinbefore provided for; the said report to be filed by the clerks of the said several counties. And the said survey and report, when so filed, shall be, and be construed to be, in all of the courts of the Commonwealth, as conclusive evidence of the boundaries and limits of all the natural oyster beds, rocks, and shoals lying within the waters of the counties wherein such survey and report are filed; and shall be construed to mean in all of the said courts that there are no natural oyster beds, rocks, or shoals lying within the waters of the counties where such report and survey are filed, other than those embraced in the survey authorized by this act: provided, that the said survey and report shall not be so construed in any pending trial or proceeding in any court upon any assignment made prior to the twenty-fifth day of February, eighteen hundred and ninety-two. Provided, also, that not less than twenty-five residents of any county may, within four months from the filing of the said survey and report in such county, file in the clerk's office of the county court of said county a petition in writing under oath, alleging that twenty-five or more adjacent acres of natural oyster beds, rocks, or shoals in such county have been omitted from said survey, describing the location of the same, by a plat, or as near as may be with reasonable certainty by such landmarks as will locate and designate the rocks, beds, or shoals so omitted as afore-

said, but this proviso shall not apply where the ground claimed by the petitioners has been assigned prior to February twenty-fifth, eighteen hundred and ninety-two.

The said clerk shall docket the same in the county court. At the next term of the said court the judge thereof shall appoint three commissioners, who shall be persons other than the commissioners directed to be appointed by section four of an act entitled an act to protect the oyster industry of the Commonwealth, approved February twenty-ninth, eighteen hundred and ninety-two, and by its order direct them to ascertain and report to court whether the facts contained in said petition be true.

The said commissioners shall view and examine the alleged oyster rocks, beds, or shoals, and to that end may employ a competent surveyor to survey the same at the same rates paid the county surveyor by law for similar services, administer an oath to and examine such witnesses as may appear before them, and make report to court. If the said commissioners shall report that less than twenty-five adjacent acres of natural oyster rocks, beds, or shoals have been omitted from the said survey, the said petition shall be dismissed at the cost of the petitioners; but if the said commissioners shall ascertain and report to court that twenty-five or more adjacent acres of natural oyster rock, bed, or shoal in the said county have been omitted from the said survey, they shall designate the same by plat or otherwise with reasonable certainty in their said report, which report shall be spread upon the records of the said court, and by the clerk thereof certified to the board of the Chesapeake and its tributaries: provided, however, that in the tributaries of the rivers James, Elizabeth, York, Rappahannock, Potomac, and Mobjack bay the area to which exception may be taken by the twenty-five citizens shall be ten acres. Thereupon the said board shall direct a survey, under the direction of the said commissioners, of the area designated in said report, to be made by the United States Coast and Geodetic Survey officer detailed for duty under section six of an act entitled an act to protect the oyster industry of the Commonwealth, approved February twenty-ninth, eighteen hundred and ninety-two, or by such person as the said board shall direct.

Such survey shall be filed in the clerk's office of said court as the original survey hereinbefore provided for is required to be filed; and when so filed, shall be conclusive evidence in all of the courts of this Commonwealth that the area embraced therein is a natural oyster bed, rock, or shoal.

The costs of the proceedings in the county court shall be paid by the Commonwealth if the said commissioners shall report in favor of the petitioners. In those counties of the Commonwealth where no survey and report are filed within three months after the completion of the survey of the natural oyster beds, rocks, and shoals of the Commonwealth, it shall be construed to mean, in all the courts of the Commonwealth, that there are no natural oyster beds, rocks, and shoals in said county or counties, and that all area of the Chesapeake bay and its tributaries not embraced in the survey of the natural oyster beds, rocks, and shoals authorized by this act, shall be construed to be, in all the courts of the Commonwealth, barren area, and disposal by the Commonwealth for the purpose of planting or propagating oysters thereon under section twenty-one hundred and thirty-seven of the Code of Virginia, as amended and re-enacted by act approved February twenty-fifth, eighteen hundred and ninety-two. All the work appertaining to and necessary to the completion of said survey shall be under the control and done under the direction of the board of the Chesapeake and its tributaries, which said board is hereby empowered to require the shell-fish commissioner hereinbefore named to

do all things necessary to the successful prosecution and completion of the said survey.

(Acts of 1893-4, page 605; section 2138 a, Pollard's Supplement; page 29, Compilation of Virginia Oyster Laws.)

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In reference to the investigation called for by the resolutions adopted by the General Assembly in March last, as to the nature and amount of the liabilities of William R. Smith, deceased, who from twenty to thirty-four years ago was a clerk in the office of the auditor of public accounts, and as to the question whether the several auditors of public accounts, during the period covered by the criminal transactions of said Smith, and the sureties on the official bonds of said auditors, are liable for the criminal acts of said Smith, I beg leave to say that, since the first report relative to those matters made to your Excellency in May last, I have given such further attention to that subject as I could with the inadequate sources of information in my reach, and will be able to make a final report as soon as I can again take the matter up and give it the requisite attention without neglecting other more urgent duties. The same may be said as to the investigation provided for in the resolution adopted at the same session of the General Assembly in reference to the criminal transactions of Joseph H. Shepherd, now a prisoner in the penitentiary. As to this latter subject, I have to report that measures have been taken to collect all that can now be collected on account of the large liability of said Shepherd to the Commonwealth. As soon as the measures adopted shall have reached a stage where any definite results shall be secured, a full account thereof will be furnished you;—all of which, together with a response, as full and definite as it will be practicable to make, will be embodied in a final report upon the subjects embraced in the said resolutions, to be made as soon as it is possible for me to do this in a way just to the State and to the persons directly concerned. As is shown in my former report to you upon this subject, I have been not a little embarrassed in conducting the investigations called for by those resolutions, on account of the fact that I have no authority to send for persons and papers, or to require any person to testify. My former report fully shows the difficulties in the way of a full response to all the inquiries embraced in said resolutions. I can only say now that my final report will be as full as it is possible for me to make it, and that no interest of the Commonwealth will suffer detriment from the unavoidable delay in its completion.

In concluding this report, I desire to express my obligation to Mr. John S. Eggleston for his faithful and efficient services as my secretary, and for the valuable aid he has rendered me as my assistant in the argument of cases, some of which were most satisfactorily argued by him both in print and orally upon their hearing in the Supreme Court of Appeals of the State.

All of which is respectfully submitted.

WILLIAM A. ANDERSON.

