

ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1905

RICHMOND:
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REPORT.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.

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

SIR:

I have the honor to submit my report for the year just ended.

The cases in which it is made the duty of the Attorney-General to represent the Commonwealth, and which have been disposed of during the last year, or are still pending, are mentioned below.

IN THE SUPREME COURT OF THE UNITED STATES.

Old Dominion Steamship Company vs. The Commonwealth. This case involved the question of the power of the State to tax vessels which were exclusively plying the navigable waters of Virginia, but were owned by a Delaware corporation and enrolled under the Act of Congress in their "home port" outside of this State.

The United States Supreme Court, confirming the decree of the Supreme Court of Appeals of Virginia, which in turn confirmed the order of the State Corporation Commission, held that these vessels were legally taxable by the State.

This case was an important one, not only in the amounts directly involved, but in the principle it settled. An adverse decision could have been availed of by the owners of all vessels engaged in trade or navigation, upon the tidal waters of Virginia, to avoid all taxation upon such craft. If the contention of the appellants had been sustained, it would only have been necessary for the owners of such property to obtain a Delaware charter, register their boats in some port of that State, and their vessels would have escaped all State and local taxation.

CASES PENDING IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

1. *Edgar Poe Lee vs. A. J. Montague, Governor of Virginia; John S. Barbour, and other members of the late Constitutional Convention residing in the Eastern district of Virginia, who voted to adopt the Constitution without submitting it to the vote of the people; and James H. Bradley and others, registration officers of Jackson Ward, Richmond city, defendants.* Pending at Richmond.

2. Anthony S. Pinner *vs.* A. J. Montague, Governor of Virginia, the above members of the Constitutional Convention; J. Frank Coleman and others, judges of election at Huntersville precinct, Norfolk county. Pending at Norfolk.

These two suits were brought to test the validity of the Constitution and of the suffrage article thereof.

The defendants have demurred to the declaration in each case, and they are likely to be finally disposed of upon the objections thus raised.

3. John E. Brickhouse *vs.* Gallup and others, judges of election. Pending at Norfolk.

This is an action brought by the plaintiff against the defendants upon the averment that he was a duly registered voter of the State prior to the adoption of the present Constitution, and was wrongfully deprived by the defendants of the right to vote at the election held for congressmen on November 4, 1902. The case, as it at present stands, turns on the issues made up by demurrer to the declaration, and by the special plea filed for the defendants, the demurrer of the plaintiff to that plea, and the joinder in that demurrer of the defendants.

These pleadings squarely present the question of the validity of the Virginia Constitution, which seems to be the ground relied on by the counsel for the plaintiff.

If the defendants' demurrer shall be sustained, or the plaintiff's demurrer to the defendants' plea overruled, the decision in the United States Circuit Court must be for the defendants; but an appeal will doubtless be taken.

The preparation of the pleadings in this case have involved a great deal of labor, and the Commonwealth is fortunate in having had in this the benefit of the valuable services of Mr. Frank W. Christian.

The last case is the only one that is likely to be seriously pressed. Repeated efforts have been made by the counsel on both sides to have the case heard upon the issues now made up; but owing to the press of business in the hands of the judge of the court, Hon. Edmund Waddill, Jr., and to conflicting engagements of counsel, it has been found impracticable so far to have the cases heard. It is hoped they will be disposed of during the winter.

4. *Ex parte*, James La Fontaine and John C. Nelson.

This was a case which arose on a writ of *habeas corpus* awarded by Judge Waddill against the sheriff of Alexandria county. The petitioners claimed in their petition to have been engaged in carrying on a lawful business in Alexandria county, and to have been adjudged by a justice of the peace of said county to be guilty, and fined a large sum, and committed to the custody of the sheriff of said county, when they had done nothing in violation of the law; and they alleged that the territory embraced in what is known as Alexandria county, is not within the jurisdiction of Virginia; that the Act of Congress retroceding that territory to Virginia was unconstitutional and void; that Alexandria county was still a part of the District of Columbia; that the alleged justices and other officers of said county were without jurisdiction, and that their acts were void.

Crandal Mackey, Esq., attorney for the Commonwealth for Alexandria county, appeared with me upon the hearing of the case, and argued the case

upon a motion to quash the writ, which motion was, after a second hearing, granted by the judge, and the prisoners, who had been bailed, were remanded to the custody of the State authorities.

The fact was that the prisoners had been convicted of keeping a common gaming house, but their petition had not apprised Judge Waddill of the nature of the offense for which they had been convicted. When informed of the facts, the judge quashed the writ, and refused to allow the petitioners a writ of error to the Supreme Court of the United States, or to interfere with the State authorities in any way.

SUPREME COURT OF APPEALS OF VIRGINIA.

1. *Lake Drummond Canal and Water Company vs. Commonwealth.* Appeal from State Corporation Commission. Appellant claimed to be exempt from all taxation by virtue of the charter of the Dismal Swamp Canal Company, which exempted the property of the company in the hands of its shareholders from all taxation.

The court held that the appellant company did not acquire or succeed to the immunity from taxation granted its predecessor company, or the stockholders thereof, and affirmed the order of the State Corporation Commission holding the property of the present company liable to taxation.

2. *Norfolk and Portsmouth Belt Line Railroad Company vs. Commonwealth.* Appeal from the State Corporation Commission. This case was argued by Mr. A. C. Braxton, counsel for the F. S. Royster Company, at whose instance, and for whose immediate benefit the matter had been brought to the attention of the Corporation Commission. Order of the Commission affirmed.

3. *Jones vs. The Commonwealth.* Appeal from Circuit Court of Clarke county, in which Jones was convicted of a felony. Reversed.

4. *Interstate Coal and Iron Company vs. The Commonwealth.* From Circuit Court of Wise county.

The decision in this case interprets the act of May 13, 1903, prescribing the manner in which mineral lands shall be valued for taxation. It was an important case in that only such quantity of the land underlaid with minerals as could be mined out in two years would have been assessed and taxed as mineral land "improved and under development," had the contention of appellants been sustained. The effect of the decision is to construe the statute as meaning that the entire body of the mineral land which can be served by the mines opened and worked upon it, should be assessed as "improved and under development."

5. *Crall vs. Commonwealth.* From Circuit Court of Chesterfield. Affirmed.

6. *Crall and Ostrander vs. Same.* Affirmed as to Crall; reversed as to Ostrander.

7. *Kloss vs. Commonwealth.* From Corporation Court of Fredericksburg. Reversed.

The last three cases were all prosecutions for violations of the peddlers' license tax law.

8. *Virginia Passenger and Power Company vs. The Commonwealth.* Appeal from State Corporation Commission.

Argued by F. M. Connor, Esq., for citizens of Henrico county; by H. R. Pollard, Esq., for the city of Richmond, and by the Attorney-General for the Commonwealth. Affirmed.

9. *The Mutual Protective Association vs. Morton Marye, Auditor of Public Accounts.* Petition for mandamus to compel auditor to issue petitioner, a Virginia corporation, a license to do business in Virginia without its having first made a deposit under section 1271 of the Code, as amended by the Acts of 1904, page 317. Writ denied.

10. *Hill vs. Haney.* Petition for writ of prohibition to prohibit the respondent, who is a justice of the peace in and for the county of Alexandria, from trying a warrant for a misdemeanor committed in that part of said county which is within one mile of the corporate limits of the city.

Relator contended that exclusive police and criminal jurisdiction is given by law to the city authorities within a radius of one mile from the city limits. Court held that the county authorities had jurisdiction. Writ denied.

11. *Burdett vs. Commonwealth.* From Circuit Court of Nelson county. Argued at Staunton. Affirmed.

CASES PENDING AND UNDECIDED IN SUPREME COURT OF APPEALS OF VIRGINIA.

1. *Jernigan vs. Commonwealth.*
2. *Haynes vs. Commonwealth.*
3. *Johnson vs. Commonwealth.*
4. *Robinson vs. Commonwealth.*
5. *Harding vs. Commonwealth.*
6. *Cremeans vs. Commonwealth.*
7. *Hoback vs. Commonwealth.*

The above seven cases will be argued at the next term of the court or as soon as they are ready to be heard.

8. *American Can Company vs. Commonwealth.*
9. *Standard Oil Company vs. Commonwealth.*

These two cases are upon appeals from the State Corporation Commission, and involve the question of the amount of the charter or entrance fee which these two foreign corporations shall be required to pay; whether that fee is prescribed by Sec. 37 of the tax law, which would be \$3,000 for the American Can Company and \$5,000 for The Standard Oil Company, or that prescribed by Sec. 38 of the tax law, which would be \$600 for each company.

Both cases are to be argued at the November term.

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 of 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 and 24. Two cases. Richmond, Fredericksburg and Potomac Railroad Company *vs.* Commonwealth. Application for correction of an assessment of a franchise tax by the State Corporation Commission.

These cases have been argued upon demurrer before the Circuit Court of the city of Richmond, and submitted.

25. 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 *vs.* The United States, due for advances made the latter during the war of 1812-15. A demurrer and an answer have been filed to the petition, and the case has been argued upon the demurrer and submitted.

26. Richmond Traction Company *vs.* Commonwealth. Application for correction of an alleged erroneous assessment of petitioner's property by the State Corporation Commission.

27. Richmond Passenger and Power Company *vs.* Commonwealth.

Application for correction of an alleged erroneous assessment of petitioner's property by the State Corporation Commission.

28. Virginia Passenger and Power Company *vs.* Commonwealth.

Application for correction of an alleged erroneous assessment of petitioner's property by the State Corporation Commission.

29. 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 the petitioner. A demurrer has been filed to the petition, upon which the case will doubtless be decided.

30. Commonwealth *vs.* D. Mott Robertson, late treasurer Appomatox county. Judgment recovered. Liability satisfied.

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, and in which the State generally has little interest.

13 and 14. Two cases. Richmond, Fredericksburg and Potomac Railroad Company *vs.* Morton Marye, Auditor. The decision of these cases will follow that of Nos. 23 and 24 of the law side of the court.

15. Commonwealth *vs.* John C. Wrenn. This suit was instituted at the request of the Secretary of Virginia Military Records to recover certain docu-

ments alleged by the said Secretary to be the original muster rolls and pay rolls of Virginia troops which served in the late Civil War. A demurrer and answer has been filed to the petition.

16. W. Horace Rose *vs.* Morton Marye, Auditor.

OPINIONS.

As was stated by me in my report for the year 1904, 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. ELECTIONS, REGISTRATION, VOTING, ETC.

May 3, 1905.

R. S. BEVILLE, ESQ., *Recorder*,
Crewe, Virginia.

MY DEAR SIR:

Your favor of the 3d instant just received at the hands of Mr. T. S. Harlan.

Of course, you will understand that the Attorney-General is not authorized, nor it is his duty, to give advice as to local or municipal questions. There are 100 counties and about 300 towns in the State, and it would be impossible for one man to give advice upon the multitude of questions that arise in these various localities. As you will see, too, from Sec. 3203 of the Code, the matters as to which the Attorney-General is authorized to give an official opinion are limited. It gives me pleasure, however, personally and unofficially to express my views upon the question you submit.

As you will find, upon an examination of Sec. 1033g and Sec. 1048 of the Code of 1904, the provisions of your town charter and of the charters of all other municipalities in respect to the manner in which the issuance of bonds for the purpose indicated by you may be authorized, are practically repealed and actually supplanted by said Sec. 1033g; and a loan for such a purpose can be contracted by a municipality only in the way now prescribed in subsection (b) of said Sec. 1033g. As you will observe on reading that subsection, bonds of a municipality can be issued for the purpose referred to by you, if the issuance is approved by the affirmative vote of the majority of

the qualified voters of the town or city voting upon the question of their issuance at the general election next succeeding the enactment of the ordinance, or at a special election held for that purpose.

Now, the question as to who are "qualified voters" at such election is determined by Sec. 62 of the Code of 1904, which prescribes the same qualifications for voters at a special election in a town that are prescribed by the Constitution and statutes for voters in a regular election. The effect of this is to require that the voters shall, in the first place, be registered, as required by law, and, in the second place, that unless they are veterans of the Civil War, they must (if such election is held this year) have personally paid, at least six months before such election, all State poll taxes which have been, or should have been, assessed against them for the years 1903 and 1904. However, any citizen who has become of age since February 1, 1904, or will come of age before such election, may be registered, if qualified, upon paying \$1.50 to the treasurer, which \$1.50 will be payment in full of the first State poll tax legally assessable against him. When registered, he may vote, even though this \$1.50 was not paid six months before such election. See Sec. 20 of the Constitution.

The later, therefore, this special election is held, the greater will be the number of your citizens who will be entitled to vote therein, because of having paid poll taxes six months before it is held. I am,

Yours very truly,

WILLIAM A. ANDERSON.

August 21, 1905.

HON. JAS. B. DOHERTY,

Chairman Democratic Committee, Richmond, Virginia.

DEAR SIR:

Replying to your inquiry, whether a citizen, who is a veteran of the Civil War, but who registered under the new Constitution *without basing his application for registration on that ground*, and who now has a transfer from his former election district to one of the precincts in the city of Richmond, should be allowed to register on said transfer and vote in the primary, notwithstanding the fact that his poll taxes are unpaid, I beg to say that, by the express provision of Sec. 22 of the Constitution, *no person who served in the Civil War "shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote."* This provision of the Constitution clearly entitles this citizen to register and vote without having paid any poll taxes; and the fact that, when he was first registered, he did not state he was a veteran, cannot deprive him of his constitutional right. He is entitled *now* to show, by his oath and any other evidence satisfactory to the election officer, that he was a veteran, and, on proving this, he should certainly be entitled to vote.

Yours very truly,

WILLIAM A. ANDERSON.

September 14, 1905.

W. C. BURNHAM, ESQ., *Clerk of Warwick County.**Denbigh, Virginia.*

DEAR SIR:

The question submitted in your favors of the 5th and 13th is not one as to which the Attorney-General is authorized to give an official opinion under the circumstances. See Code of Virginia, Chapter 155.

However, answering your inquiry personally and unofficially, I will say that, while I know of no provision in the Constitution or statute law which expressly prohibits electoral boards from appointing themselves as judges of elections, there is such a manifest impropriety in such a stretch of their authority that I am unwilling to believe that any board in Virginia would deliberately, and upon any careful consideration, attempt to do such a thing. If any such board should commit such a mistake, I am strongly inclined to the opinion that the courts would hold the appointment invalid, on the ground that there was a flagrant incompatibility between the office of judge of election and the office of member of a county or city electoral board, which rendered it improper for the same man to hold both.

Very truly yours,

WILLIAM A. ANDERSON.

October 6, 1905.

C. R. JAMES, ESQ.,
Cheriton, Virginia,

DEAR SIR:

Although the Attorney-General is not authorized to give an official opinion upon a matter in reference to a local election at the request of any citizen (as you will see from Chap. 155 of the Code), it gives me pleasure, personally and unofficially, to answer your inquiry.

All of the voters of your district, town or county, still residing there, who were qualified to vote at the November election, 1905, will be undoubtedly qualified voters at any local option election which may be held therein during the month of December following. It is by no means clear that they would all be qualified voters at such an election held in January, or February, 1906, for the reason that none, or certainly very few of them, will have paid the capitation tax assessed, or assessable, against them for the preceding year, six months before any election held in either of those months.

There is some difference of opinion as to whether a person must have paid his capitation tax for the preceding year, six months before a local option election. I think the law, by strong implication, if not by positive mandate, prescribes the same qualifications for voters at local option elections which are required for general elections; and able lawyers agree with me in this view, though one of the best circuit judges in the State has, I understand, decided differently.

If I am correct, only veterans of the Civil War, and the very few citizens who possibly paid their poll taxes for 1905, in June, July or August, 1905, could vote in January or February, 1906.

There can be no question that all who can vote in November, can vote in December, 1905, and that is the best time to hold such an election and have the question decided by the largest available number of certainly qualified voters without any question as to their right to vote.

As the law prohibits any such election from being held within thirty days of the general election, it would have to be held between the 7th of December and the 1st of January following.

Hoping that I have answered your inquiry satisfactorily,

Very truly yours,

WILLIAM A. ANDERSON.

October 28, 1905.

MR. J. S. SALVER.

Castlemood, Va.

DEAR SIR:

Yours of the 25th this inst. received.

The election officials, or the courts if the election officials do injustice, are the proper authorities to decide whether any particular person has a right to vote. The Attorney-General is not authorized to decide any such question. He can only lay down general rules which the local authorities must apply.

The question of residence is often a most difficult one to determine. It is a question not only of intention, but of *fact*. If a man has once actually and designedly changed his residence, he loses his vote in the place from which he has removed. The ownership of property may have little or nothing to do with the decision of the question.

Of course, temporary absence from one's home where there is all the time the intention of returning to it will not deprive a man of the right to vote at his home, even if the absence continues for a year or more. But there must be the purpose of returning and he must not have acquired a legal domicile elsewhere. Every case must be decided upon the facts and circumstances of that particular case, according to the right of each case.

If I was authorized to decide your case, I would not undertake to do it without a fuller statement of the facts than you give me.

Yours very truly,

WILLIAM A. ANDERSON.

II. SCHOOL LAWS.

November 29, 1904.

HON. JOSEPH W. SOUTHALE.

Superintendent of Public Instruction, Richmond, Virginia.

DEAR SIR:

I have considered the question submitted in the letter of D. B. Capps, Esq., of Princess Anne county, under date of the 7th inst., addressed to you, and by you referred to me on the 24th inst. The letter of Mr. Capps is herewith returned.

In reply, I beg to say that the salary of a division superintendent of schools is fixed absolutely by Sec. 1438 of the Code, as amended at page 803, Acts of 1902-3-4.

The powers of local school boards, both county and district, are prescribed by Chapter 509, pages 798 et seq., Acts of 1902-3-4. There is no authority granted by that chapter to either of the said boards to increase or supplement the salary of a division superintendent of schools. Of course, such boards have no more power than is expressly granted them.

You will, doubtless, remember that an effort was made by the State Board of Education to prevail upon the General Assembly to provide for the allowance, by county or district boards, of a larger compensation to division superintendents of schools, payable out of the county or district school fund; and that the General Assembly declined to act upon the recommendation of the State Board of Education in this particular.

I am, therefore, of opinion that, unless there is some special act of the General Assembly, granting such authority to either or both of said school boards for Princess Anne county, neither the county school board of said county nor any district school board of said county, may allow the division superintendent of schools for said county any compensation, on account of salary, in addition to the salary expressly prescribed by said Sec. 1438 of the Code, as amended.

Very truly yours,

WILLIAM A. ANDERSON.

December 31, 1904.

HON. JOSEPH W. SOUTHALL,

Superintendent of Public Instruction, Richmond, Virginia.

DEAR SIR:

I have considered the following question, submitted in the letter of Mr. John H. Hopkins, treasurer of Accomac county, dated December 10th, and referred to me by Mr. Frank P. Brent, secretary of the Board of Education, viz: Whether the fund, arising from the sale of the bonds authorized to be issued by the board of school trustees of Metompkin school district in said county, by the act approved March 29, 1902, (Acts of 1901-2, p. 452), *should be paid over to the treasurer of the said county and disbursed by him upon the warrants of said district board for the purposes prescribed in said act.*

I beg leave to answer this inquiry as follows: The act referred to, authorizing the said district school board to borrow not exceeding \$5,000 for the purpose of enlarging or purchasing schoolhouses in said district, is silent as to who shall be the custodian of the money derived from any money so borrowed. It does not authorize said district board to receive the same, though said board is empowered by the act to direct and control its expenditure for the improvement, enlargement, building, or purchase of schoolhouses, as said board may deem proper and desirable.

It has been uniformly the practice and policy of the law in this State to require all public moneys to be paid to some bonded officer who shall be entrusted with the custody and disbursement of the same, upon warrants issued by the proper authority; and so we find that, by Sec. 1515 of the Code, it is expressly provided that,

"All school moneys to be disbursed in any county shall be received, kept, and disbursed by the county treasurer thereof, subject to similar responsibility as in case of other funds by law committed to him."

This section then goes on to provide that it shall be the duty of the treasurer "also to receive and collect all taxes" levied by the board of supervisors in such county, whether for district or county school purposes, and to require the treasurer to keep the district funds in separate accounts from those of the State and the county. It plainly makes it the treasurer's right and duty to receive and disburse "ALL SCHOOL MONEYS," whether district or county, which may be derived from any source and devoted to any purpose within his county.

It seems to me to be manifest, therefore, that the fund arising from the loan referred to in Mr. Hopkins' inquiry, should be received and disbursed by the treasurer of Accomac county.

I regret to discover that the law does not prescribe what the compensation of the treasurer shall be for his services in receiving and disbursing school moneys other than levies and moneys apportioned to the county from the State funds. In the absence of any express enactment on the subject, I would suggest that his compensation in such cases should be fixed by the county school board, provided that it should be limited to a fair allowance for *disbursing* the money, as the treasurer would be subject to very little trouble in the matter of *receiving* it from the persons who lend it to the district school board.

Very truly yours,

WILLIAM A. ANDERSON.

February 18, 1905.

HON. JOSEPH W. SOUTHALE.

Superintendent of Public Instruction, Richmond, Virginia.

DEAR SIR:

The question presented in the letter of Mr. Conrad Kownslar, superintendent of schools for Clarke county, dated the 13th instant, addressed to you, any by you referred to me, has been considered, and I beg to say that, while there does seem to be an apparent inconsistency between the statute embodied in Sec. 1466a, Pollard's Code, and Sec. 1482 of said Code, yet in my opinion the provisions of the latter section must be taken to control in reference to all district school property.

Sec. 1466a should be read in connection with the fourth subdivision of Sec. 1447 of said Code, and, so considered, I think it is fair to conclude that it was intended to apply only to such public school property as, by the provisions of said fourth sub-division of Sec. 1447, is vested in the county school board.

In addition to this view, Sec. 1482 is the latest enactment in reference to the subject to which it relates, and is evidently designed to specifically cover the matter of the title, control and transfer of district school property, and to vest in the district school trustees the power "to take, hold, lease and convey" all district "school property, both real and personal."

I am, therefore, of opinion that it is clearly competent for the school trustees of Long Marsh district, Clarke county, to sell and convey the school house referred to in the letter of Mr. Kownslar, which is herewith returned.

Very truly yours,

WILLIAM A. ANDERSON.

September 16, 1905.

HON. J. W. SOUTHALL,

Superintendent of Public Instruction, Richmond, Virginia.

DEAR SIR:

I have considered the question submitted in the letter of Mr. A. M. Ely, treasurer of Lee county, dated the 13th instant, and addressed to you, and beg leave to give you my construction of the following extract from Sec. 1515 of the Code:

“ * * * * For receiving, collecting and disbursing levies imposed for and by counties or school districts he shall be entitled to the same compensation allowed him by law for receiving, collecting, and disbursing county levies, and for other ordinary purposes. In computing commissions for collecting and disbursing all sums levied for county, school, and district purposes, the amount shall be treated as one sum, and shall not be divided for the purpose of calculating the treasurer's commissions. * * * * ”

As I understand the language quoted, it requires that the compensation of county treasurers for receiving, collecting, and disbursing county and district school taxes or levies, shall be computed, ascertained, and determined as follows:

The *rate* of compensation is the same which he is allowed for receiving, collecting and disbursing county levies.

That rate is fixed by Secs. 613 and 614 of the Code, as amended by the Acts of 1904, pp. 310 and 311, at a commission graduated according to the aggregate of the sums collected and disbursed in any one year.

The entire amount collected by the treasurer for all county and district purposes, of all and every character and description, including county and district school and road levies, and all other levies, are aggregated together and taken as one sum, for the purpose of determining the *rate* of the treasurer's compensation in each case.

This compensation thus ascertained, should be apportioned among the respective funds for which the taxes are collected in proportion to the amount of each fund, and the ratable share of the treasurer's compensation, chargeable to each specific fund, deducted therefrom before disbursement.

When the aggregates of all sums received by county treasurers on all accounts, for county or district taxes or levies of any description, do not exceed \$15,000 for any one year, the problem is a very simple one, for his compensation under Secs. 613 and 614, is the uniform commission of five per cent.

Where these totals aggregate more than \$15,000 for any one year, the compensation is three and one-half per cent. on sums over \$15,000.

The above is subject to these provisions: that, when the aggregate of all the above collections does not exceed \$10,000, the treasurer is entitled to an additional compensation of four per centum on the taxes remaining unpaid on December 1st, and collected by him; and when the aggregate of all such levies and taxes exceeds \$10,000, but does not exceed \$15,000 for any one year, he is allowed three per cent. on all levies collected after December 1st.

The above is subject to the especial provision that the board of supervisors of Pittsylvania county may fix the compensation of the treasurer of that county for receiving and disbursing county and district levies.

To illustrate: If in any particular county the aggregate of all collections on account of county and district levies shall be, say \$20,000, and the aggregate for school purposes \$10,000, the treasurer's compensation therefor would be 5 per cent. on \$15,000, \$750; 3 1-2 per cent. on \$5,000, \$175. Total, \$925, or an average commission of 4 5-8 per cent.

The school fund would be credited with \$10,000 and charged with its aliquot share of the treasurer's commission, say 4 5-8 per cent., \$462.50, leaving to the credit of the school fund this net sum, \$9,537.50.

In the above illustration, I take no account of the distribution of the aggregate school fund between the county and the district, and between the several districts; but that is merely a matter of bookkeeping, and can be readily adjusted when the average rate of the treasurer's compensation has been determined.

I enter thus into details because the question has arisen repeatedly in the past, has heretofore been passed on by me more than once, and must arise in hundreds of cases in the future. I therefore desire to make this opinion as full and clear as possible.

It might be well, if you approve my views, to issue a circular to the treasurers and division superintendents containing your ruling on the question.

Very truly yours,

WILLIAM A. ANDERSON.

October 11, 1905.

W. E. PUCKETT, Esq.,

President Board School Trustees, Newport News, Virginia.

DEAR SIR:

Your letter of the 8th instant has been received.

By the provisions of Section 1533 of the Code, as amended by Acts 1902-3-4, at page 826, the division superintendent of a city receives pay from the State in like manner as other division superintendents of schools, that is, as provided in Sec. 1438 of the Code:

* * * * "thirty dollars for every thousand of population under his jurisdiction for the first ten thousand; twenty dollars for every thousand in excess of ten and up to and including thirty thousand; and ten dollars for every thousand in excess of thirty thousand; rejecting in each case fractions less than five hundred: provided that the pay of a superintendent shall not in any case be less than two hundred dollars a year."

But by the further provision of Sec. 1533, the division superintendent of a city may be paid such additional remuneration as the *council* of his city may allow.

The subject of the pay of the division superintendents is fully covered by the sections above quoted, and the city school board is not authorized to make any increase in such salaries.

Thanking you for your kind words and good wishes,

Yours very truly,

WILLIAM A. ANDERSON.

III. PENITENTIARY MATTERS.

January 9, 1905.

MESSRS. MILTON E. MARCUSE, JOHN C. EASLEY and T. H. ELLETT,
Committee of the Board of Directors of the Virginia Penitentiary.

GENTLEMEN:

Your letter of inquiry of the 4th instant has received my careful consideration.

The act appropriating the public revenue, approved March 12, 1904 (Acts of 1904, pp. 170-5), was designed to sanction and legalize the disbursements made by the Auditor of Public Accounts during the five months between the first day of October, 1903, and the first day of March, 1904. Those disbursements by the Auditor had been made, in large part, under antecedent laws, and not in pursuance to the provisions of any act appropriating the public revenue, to prevent the absolute stoppage of the wheels of government, as had been the practice of that office for many years.

I find that the appropriations on account of the penitentiary, including salaries of officers, directors, guards, clothing, supplies, etc., etc., for the five months referred to, provided for on pages 171-2 of the said act aggregated \$34,904.16. And that the appropriations on account of the penitentiary farm, including salaries of officers, guards, supplies, food, repairs, etc., etc., for said period, aggregated \$9,300.00. The total of the maximum appropriations on all of these accounts being, therefore, \$44,204.16.

On inquiry at the office of the Auditor of Public Accounts I ascertain that there was actually paid out, upon the warrants of the Auditor, on account of the penitentiary and penitentiary farm, embracing all the above items, during said period of five months, as aforesaid, sums amounting in the aggregate, to \$65,940.01, and particularly that every expense authorized by then existing law to be incurred (or sanctioned by the Act of March 12, 1904) on account of the penitentiary farm was paid by said warrants.

The aggregate sum thus actually paid out by the Auditor during the period referred to on account of the penitentiary and penitentiary farm EXCEEDED the appropriations made by said act of March 12, 1904, for these items, by the sum of \$21,735.85.

I take it for granted that this excess of disbursements on account of the penitentiary and penitentiary farm would have been provided for in the Act of March 12, 1904, had the General Assembly been informed as to the amounts which the Auditor had actually paid out.

It is clear to my mind that the Auditor would not now be authorized to pay out anything more upon any of the accounts included in said specific appropriations, particularly in view of the fact that he had already exceeded them before the Act of March 12, 1904, was passed.

I regret very much the condition of things which you mention, but I can see no way by which the Auditor could make any such disbursement as you suggest without plainly transcending his powers.

It is unfortunate that the General Assembly has not provided for such a contingency, but it is an omission which cannot be helped by the Auditor.

I have the honor to be

Very truly yours,

WILLIAM A. ANDERSON.

March 24, 1905.

COLONEL S. M. BOLLING,

Superintendent State Penitentiary.

DEAR SIR:

Replying to your favor of this instant, I beg leave to say that by Sec. 4113, Code of 1904, the Board of Directors of the penitentiary may, with the approval of the Governor, prescribe rules, not contrary to law, for the preservation of the health of the convicts in the penitentiary; and, for this purpose, it would be competent for said Board, with the approval of the Governor, if no such rule has yet been adopted, to adopt and prescribe a rule directing you not to send for or receive into the penitentiary, from any jail in the Commonwealth, any convict sentenced to confinement in the penitentiary, if the surgeon of the penitentiary should notify you in writing that he was reliably informed that small-pox or some other dangerous, contagious disease existed either in said jail or in the locality in which the jail was situated, and that it would, therefore, be unsafe to admit such convict into the penitentiary while this condition of things existed; and until the surgeon of the penitentiary shall thereafter advise you that it is safe to do so.

By this section of the Code, the Board of Directors, with the approval of the Governor, is given control of this subject, and you and the surgeon should act under such rules and regulations as the Board may prescribe.

Very truly yours,

WILLIAM A. ANDERSON.

IV. MEDICAL EXAMINING BOARD.

February 7, 1905.

DR. R. S. MARTIN,

Secretary State Board of Medical Examiners, Stuart, Virginia.

MY DEAR SIR:

Your favor of the 1st instant has been received.

1. An answer to your first inquiry is furnished by Sec. 1747 of the Code, as amended by the Act of April 23, 1903 (Acts of 1902-3-4, page 244), which

requires that an applicant for a certificate to practice medicine or surgery in this State shall be examined by the State Board of Medical Examiners. Such examination must be by the Board in every case where a person, who proposes to practice medicine or surgery in this State, is required to stand an examination at all, with the single exception covered by the second proviso embodied in said Sec. 1747, which is as follows: "And provided further, that when, in the opinion of the president of the Board, any applicant has been prevented by good cause from appearing before the Board, he shall have authority, in his discretion, to grant a special permit to such applicant to practice medicine or surgery until he shall have an opportunity to appear before the Board in session for examination, which special permit shall be revocable at the discretion of the president, and in no case shall it entitle the holder thereof to practice after the next regular meeting of said Board."

This proviso does not prescribe any other mode of examination, but authorizes the president to grant a "special permit," which shall not be operative after the next regular meeting of the State Board of Medical Examiners.

It occurs to me, in this connection, that it would be competent for the president of the Board to adopt such means of informing himself as to the fitness of an applicant, who had been prevented by good cause from appearing before the Board at its regular session, to receive such temporary certificate; and, if your president chose to require an applicant in such case to be examined by himself, or by physicians to be designated by him, before he would issue such certificate, such a course of procedure would, I think, be legal.

I understand your question, however, to refer to the granting, not of temporary, but of regular certificates. The temporary, or *ad interim*, certificate could be granted by the president upon such conditions as to the furnishing of satisfactory evidence in regard to the competency of the applicant as may seem proper to the president.

I have read with interest the opinion of Hon. E. J. Harvey upon the above question, which you inclosed with your letter, and I concur entirely in the views so well presented by him.

2. As to what fee may be charged an applicant who is a graduate of some satisfactory medical college chartered by some other State or Territory, and has a certificate from the examining board of such State or Territory, the Virginia statute makes no specific provision. It provides that a fee of \$10.00 shall be paid by each applicant who is to be examined by the Board before the examination is had; but no fee is prescribed in any case where such examination is not required. However, your board is expressly given a broad "discretion" as to the terms and conditions on which it will accept the diploma referred to and the certificate of examination by the board of another State, as the equivalent of an examination by the Virginia Board. It seems to me that your board could, therefore, with propriety and fairness, require this class of applicants to pay a reasonable fee before receiving a certificate to practice in this State. *The charge ought to be reasonable*; and I would hardly think that it ought to be more than that prescribed by law for an applicant who stands an examination before your board, and who therefore subjects your board to more trouble and expense than would one whose application is based

upon the diploma of a college and certificate of examination of another State.

It is my pleasure to answer your inquiries as best I can, and I hope my response will meet your approval.

Very truly yours,

WILLIAM A. ANDERSON.

March 4, 1905.

DR. R. S. MARTIN,

Secretary State Board of Medical Examiners, Stuart, Virginia.

MY DEAR SIR:

Your favor of the 27th ulto., inclosing a letter from Dr. A. L. Hodgdon, addressed to you, and dated the 9th ulto., has been received, and I herewith return the letter you inclosed.

Your inquiry is: Can a physician who began the practice of medicine in Virginia prior to 1885, remained in Virginia for only a few years, then left the State for nearly twenty years, now return to Virginia and resume the practice of medicine without taking an examination before your Board?

If Sec. 1750 of the Code of 1904 (or see Acts of 1902-3-4, page 705) was the only statute upon the subject, the physician referred to would be entitled to resume practice in Virginia without taking an examination, for that section refers to persons "who shall have commenced the practice of medicine or surgery in this State since the first day of January, eighteen hundred and eighty-five."

It seems, however, that the case of the physician referred to is covered by Sec. 1743h of the Code of 1904 (or see Acts of 1893-4, page 400), which was enacted on the 22d day of February, 1894. The first section of this statute reads in part as follows:

"(1). *From and after the passage of this act, the following persons and no others shall be permitted to practice medicine or surgery in this State:*

"First. All persons who have practiced medicine or surgery in this State continuously for the period of at least five years prior to the passage of this act, but only such persons as have been assessed with a license tax as a physician or surgeon by some commissioner of the revenue in this State during each of the five years preceding the passage of this act shall be regarded as included within the provisions of this clause: provided, that this act shall not apply to any physician or surgeon now" (i. e., at the date of the passage of this law) "legally licensed and practicing as such in this State."

So that it is very clear that the physician referred to is, by the statute from which I have just quoted, disqualified from now returning to Virginia and resuming practice without taking an examination before your Board, which would, under the third clause of the first section of this statute, permit him to practice if he successfully stood such examination. What I have said would not apply, however, if the physician referred to has already been duly examined and awarded a certificate *under the act of January 31, 1884*, which I infer is not the case.

Very truly yours,

WILLIAM A. ANDERSON.

V. BOARDS OF HEALTH.

STAUNTON, VA., September 5, 1905.

DR. PAULUS A. IRVING,

Secretary Virginia State Board of Health, Richmond, Va.

DEAR SIR:

Your favor of the 1st instant forwarded from Richmond has been received. The questions which you submit have received my careful consideration.

Your inquiries are as follows:

"(1) Is the Quarantine Commission of the Elizabeth River District an entirely independent Commission or Board?

"(2) Has the Quarantine Commission of the Elizabeth River District like powers and duties of other municipal or county (local) boards?

"(3) Has the State Board of Health any jurisdiction or supervisory power or control over the Quarantine Commission of Elizabeth River District, such as it has over other local boards?"

The act creating the Quarantine District of Elizabeth River and a Board of Quarantine Commissioners and a quarantine officer for said district became a law February 20, 1877. Acts 1876-7, page 100. Acts amendatory of certain sections thereof were approved January 28, 1878—Acts 1877-8, page 33; and February 26, 1886—Acts 1885-6, page 255. These several sections were continued in force by Sec. 1743 of the Code of 1887.

The act conferring jurisdiction on said Board of Elizabeth River District, and the quarantine officer thereof, over carriers by land, was approved February 28, 1898—Acts 1897-8, page 568.

The statute creating the State Board of Health and defining its duties and powers was approved March 7, 1900. As then enacted and subsequently amended, it is found in Pollard's Code, Sec. 1713d, clauses (1) to (13) inclusive.

An examination of the acts referred to will show that the statutes creating and defining the powers of the Quarantine Board and officer for Elizabeth River District, and the statutes creating the Virginia State Board of Health, and defining the powers of that Board and of its secretary or executive officer, are all substantive parts of the statute law of this State. One is a general statute applicable to the entire Commonwealth; the other may be regarded as a special or local statute applicable only to the district therein defined, embracing the cities of Norfolk and Portsmouth and the county of Norfolk.

While a general statute which is evidently designed to cover the entire subject of legislation embraced by its provisions (as I take it to be true in respect to the Act of March 7, 1900, creating your Board), will operate as a repeal of any and all previous legislation of a general nature relating to the same subject (see Fox's *Adm'r vs. Commonwealth*, 16 Gratt. 1), such a general statute will not be construed to repeal or amend a special or local statute upon the same subject, unless the legislative intent so to repeal or amend is clearly manifest from the language used in the general act. *Commonwealth vs. Richmond & Petersburg R. R. Co.*, 81 Va. 355.

It seems to me, therefore, that the Quarantine Board of Elizabeth River District and the quarantine officer for said district are clothed with all the powers conferred upon that board and officer by the Acts in respect thereto, above recited, except in so far as the powers and duties of said local board are clearly made subordinate to the powers and duties of the State Board of Health and of the executive officer thereof under Sec. 1713d of Pollard's Code.

While the said Elizabeth River Board is not, of course, either a county board or a city board of health with in the meaning of clause (5) of Sec. 1713d, it seems to me clear that said Elizabeth River Board and the quarantine officer thereof are "local health authorities" within the meaning of clause (4) of said section.

As will be seen, very broad powers and comprehensive duties are devolved upon the State Board of Health by the terms of clause (4), among them being the following powers and duties, viz.: "To take cognizance of the interests of the health and life of the people of the State, and all matters pertaining thereto"; and by another provision in the same clause the State Board of Health in unqualified terms is given power to "annul or modify any order, regulation, by-law or ordinance of local health authorities concerning any matter which *in its judgment* affects the public health beyond the territory over which the said local health authorities have jurisdiction."

The language of this enactment is, it seems to me, broad enough to cover every possible local health authority of the Commonwealth, and to plainly express the legislative purpose to confer upon the State Board of Health the duty and the power of modifying or abrogating any order or regulation of any local health authority in the State which, in the judgment of the State Board of Health, affects the public health beyond the territory over which such local health authority has jurisdiction.

Clause (10) of Sec. 1713d confers very broad powers upon the secretary of the State Board of Health for the prevention of transit through, or introduction into, the Commonwealth, of infected persons, goods or animals, making it his duty "to cause such persons, goods or animals to be removed from the cars, stages, vessels, boats or conveyances and securely isolated and disinfected." The only limitation upon his power is that he has no right to act under the jurisdiction of municipal health authorities or the State Quarantine Board unless, "in his judgment, such authorities or the State Quarantine Board have failed or are neglecting to take proper steps for the protection of the public health," and subject to the further qualification that any action he may take in the matter shall be subject to the supervision and control of the State Board of Health.

By the language of this enactment the executive officer of the State Board of Health is given plenary power, subject to the qualification mentioned, which can hardly be construed to be a practical limitation of his power except that he is subject to the paramount authority of the State Board of Health. The exception stated in this clause does not, in my opinion, embrace the Elizabeth River District Quarantine Board, as that is not a "municipal" health authority.

Answering your inquiries in the inverse order in which you propound them, I conclude therefore : (1) That the State Board of Health has power and jurisdiction to annul or modify any order of the Board of Elizabeth

River District or of the quarantine officer thereof concerning any matter which, in the judgment of the State Board of Health, affects the public health beyond the territory over which the said Elizabeth River District Board have jurisdiction; (2) that subject to this paramount authority of the State Board of Health the Quarantine Commission of Elizabeth River District retains the powers and duties devolved upon it by the acts above recited; and (3) that the Quarantine Commission or Board of Elizabeth River District is not "an entirely independent commission or board," but is subordinate to the superior authority of the State Board of Health to the extent and in the particular mentioned in my answer (1) above.

I am further of opinion that the powers conferred upon the secretary and executive officer of the State Board of Health by clause (10) of Sec. 1713d, and exercised by him subject to the superior supervision and control of the State Board of Health, are paramount to any powers and duties which may be attempted to be exercised for the same purpose under authority of any local board whatever, and that where any conflict may arise between the secretary or executive officer of the State Board of Health and any local board, the authority of the secretary of the State Board will be paramount.

I have endeavored to make my answers to your inquiries as explicit as possible, but, of course, it will be the function of your board or of its secretary, acting subject to its supervision and control, to apply these rulings to any particular case which may arise.

I have the honor to be,

Very truly and respectfully yours,

WILLIAM A. ANDERSON,
Attorney General.

VI. SUPERINTENDENT OF PUBLIC PRINTING.

October 2, 1905.

DAVIS BOTTOM. ESQ.,

Superintendent of Public Printing, City.

DEAR SIR:

Your favor of this date just received.

The question you submit, as I understand, is: Whether under the law (Acts of 1904, page 325, amending Sec. 273 of the Code) it is proper for you, as one of the terms mentioned in your advertisement for bids, to state that: "The Superintendent reserves the right to reject any and all bids"; and whether, after having so advertised you would have the right to reject any or all the bids if you found that fair competition had in any way, or from any cause, been prevented; that the bids were excessive and unreasonable; that there had been a combination among bidders to put up the price for the work to be done; or, if from any state of facts presented when the bids were opened, you found that unfair advantage had been taken of the State, or that the interests of the State would be unduly prejudiced if you accepted any particular bid, or all of the bids.

I understand that it has been the unvarying practice of your predecessor in office for years to reserve the right to reject any and all bids, and that he

exercised this right when he found it necessary for the protection of the State; and that such for years has been the practice of the office, of which the public generally, and the printing houses in particular, have had notice.

My information is also to the effect that it is the usual, if not the universal usage of public officers, as well as of the agents of corporations, and individuals, letting any important contracts upon competitive bidding, to reserve the right to reject any and all bids; and that without such a reservation the interests of the State might be greatly prejudiced by combinations, or misapprehensions among bidders, and the absence of any fair competition.

It will be seen that the statute referred to gives the Superintendent of Public Printing considerable discretion in the awarding of such contracts.

Under the facts mentioned I do not think it requires him to accept any bid which is made, because it is the lowest, when he finds that such bid is grossly excessive, and particularly when there has been, for any reason, no fair competition.

In view of these facts, and particularly of the uniform practice upon the subject, it seems to me to be proper and right for the Superintendent of Public Printing to state the terms of the bidding in his advertisement therefor, and among these to give notice that he reserves the right to reject any and all bids; and that it becomes his duty to exercise that right when he finds that justice to the State, and fair dealing, require him to do so.

Respectfully yours,

WILLIAM A. ANDERSON.

October 21, 1905.

DAVIS BOTTOM, ESQ.,

Superintendent of Public Printing, City.

DEAR SIR:

In reply to your inquiry as to whether you, as Superintendent of Public Printing, or the respective departments, or department chiefs and officers, of the State government shall contract for such additional copies of the annual reports as are authorized by Sec. 280 of the Code of 1904 as may be desired by the institutions or officers making the report, I beg to say that:

1. By Sec. 273 of the Code, the Superintendent of Public Printing is authorized and required "to let out to the lowest responsible bidder * * * all the printing, binding, ruling * * * required by any department of the State and authorized by law to be done, or required in the execution of any law," and,

2. By Sec. 280 it is expressly prescribed that: "It shall be the duty of the Superintendent of Public Printing, in making his contracts for the printing of the reports referred to in this section, to provide that the contractor shall print such additional copies of the said reports as may be desired by the institutions or officers making the reports at such prices as may be agreed upon between the superintendent and contractor; the account for the same, when approved by the superintendent, shall be paid by the department or institution ordering said printing." * * * *

These provisions of the statute, controlling the entire subject, are so explicit as to need no interpretation, and they, in unmistakable terms, require that while the extra copies of the annual reports shall be paid for by the department or institution ordering the same, the printing thereof shall be done under contracts made by you as directed in Sec. 273.

The only exception as to the mode of payment for printing done for any of the departments is that contained in the special act embraced in Sec. 275 a of the Code of 1904 in reference to printing and publishing for the State Corporation Commission, which expressly directs that all printing and publishing done for said commission shall "be paid for out of the general appropriation for public printing."

Very truly yours,

WILLIAM A. ANDERSON.

VII. OTHER PUBLIC BOARDS.

February 20, 1905.

COLONEL L. W. LANE, JR.,

Commissioner of State Hospitals for the Insane.

SIR:

Sec. 1664 of the Code, as amended by the act approved April 7, 1903 (Chap. 139, Acts of 1902-3-4), following the provisions of the Constitution, devolves a number of duties upon the Commissioner of State Hospitals which require frequent visits by him to each hospital, and the statute seems also to contemplate that he shall be present, whenever practicable, at each meeting of the General Board of Directors and at each meeting of the Special Board of Directors, and that he shall audit the accounts of the expenditures of each of the hospitals of the State; and this statute provides that, while in the discharge of his duties, he shall receive necessary traveling expenses not to exceed the sum of \$500.00 in any one year. This act does not provide specifically how these traveling expenses shall be paid, but if there had been no other provision in the law they would be paid out of the funds under the control of the general board, and not directly out of the State treasury.

By the act appropriating the public revenues, approved March 12, 1904, it is provided that for the year ending February 28, 1905 (Acts of 1902-3-4, page 179), the Commissioner of State Hospitals shall receive out of the State treasury for necessary traveling expenses a sum not exceeding \$300.00, the same to be paid on the approval of the general board, and the same provision is found for the year ending February 28, 1906 (page 186 of said Acts). Under each of these provisions, it seems to me, you are entitled to receive necessary traveling expenses, upon accounts to be approved by the general board, to an amount not exceeding \$300.00 in each of said fiscal years, payable immediately out of the State treasury upon warrants of the Auditor of Public Accounts.

As I understand from you, the necessary expenses incurred by you in attendance upon the several meetings of the general and special boards, as the chairman of said boards, and your other necessary expenses when traveling in the discharge of your duties as Commissioner of State Hospitals, will to-

gether aggregate more than \$300.00 in each year. I am of opinion that it would be lawful for the general board to provide for the payment, out of any funds under its control and not otherwise appropriated, of your necessary traveling expenses in excess of the \$300.00 (which is payable directly out of the State treasury), but not exceeding the sum of \$200.00 additional, so that the total amount of said traveling expenses shall not exceed the \$500.00 limited in Sec. 1663 of the Code, hereinbefore referred to.

Very truly yours,

WILLIAM A. ANDERSON.

February 15, 1905.

CAPTAIN E. J. BOSHER,

President Lee Camp Soldiers' Home, Richmond, Va.

DEAR SIR:

I have received your favor of the 13th instant, submitting two inquiries for my opinion, as follows:

First. "As to the eligibility of soldiers who served in Virginia commands during the war and are now citizens of West Virginia, to admittance into our Soldiers' Home."

Second. "Whether we can admit such veterans upon the payment of a sum equal to the cost of maintenance of said veterans."

It gives me pleasure to make my reply.

First. The statutes of Virginia authorizing the establishment of the R. E. Lee Camp Soldiers' Home, and providing for annual appropriations for the support thereof, are found in the Act approved March 13, 1884, entitled "An Act to incorporate R. E. Lee Camp, No. 1, Confederate Veterans" (Acts of 1883-4, Chap. 416), the Act approved February 12, 1886, making an annual appropriation for the support of the R. E. Lee Camp Soldiers' Home (Acts of 1885-6, Chap. 104), and in the Act approved March 3, 1892, making an annual appropriation to the said Home in consideration of the conveyance of the property, then used for said Home, by R. E. Lee Camp, No. 1, upon the terms prescribed in said Act (Acts of 1891-2, Chap. 625).

By the first of these Acts the Board of Visitors, to be appointed or constituted as therein prescribed, is vested with the power and duty of controlling and managing said Home; and said Board is authorized to prescribe rules and regulations proper and necessary for its government.

Upon examination of the several Acts referred to, I do not find that the said Board is required to limit the benefits of the said Home to soldiers of Virginia who served in the Confederate army in the war between the States who are still citizens and residents of Virginia.

I construe said Acts to confer upon said Board the right to define what soldiers shall be admitted into the said Home, and the terms and conditions of their admission, and that it would be within the power of said Board, in the exercise of the discretion conferred upon it, either to extend the benefits of said Home to soldiers who served in Virginia commands during the war, who are now residents of West Virginia, or to confine the benefits of said Home to those of said soldiers who are still citizens and residents of this State.

If the appropriation made by the State was made simply and exclusively for the support of the inmates of said Home, a grave question would arise as to whether it would be competent for the Legislature to make an appropriation out of the funds of the State for the benefit of citizens and residents of other States, and whether the appropriation could be used for any such purpose; but the appropriation made by Virginia to said Home is made in pursuance of a contract with the Commonwealth, and not merely for the purpose of supporting the inmates of the said Home, but rather as a consideration for the ultimate acquisition of the property of the said Home by the Commonwealth at the expiration of the period of twenty-two years from March 3, 1892.

The charter and, as I understand, the by-laws governing the said Home, prior to and at the date of the Act of March 3, 1892, authorized the admission of Confederate veterans who are residents of States other than Virginia; and, inasmuch as the appropriations made pursuant to the Act of March 3, 1892, were not merely donations to said Home, but appropriations made for the ultimate purchase of its lands, buildings and other valuable property, it seems to me to be clear that Confederate veterans now residing in other States may be admitted into said Home upon such terms and conditions as the Board of Visitors may prescribe.

Second. In answer to your second inquiry, I would say that the said Board of Visitors is, it seems to me, empowered to prescribe the terms and conditions upon which the veterans who served in Virginia commands during the war between the States, but who are now citizens of West Virginia or any other State, may be admitted into said Home; and, if said Board deems it just and proper to do so, it could require such veterans, in view of the fact that said Home is almost entirely supported by appropriations from the treasury of this State and funds contributed by citizens of this State, to pay such sum as said Board may deem to be reasonable towards their support while inmates of the said Home.

Very truly yours,

WILLIAM A. ANDERSON.

June 5, 1905.

HON. CHARLES W. HEATER,

President State Board of Agriculture, Middletown. Va.

DEAR SIR:

I have considered the following enquiries submitted to me by the State Board of Agriculture, viz.:

"1st. With whom is vested the power of appointment of the fertilizer inspectors?

"2d. Can the date or place of meeting of the board be legally changed by any method except by action of the body itself in session?"

To which enquiries I now have the honor of replying as follows:

First. The manner of appointment of the fertilizer inspectors is governed by clause 6, Sec. 1783d, Pollard's Code of 1904 (or see Acts of 1899-1900, p.

13), which provides that the Commissioner of Agriculture "shall, by and with the advice and consent of the Board of Agriculture, appoint as many inspectors of fertilizers as may be necessary," etc.

There can be no question but that this language confers upon the Commissioner of Agriculture the right to appoint—that is, to name in the first instance—the several inspectors of fertilizers whom your board shall authorize to be appointed. That is to say, the Commissioner of Agriculture names them, but their appointment does not take effect until it shall be approved by the State Board of Agriculture.

This language is very similar to that of clause 2, Sec. 2, Art. 2, of the Constitution of the United States, which provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law," etc. Under this provision of the Federal Constitution there has been, and can be, no question as to the power of the President to appoint; but the appointment is not effective until it shall have been confirmed by the Senate. The rule sanctioned by the practice of more than a century is for the President to send in to the Senate the names of his appointees, thereby requesting the advice of the Senate upon the appointments, which advice is expressed either by the Senate's rejection or confirmation of the President's nomination.

The language of the Virginia statute above referred to is a little more explicit, perhaps, as to the power of the Commissioner of Agriculture to appoint; but the effect is substantially the same. He alone can appoint, but his appointment is, of course, provisional and conditioned, as to its effectiveness, upon the consent of your board, which should be expressed by a resolution either confirming or rejecting such appointment. See *Ex parte Hennen*, 13 Peters 230.

Second. I beg leave to say that, by the terms of clause 2, Sec. 1783a, Pollard's Code of 1904 (or see Acts of 1902-3-4, p. 831), the two regular stated meetings of the board, provided for by that law, can only be fixed by the board; and the board can, of course, only act while in session. The only way in which the members of a board can act legally and authoritatively is while the board is actually in session.

Special meetings of your board may be called at any time (as is prescribed in the statute just referred to), by the president of the board, upon his own authority, or by him upon the written request of the Commissioner of Agriculture or three members of the board; and I would say that the place of the special meeting, as well as the time, could be fixed by the same authority which fixes the time for the meeting, unless the board shall have adopted a regulation prescribing some place at which its meetings shall be held.

The above response does not cover the case of an adjourned meeting of the board. The board can, of course, at any regular or special session, adjourn a meeting to any time and place that it may by its order direct.

I hope the above views fully answer the enquiries submitted by your board.

Very truly yours,

WILLIAM A. ANDERSON.

POWER TO LEASE CERTAIN OYSTER BOTTOMS.

RICHMOND, VA., June 6, 1905.

DR. JOHN W. BOWDOIN,

Chairman State Board of Fisheries of Virginia.

Bloxom, Virginia.

DEAR SIR:

Your favor without date was received several weeks since, and I have considered the enquiry therein presented.

For the sake of convenience, I shall divide your enquiry into two parts, viz.:

First. Whether certain designated bottoms on the ocean side of Northampton county should be treated by your board as public oyster grounds, or should be rented by your board?

The grounds referred to are defined in the notes of the Baylor survey as "Public Ground" Nos. 47, 48 and 49. They are colored brown on official chart No. 30, accompanying said report, are numbered as are other public grounds, and generally appear to be designated by certain lines and corners with reference to channels, islands and creeks or guts, as shown on said map or chart No. 30; and in each case the precise quantity of land contained in each of said parcels or lots is given upon the designation thereof upon said chart.

Said chart is evidently drawn to a scale, and is the survey described in Sec. 2 of the Act of 1891-2, as amended by the act approved March 2, 1894; and the said survey, together with the report and the delineation on the said chart, are required by the said act to be taken "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."

"Public Ground No. 47" is described in the notes of the survey as being "a strip about 200 yards wide, lying on the north side of Main Ship Shoal Channel, commencing at the mouth of the creek immediately west of Ship Shoal Inlet, and extending westerly to the extreme western point of Godwin's Island. (See oyster chart.)"

"Public Ground No. 48" is described as "a strip about 100 yards wide, lying on the south side of Main Ship Shoal Channel, commencing opposite the mouth of the creek immediately west of Ship Shoal Inlet, and extending westerly to a point opposite the mouth of White Perch Channel. (See oyster chart.)"

These two descriptions seem to me to be a substantial compliance with the requirements of the statute, the starting point of the boundary in each case being determined by a natural object, viz., the mouth of a creek. Though the courses and distances are not given in the notes of the survey, it would seem that they are adequately supplied by the lines indicated on the chart, to which the notes in each case specifically refer.

"Public Ground No. 49" does not seem to be described with the particularity required by the statute. It is described in the notes accompanying the survey as "Public Ground No. 49. Area—240.5 acres. Mud Hole Bay was designated as a natural oyster rock. (See oyster chart.)"

The whole of Mud Hole Bay is thus defined in the report and survey as a natural oyster rock. The only fixed object—if, indeed, that be a fixed object—to which its description as given on the chart could be referred is Station No. 6 of Public Ground No. 44, upon which it abuts; and the lines given are the meanderings of what is described as Mud Hole Bay. This does not seem to me to be a strict compliance with the requirements of the statute as to the mode in which these public grounds should be defined.

Answering this branch of your enquiry as well as I can, upon the information furnished by the notes of the survey and the chart accompanying the same, I would say that your board clearly ought not to attempt to rent "Public Ground Nos. 47 and 48."

There is, I think, a grave question as to whether "Public Ground No. 49" is defined with sufficient accuracy to bring it within the terms of the statute. The commissioners seem to have assumed that that bottom, Mud Hole Bay, was such a well-known and well-defined natural object in itself as to require no demarcation by metes and bounds. It is delineated on the chart, and, if Station No. 6 of Public Ground No. 44 is a "fixed and permanent object on the shore," it might be fairly regarded as being delineated with reference to such a "fixed and permanent" object. At all events, if there is any serious question as to whether your board has the power to lease such a bottom, I think it would be safest for them to solve that question against the exercise of the power. In other words, I think it is a question which should be referred to the Legislature for settlement, rather than that the board should undertake to determine it.

Second. The second branch of your enquiry is as to whether the edges of the "Thoroughfares" and the areas of the creeks, guts, etc., referred to on page 42 of the notes of the Baylor survey are bottoms which may be leased by your board.

The report, or notes of the survey, expressly declares that "the edges of the 'Thoroughfares,' *i. e.*, between high and low water marks, and the whole of the area of the small creeks or 'Guts' running up into the outer marshes on the ocean side of Northampton county were designated as natural oyster rocks by the (3) three county commissioners. (See oyster charts.)"

The edges of these "Thoroughfares" between high and low water marks and the entire areas of the small creeks or "Guts" seem to be delineated on the chart.

Considering the question you submit, solely with reference to the data furnished by the report and by the chart, which is the only information before me, I would say that the small creeks or "Guts" are sufficiently designated with reference to "fixed and permanent objects on the shore" to constitute them public ground within the meaning of the acts of February 29, 1892, and March 2, 1894, above referred to; and I am inclined to the opinion that the edges of the "Thoroughfares" are also sufficiently designated. The shore line, or high water line, of the edges of the "Thoroughfares" appears

to be delineated; and said edges are evidently defined as embracing all the areas along said "thoroughfares" between high and low water marks.

I am of opinion that your board clearly ought not to attempt to rent the areas of the creeks or "Guts" referred to.

As to the edges of these "Thoroughfares," I come to the same conclusion as I did with reference to "Public Ground No. 49"—that the board should not authorize them to be leased unless it plainly has the power to do so, and that any question as to whether they should be treated as public ground or not should be determined by the General Assembly.

3. The enquiry was also informally submitted to me as to whether Chapter 219, page 273, Acts of 1887-8, approved February 24, 1888, is in conflict with the opinion I rendered your board on October 13, 1904.

I beg leave to say that my opinion is not affected by that act, which is merely, so far as I can see, declaratory of the law which had been in force long before the passage of that act and now expressed in Sec. 1338 of the Code.

Nothing in the said act of 1888, or in said Sec. 1338 of her Code, deprives the State of the right to control and dispose of her own property. The only limitation upon the power of the State government to do this is that self-imposed by Sec. 175 of the Constitution, which prohibits the lease or sale of the natural oyster beds, rocks, and shoals in the waters of the State.

I have the honor to be,

Very truly yours,

WILLIAM A. ANDERSON.

VIII. MISCELLANEOUS MATTERS.

September 23, 1904.

HON. A. J. MONTAGUE,

Governor of Virginia.

SIR:

In reference to the question submitted by Frank Gilmore, Esq., in his letter to you by you referred to me, I have the honor to reply that I know of no statute or rule of law sanctioned by judicial decision which makes any part of the cost or expenses incurred in the detection, arrest, or punishment of a murderer a proper charge against the estate of his victim.

I am of opinion therefore that the estate of Mrs. Samuel McCue, deceased, lately murdered in the city of Charlottesville, cannot be required to contribute anything towards the payment of any reward offered for the discovery, arrest, or conviction of her murderer, or any other expenses or costs incurred in connection with the detection or punishment of her slayer. A reply would have been sent more promptly, but I knew you were absent.

Very respectfully,

WILLIAM A. ANDERSON.

MILEAGE ALLOWED CIRCUIT COURT JUDGES.

November 19, 1904.

COLONEL MORTON MARYE,

Auditor Public Accounts, Richmond, Va.

MY DEAR SIR:

As requested by you, I give you in writing the opinion which I gave you orally some time since, upon the following matter, viz: as to what mileage judges of circuit courts are entitled to be paid, for *necessary* travel, in attending their respective courts.

There can be no question as to the *rate* of mileage, which is fixed by Sec. 198 of the Code (as re-enacted at page 56, Acts of 1902-3-4), "at the rate of ten cents per mile for every mile of necessary travel."

The *travel* for which mileage is to be allowed is prescribed in clause "Fourth" of Sec. 185 of the Code (as reenacted at page 54, Acts of 1902-3-4), which clause is in the following language: "The judges of the Supreme Court of Appeals and of the circuit courts shall each be entitled to mileage not to exceed ten cents per mile for all necessary travel by the nearest practicable route of travel in use to and from their respective courts."

Taking this language in connection with the context, it seems to me that the word "courts" in this clause is used in its popular sense, and means the *terms* of their respective courts, and includes one trip each way, from the home of the judge to the place where a term of his court is held, and back again either to his home or to the place where the next term of his court is held, if two terms, at different places, shall so immediately succeed each other that the judge shall not have opportunity to make a visit to his home before attending another term at a different place. In other words, that it includes the necessary travel of one trip to and from each term of the judge's court, and that it would not include daily or successive trips between the judge's place of residence (or place of temporary sojourn) and the place where his court may be in session. I am confirmed in this view by what I understand from you to be the uniform practice and the uniform construction placed upon this statute, not only by the judges of the circuit courts of the State generally, but also by the judges of the Supreme Court of Appeals. Any other construction of this law would enable some of the judges of the Commonwealth, certainly in some cases, to run up a bill of mileage (if they charged for each trip taken by them during any term) which would amount to a sum equal to a large proportion of the salaries paid them, illustrations of which possibility are, doubtless, furnished by your office. I will mention only one instance in which, under any other construction of the law, this might be true. Judge Cardwell, of the Supreme Court of Appeals, resides at Hanover Courthouse, and from that place, makes a trip to Richmond nearly every day in the year except during the periods when his court is in session at Wytheville and Staunton. During the session of his court at Staunton, as I am informed, he frequently spends Sunday at his home, leaving Staunton on Saturday and returning there Monday morning. His mile-

age for each round trip from Hanover Courthouse to Richmond would be \$4.00, and from Hanover Courthouse to Staunton about \$23.00. But Judge Cardwell has taken the same view of the law which I take, and has never presented a bill for more than one mileage for each *term* of his court. And such, I am informed, has been the uniform practice of most of the other judges in the State.

It seems to me that the law does not contemplate the payment of mileage in any case where the judge, for his convenience or personal comfort, chooses to return daily, or at intervals, from the place where his court is in session, during the term thereof, either to his home or to any place which he may select for his temporary sojourn.

I believe I have answered in writing, substantially as I did orally, all of the questions you propounded.

Very truly yours,

WILLIAM A. ANDERSON.

NOTE.—I am glad that my views are in accord with the conclusion which you had previously reached in regard to this matter.

I beg to say also that the law as to the mileage of members, etc., of the General Assembly is the same as that prescribing the mileage of judges, and its construction has been in accordance with this opinion. It required a special act to entitle the members and officers of the Legislature to mileage when that body reassembled after the long recess in 1902. See Acts of 1902-3-4, p. 29.

March 2, 1905.

GENERAL W. NALLE,

Adjutant-General of Virginia, Richmond, Va.

SIR:

Replying to the inquiry submitted in your favor of the 27th ulto., I have the honor to say that Secs. 275, 275a and clause 50 of Sec. 1313a, Code of 1904 (Acts of 1902-3-4, pages 848, 658 and 151), prescribe for what officers and departments of the State government printing and binding shall be done by the Public Printer and paid for out of the treasury of the State, and what printing and binding said Public Printer is authorized to do for each of said officers and departments. The office of the Adjutant-General is not embraced in the provisions of any of these laws.

I have, therefore, to advise you that the only statute under which provision can be made for the necessary printing and binding for the office of the Adjutant-General is Sec. 377, Chapter 21 of the Code, which section authorizes necessary expenses of this kind to be paid out of the Military Fund on the concurrence and order in writing of all of the members of the Military Board.

Very truly yours,

WILLIAM A. ANDERSON.

FILLING VACANCY IN CIRCUIT JUDGESHIP DURING RECESS OF GENERAL ASSEMBLY.

September 13, 1905.

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

SIR:

The inquiry submitted in your favor of the 11th instant as to what is your constitutional authority in the matter of appointing "a judge of the Circuit Court to fill a vacancy occasioned therein by resignation" has been considered with care.

The provisions of the Constitution relative to that matter are as follows:

"The manner * * * * of filling vacancies in office, in cases not specially provided for in this Constitution, shall be prescribed by law." * * * * Const., Sec. 56.

By Sec. 73 of the Constitution the governor is given power:

"during the recess of the General Assembly * * * * to fill, pro tempore, vacancies in all offices of the State for the filling of which the Constitution and the laws make no other provision; but his appointments to such vacancies shall be by commissions to expire at the end of thirty days after the commencement of the next session of the General Assembly." * * * *

By Sec. 102 of the Constitution it is provided that:

"All the judges shall be commissioned by the governor. * * * * Their terms of office shall commence on the first day of February next following their election, and whenever a vacancy occurs in the office of a judge, his successor shall be *elected* for the unexpired term."

The only provision which I find in the statutes of the State relative to this subject is that contained in Sec. 3049 of the Code of 1904 in the following words:

* * * * "If a vacancy shall occur from any cause in the office of a judge of a circuit or city court that fact shall be at once certified by the clerk of such court to the governor, who, instead of appointing at once a successor, may designate a judge of some other circuit court, or of some other city court for a city of the first class, to hold the terms of the court in which such vacancy exists, and until the same shall have been filled in the mode prescribed by law." * * * *

It will be seen from the above quotation from Sec. 73 of the Constitution that, by its terms, the governor is empowered "during the recess of the General Assembly * * * * to fill, pro tempore, vacancies in all offices of the State for the filling of which the Constitution and the laws make no other provision."

This clause of the Constitution clearly empowers the governor to fill any vacancy occasioned by the resignation of a circuit judge during the recess of the General Assembly, unless some other provision is made for filling such

vacancy, either by the Constitution itself, or by the statute law of the State.

The first question which arises, therefore, in the consideration of your inquiry is whether the *Constitution* makes any provision for the filling of such vacancy?

In the consideration of this question we are met by the following mandate of Sec. 102 of the Constitution, quoted above:

* * * * "Whenever a vacancy occurs in the office of a judge, his successor shall be elected for the unexpired term."

This language was probably adopted for the purpose of embodying in the Constitution the rule enunciated by a majority of the Supreme Court of Appeals of Virginia in *Burks vs. Hinton* (77 Va. 1), construing the provisions in the former Constitution of the State relating to the same subject.

There had been conflicting decisions upon the question adjudicated in that case, and the correctness of that decision had been questioned. (*Ex parte Meredith*, 33 Gratt. 119.)

But it may be contended that the Convention, in the language used in Sec. 102, went farther than was necessary to adopt the rule in *Burks vs. Hinton*. To have expressed that rule in the Constitution, it would have been only necessary to have provided that "All elections to fill vacancies occurring in the office of judge shall be for the unexpired term."

It will be observed that Sec. 102 of the Constitution, as adopted by the Convention, does more than this. It not only provides that the term of the succeeding judge shall be for the unexpired term of his predecessor, but it may be claimed that it requires that the judge, who shall be chosen to fill such vacancy, shall be "elected."

The only mode provided in the Constitution by which a judge can be elected is by the General Assembly, and the General Assembly can elect only when in session.

As the General Assembly meets in regular session for only sixty days in two years, and recesses between its sessions embrace about eleven-twelfths of every two years, there would be periods of twenty-two out of every twenty-four months in which a vacancy in a judgeship could not be filled, if the provision of Sec. 102 of the Constitution was the only enactment covering the case.

I conclude, therefore, that the Constitution does not contain any provision for filling any such vacancy occurring "during the recess of the General Assembly."

The second question to be considered, in order to answer your inquiry, is whether the *laws* make any provision for filling a vacancy in such a case?

The paragraph from Sec. 3049 of the Code, as amended by the act approved March 15, 1904 (Acts 1904, p. 334), quoted above, contains the only legislative enactment covering the subject. This section, as found in the Code of 1887, as amended by the act approved March 5, 1894, and by the act approved January 27, 1903, related entirely to vacancies occurring in the office of a judge of a county, or of a corporation court, and provided that whenever a vacancy occurred in any such office the governor should designate a judge of some other county court to hold the next regular term of the county

court in which the vacancy existed; and some circuit or corporation judge to hold the next regular term of the corporation court in which such vacancy existed, until the vacancy be filled as provided by law. (See Acts 1893-4, page 814, and Acts 1902-3-4, page 40; Code 1904, Sec. 3049.)

This act was again amended by acts approved May 20, 1903, December 12, 1903, January 12, 1904. Instead of passing a separate act to provide for filling vacancies in the office of circuit judge, the legislature, as will be seen, amended the act which had formerly provided for supplying vacancies in the offices of county and city judges so as to substitute circuit judges for county judges, which latter office no longer existed. The statute as previously enacted was plainly intended to provide the method for filling vacancies in the offices of county judge and corporation judge.

The three last amendatory acts, namely, those of December 12, 1903; January 12, 1904, and March 15, 1904, were thus apparently designed to accomplish this purpose in respect to circuit judges also. They provided that the governor * * * * "instead of at once appointing a successor, may designate a judge of some other circuit court, or of some city court, for a city of the first class, to hold the terms of the court in which such vacancy exists, and until the same shall have been filled in the mode prescribed by law." * * * *

I have been unable to find that there is any other statutory provision whatever for filling such a vacancy, nor is any mode, except election (and, of course, election by the General Assembly) expressly provided in the Constitution for filling such a vacancy.

Nevertheless, I am not prepared to say with absolute positiveness and certainty (though I am strongly inclined to hold that view) that the language of this act makes such provision for filling a vacancy in the office of circuit judges as is contemplated by Sec. 73 of the Constitution.

It may be argued with plausibility and some force that Sec. 3049 of the Code, as thus amended, merely prevents a hiatus or interregnum in the court, but does not provide for filling a vacancy in the office of the judge of such court. To which it may be answered: That the judge designated by the governor to hold the terms of such court until the vacancy can be filled in the manner prescribed by law, namely, by election by the General Assembly, is, temporarily, though *pro hac vice*, as much the judge of the court which he holds as would be a judge appointed *pro tempore* by the governor, if the governor clearly had the power to make such appointment.

The question is not free from difficulty, however. It is one which the Legislature can readily settle by a more specific enactment in the premises.

There may be a grave doubt as to whether the governor has power during the recess of the General Assembly to fill a vacancy in the office of circuit judge by a temporary appointment to expire thirty days after the commencement of the next session of the General Assembly. There can be no question as to his power to designate some circuit judge, or some judge of a city of the first-class, from time to time, to hold the courts of a circuit in which a vacancy exists, until the same shall have been filled in the mode prescribed by the organic law.

Yours very truly,

WILLIAM A. ANDERSON.

NOTICE TO CONSULS OF DEATH OF FOREIGNER.

September 14, 1905.

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

DEAR SIR:

Your favor of the 13th instant enclosing the letter of Mongr. Naselli, consul of Italy, numbered 4870, dated the 11th instant and addressed to you, has been received.

In reply to your inquiry, I have the honor to say that I know of no statute which devolves upon the executive of any State of the United States any duty or authority in connection with carrying out the stipulation expressed in Article XVI of the Convention between the United States and the Kingdom of Italy of May 8, 1878.

I find that stipulations identical with that in the article referred to are contained in conventions between the United States and the governments of Austria-Hungary, Belgium, Germany, Netherlands, Roumania and Serbia.

Although these conventions have been in force from twenty to thirty-three years, I have been unable to find any provision in the statutes of the United States, or of Virginia, which designates the local authorities whose duty it shall be to give to the consuls or consular agents of the nations referred to, notice of the fact of the death within the United States of a citizen or subject of any of those nationalities, without a known heir or testamentary executor designated by such decedent.

Until this omission shall have been supplied by competent legislative enactment, it would be impossible to determine which one of the various local authorities of a State was charged with the duty of carrying out the provisions of these conventions.

The next of kin, or persons entitled to the estate of an alien dying in Virginia, are given the same privileges and protection under the laws of this State which are accorded to natives or citizens under like circumstances.

I may be permitted to add that under the laws of Virginia no officer of the State is charged specifically with the duty of giving notice to anybody of the death of a citizen or resident of this State who has no known heir or testamentary executor designated by him, except such notice as is provided for by Chap. 105 of the Code of 1904 in respect to escheats, and property derelict.

In proceedings under that chapter in respect to the property of an alien dying in Virginia it would be entirely proper for notice to be given to the consul or consular agent of the nation to which the decedent belonged; but that is rather a matter for the action of the courts than of the executive.

I can find no duty which is devolved by law on the governor of Virginia in connection with carrying out the stipulations of Article XVI of the above mentioned Convention between the United States and Italy.

In compliance with your request, I return herewith the letter which you enclosed to me.

Very truly,

WILLIAM A. ANDERSON.

SUPPLIES FURNISHED BY STATE TROOPS TO UNITED STATES IN
SPANISH WAR.

October 5, 1905.

HON. A. J. MONTAGUE.

Governor of Virginia, Richmond.

SIR:

Adjutant-General Nalle has brought to my attention the matter of the claim of Captain R. E. Freeman, acting for himself and for his company, Company H, 3d Virginia Regiment, mustered into United States service in 1898 in the Spanish-American war, for a complete outfit of tents, cooking utensils and mess furniture purchased and paid for by them for the use of his company and turned over to the United States quartermaster when that company was mustered in.

He informs me that Captain Freeman has presented a claim to the War Department for reimbursement for these articles so furnished by him or his company to the United States, but so far said claim has not been allowed.

The only provision which I have been able to find in any act of Congress providing for a claim of this kind is that made in the clause taken from sec. 4 of the act to amend an act entitled,

“‘An Act to reimburse the governors of States and Territories for expenses incurred by them in aiding the United States to raise and organize and supply and equip the Volunteer Army of the United States in the existing war with Spain,’ approved July eighth, eighteen hundred and ninety-eight, and for other purposes.”

approved March 3, 1899, Volume 30 United States Statutes at Large, page 1358, in the language which I quote as follows:

“*And provided further*, That where the governor of any State or Territory, or any officer of the army detailed as mustering officer of volunteers, or any commander of a company or companies, or troop or troops, or battery or battalion, or regiment, or brigade, has purchased or authorized the purchase of supplies or equipments, or incurred any necessary expense for the comfort of the men in camp or rendezvous, and said supplies were used and equipments subsequently taken into the United States service by said volunteers, and no receipts given to such military officer, the certificate to that effect of the governor of the State or Territory to which the volunteers belonged, shall be held sufficient to authorize the settlement and payment of such account on investigation, if the Treasury Department shall be satisfied of the fact of such purchase of such equipment and supplies, or that such necessary expenses were incurred and such use of such supplies, or such taking of such equipments into the United States service, and the voucher or vouchers of said officers be produced by said governor.”

Sec. 6 of said act provided that all claims for reimbursement thereunder, or under the act of which it was amendatory, “Shall be presented in itemized form to the Treasury Department on or before January first, nineteen hundred and two, or be forever barred,” but by an act approved April 27,

1904 (United States Statutes at Large, Volume 33, part one, page 312), this time has been extended until January first, nineteen hundred and six.

If Captain Freeman, acting for himself and for his company, presents such an itemized claim to the United States Treasury Department before the first day of January, nineteen hundred and six, with the certificate from the governor of the Commonwealth, required by the clause quoted above, to the effect that the supplies and equipment so mentioned in detail in said claim were purchased, and that said supplies were used and equipments were subsequently taken into the United States service by said volunteers, and no receipts given to Captain Freeman, then Captain Freeman would, it seems to me, be entitled under the said statute, to collect from the United States Government the amount of the claim so authenticated.

Yours very truly,

WILLIAM A. ANDERSON.

October 19, 1905.

GENERAL WILLIAM NALLE,

Adjutant-General of Virginia.

SIR:

Responding to the inquiry made in the second endorsement, dated the 17th instant, on the opinion given by me to the governor on the 5th instant, I beg leave to say that the clause quoted in that opinion from Sec. 4 of the act of Congress of March 3, 1899, by its terms only covers supplies, equipments, etc., furnished as therein specified, *for which no receipts were given to the officer furnishing the same.*

The matter is one, of course, which can only be disposed of by the appropriate officers of the United States Government, and it is more than probable that they have repeatedly ruled upon it.

I have been surprised not to find any provision in the act for the reimbursement of officers in cases where receipts were given for the supplies, etc., which they purchased and furnished.

The following view occurs to me as affording a possible way to a just conclusion: The act in question is based upon the theory that the supplies, equipment, etc., were purchased and furnished by the governors of the several States and Territories when, in fact, they were doubtless purchased and furnished in most cases by the respective States or officers other than the governor. The governor is taken as the representative of the State, or State officers, who incurred the expenditures authorized to be reimbursed.

It occurs to me that it would be proper for the claim of Captain Freeman and his company officers to be made out in the name of the governor for *their benefit* and file it in that shape, supported by proper proofs, and that payment should and might then be made of the amount shown to be due to the governor, who could direct its disbursement to the officers entitled, as in other cases.

The matter is one, however, which can be effectually dealt with only by the Treasury Department of the United States, or by Congress, if that Department cannot give the desired relief.

Very truly yours,

WILLIAM A. ANDERSON.

October 7, 1905.

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

SIR:

I return herewith as an enclosure the letter of Messrs. Watkins & Watkins, relative to the payment of a reward to the sheriff of Prince Edward county.

Sec. 4197 of the Code 1904, after providing for the offering of a reward by the governor, contains this clause:

* * * * "But no such reward shall be paid to any sheriff, sergeant or other officer, who arrests such person by virtue of any process in his hands to be executed." * * * *

This is the only limitation I have been able to find on the sheriff's right to the reward. The matter must depend therefore on the facts of the particular case, which were not stated in the communication.

Very respectfully,

WILLIAM A. ANDERSON.

TAXATION OF FRATERNAL ASSOCIATIONS.

December 21, 1904.

HON. MORTON MARYE,
Auditor of Public Accounts.

DEAR SIR:

I will consider the two questions you have submitted to me separately.

First. Your first question is, What tax, if any, is now imposed by the laws of Virginia upon fraternal beneficial associations, orders or societies?

By Sec. 25 of the tax law, as amended by the act approved March 7, 1904 (Acts of 1904, Chap. 61, page 108), it is provided "that nothing in this act shall be construed to require any tax other than the tax imposed upon property and the fees imposed by the general law defining and regulating fraternal beneficial associations, orders, or societies, upon secret or fraternal orders where the benefit or relief is payable by the grand or supreme body of the same, and is derived from assessment upon lodges, councils, or other bodies."

At the time this act was passed "fraternal beneficial associations, orders, or societies" were defined by the act approved March 3, 1898 (Acts of 1897-8, page 734), and the fees or taxes to be paid by such associations, etc., were prescribed by that act.

By an act approved seven days *after* the passage of the act amending Sec. 25 of the tax law (viz., the act approved March 14, 1904, being Chap. 183, page 302, Acts of 1904), Chap. 688 of the acts of 1897-8, which is the act to define and regulate fraternal beneficial associations, etc., mentioned above, was repealed merely by a reference to said chapter. In view of the opinion of the Supreme Court of Appeals of Virginia, in the Iverson Brown case, 91 Va. 707, and particularly in view of the decision of said court in the recent case

of *The Mutual Protective Association vs. Marye*, Auditor, upon a petition for *mandamus*, in which latter case a question was raised as to the constitutionality of a law which amended a section of the Code by no other description in the title of such amendatory act than a reference to the number of the amended section, and the court held that the title was a sufficient compliance with the Constitution, I am not prepared to say that the act of March 14, 1904, repealing a number of chapters passed by the General Assembly of Virginia at different sessions, and which chapters are described in the title of said repealing act merely by a reference to the number of each of said chapters and the session at which the same was passed, is unconstitutional by reason of the failure of its title to disclose the object of said act.

Therefore, accepting said Chap. 183 of the Acts of 1904 as a valid enactment, there is no longer any statute of this State imposing *any* fees upon fraternal beneficial associations, etc.

But there is another difficulty in construing Sec. 25 of the tax law (as amended), viz., that the exemption prescribed in the proviso at the end of that section seems, by the language used, to be limited to "secret or fraternal orders where the benefit or relief is payable by the grand or supreme body of the same and is *derived from assessments upon lodges, councils, or other bodies.*"

My information, derived from a number of the representatives of secret or fraternal orders of the character named, is that there are none of them as to which the language just quoted, strictly construed, will apply; but that there are a number of them, and perhaps a great number, as to which it is true that, although the "benefit or relief" is derived from assessments upon the *individual members* of lodges, councils, etc., such assessments are *collected* through such lodges, councils, etc., or by a collector, or "financial reporter," chosen by the subordinate lodge or body, and that, if default is made in the payment of the assessments, the charter of the subordinate lodge (in some cases at least) will be revoked or forfeited. While it is not strictly true that the relief is derived from assessments upon the "lodges, councils, or other bodies," it is true, in every case, that the benefit or relief is derived from assessments upon the members that constitute such lodges, councils, or other bodies.

It is a just assumption that the Legislature meant something by the language quoted above, and I am strongly inclined to the conclusion that the exemption, expressed in the language referred to, was intended to apply to all secret or fraternal beneficial orders, associations, or societies, having a grand or supreme body, and subordinate lodges, councils, or other bodies, when, from the members constituting such subordinate lodges, councils, etc., assessments are collected for and remitted to the grand or supreme body.

Therefore, I think you will be justified in exempting such associations, orders and societies, as are thus defined, from any tax or fee except the taxes imposed on property.

It was, doubtless, the purpose of the General Assembly to pass some act in place of Chap. 688 of the Acts of 1897-8 defining and regulating fraternal beneficial associations, orders, or societies, and fixing the fees and taxes to be paid by them; but, until such omission shall have been supplied by some

future legislation, you cannot, of course, require such associations, orders, or societies to pay any fees or taxes except such as are expressly imposed by the tax law, which is now limited to a tax upon the property of such associations, orders, or societies.

Second. Your second question is: Does Sec. 1271 of the Code, as amended by the Acts of 1904, page 317, apply to such secret or fraternal beneficial associations, orders, or societies?

I have found it exceedingly difficult to reach a satisfactory conclusion as to what is the proper answer to this inquiry.

The language used in Sec. 1271 (as amended) is exceedingly broad, and embraces in general terms "every insurance company," except those by the terms of said section specifically exempted from its operation. And yet an examination of the laws of the State in reference to insurance, during the last fifteen or twenty years, and the decisions of the highest court of the State, shows that a distinction has been, during all of that period, made in the legislation of Virginia as to life insurance companies between insurance companies upon the "old line," life, and "legal reserve" plan, and insurance companies upon the assessment plan upon the one hand, and "fraternal beneficial associations, orders, or societies," or secret or fraternal orders, on the other hand. *Mutual Benefit Life Ins. Co. vs. Marye, Auditor*, 85 Va. 643; *Knights of Honor vs. Oeters*, 95 Va. 610; *International Fraternal Alliance vs. Marye, Auditor*, and *The Mutual Protective Association vs. Marye, Auditor*, the two last mentioned cases both being applications for *mandamus* in which no written opinions were filed, and which, therefore, have not been reported. The first of said *mandamus* cases was decided in 1895, and the second in November, 1904.

The distinction referred to has been preserved in the present law by Sec. 25 of the tax law, and by Sec. 11 of the act in relation to insurance companies upon the assessment plan, which latter section is as follows:

"11. Nothing in this act shall apply or be construed to require any fraternal, secret, or industrial societies, such as the Independent Order of Odd Fellows, Free and Accepted Masons, Knights of Honor, Knights of Pythias, Royal Arcanum or like associations, by whatever name known, and when benefits, charity, or relief is payable by the grand or supreme bodies of the same, and is derived from assessments upon subordinate lodges or councils, to file reports with the Auditor, or come under the provisions of this act."

Although this section has become, to a considerable extent, inoperative, by reason of the fact that Sec. 9 of the act of May 18, 1887, of which act it is a part, and to which section the above quoted section in part refers, has been suspended by Sec. 23 of the tax law, approved April 16, 1903, nevertheless this said Sec. 11 has not been repealed and is still in force in all other particulars.

It has been the policy of the law to exempt these secret or fraternal beneficial orders from taxes levied upon "insurance companies" generally, and whether they be foreign or Virginia orders, societies, etc., not to impose upon them the duty of making a deposit of bonds with the treasurer of the State.

They cannot, of course, be held to be compellable to comply with the requirements of Sec. 1271 of the Code (as amended), unless they are clearly embraced in its terms.

Taking the legislation of the State upon this subject as a whole, I am not prepared to say positively that its purpose or effect is to require these secret or fraternal beneficial orders, etc., to make the deposit of bonds required to be made by "every *insurance company*."

In the language of the Supreme Court of Appeals of Virginia, they belong "to that class of organizations known as benefit societies. They are not organized for the purpose of making money, but for fraternal and benevolent objects. Their schemes of benevolence, by which they aim to provide benefits for their members in time of sickness and indemnity to their families upon their death, cannot be maintained, unless the rules and regulations prescribed by their constitution and by-laws for the attainment of these objects are substantially upheld. This it should be the policy of the law and the aim of the courts to do. Otherwise their schemes for furnishing to the working classes and men of moderate incomes a cheap and simple *substitute for life insurance* cannot be accomplished." (Italics mine.) *Knights of Honor vs. Oeters*, 95 Va. 615.

It is evident from this language that the Supreme Court of Appeals of Virginia did not regard these secret or fraternal beneficial orders, etc., organized for the purpose and conducted upon the principles set forth in the opinion above quoted from to be life insurance companies in the ordinary acceptance of those words. It is to be observed, too, that this decision was rendered before the passage of the act of March 3, 1898, defining and regulating mutual benefit orders and societies, and, therefore, in reference to the law *substantially as it stands to-day*.

Considering all of the legislation of the State upon the subject together, and in the light of the adjudications referred to, and of facts with which we may fairly presume the General Assembly to have been familiar, I do not think it is clear that purely benevolent or fraternal associations, societies, etc., and secret orders whose benefits are confined exclusively to their own members, even though they be incorporated under the laws of this or any other State, are "*insurance companies*" within the meaning of the laws of this Commonwealth.

I am strengthened in this view by the fact that, as I am informed, it is supported by the decision of the State Corporation Commission, which, in the discharge of its duties in reference to foreign corporations proposing to carry on business in this State, has had to pass judicially upon this question, and the decisions of which tribunal are justly entitled to great weight and consideration.

I regret exceedingly that it is not in my power to express a more positive opinion, or to give you a more definite answer to the question you submit.

The question is necessarily involved in a haze of doubt and uncertainty, which can be dispelled only by the courts or by the General Assembly.

Respectfully submitted,

WILLIAM A. ANDERSON.

ACTION TAKEN IN REFERENCE TO THE RESOLUTIONS OF THE GENERAL ASSEMBLY IN REGARD TO THE DEFALCATIONS OF WM. R. SMITH, DECEASED, FORMERLY FIRST CLERK IN THE OFFICE OF THE AUDITOR OF PUBLIC ACCOUNTS, AND IN REFERENCE TO THE EMBEZZLEMENT OF JOSEPH H. SHEPHERD, LATELY A CLERK IN SAID OFFICE.

I beg leave to refer you to the report which I made to you in regard to these matters on the 12th of May, 1904, which is as follows:

May 12, 1904.

Preliminary Report in Response to Resolutions of the General Assembly in Reference to William R. Smith and Joseph H. Shepherd.

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

SIR:

The two resolutions, copies of which are hereto annexed, were adopted by the two Houses of the General Assembly, as I am informed, during its recent session, and some time after its adjournment were furnished to me.

Neither seems to have been sent to you, or to have received your approval, and they, therefore, do not have the force of law. Notwithstanding this, it has been, and is, my purpose, as far as it is practicable for me to do so without neglecting imperative duties devolved upon me by law, to comply with the request of the General Assembly.

I have, therefore, already given as much time as could be taken from other duties to the investigation of the transactions of William R. Smith, who I presume is the clerk referred to, as there was a defaulting clerk of that name, and also the transactions of Joseph H. Shepherd, now a convict in the penitentiary.

The result of the necessarily partial investigation which I have made is to demonstrate that it would require efficient and thorough investigation of a thoroughly competent expert accountant, and months of the time of such an accountant, to comply with the terms of these resolutions.

It would be absolutely impossible for me, or for any lawyer, with the means of information at my command, to respond satisfactorily to either resolution within the period of sixty days—certainly without the assistance of a thoroughly competent expert accountant.

The trouble is that in each case these defaulting clerks, as is not surprising, left no record of their criminal transactions, and the data for making up the account between the Commonwealth and these parties and ascertaining the precise character of each transaction and the amount purloined by them in each case has to be obtained and the facts established either by the testimony of witnesses or by the evidence furnished by receipts, checks or other papers, signed or used by said Smith and Shepherd, respectively.

As Attorney-General I have no power to send for persons and papers or to compel persons to testify; and the investigation which I am directed to make is one which could have been exhaustively and satisfactorily completed only by a committee of the Legislature vested with full powers.

I find from the Journals of the General Assembly that that body, in 1884, appointed a special committee with full power to investigate the transactions of William R. Smith; that this committee, as is shown by contemporary reports of the Auditor and by the Journal of the House of Delegates, made an investigation of those transactions from time to time, extending over a period of more than a year; that they employed a most competent expert accountant, who has left the results of his labors in a book in the Auditor's office, in which the accounts and data as made up by him were recorded; and that this committee made a report in 1886 to the General Assembly; but, though I have personally and through others made diligent search throughout the public offices for a copy of this report, I have been unable to find it anywhere. I learn that it has been the custom not to preserve such papers except for a comparatively brief period after the adjournment of the General Assembly to which such reports were made, except in cases where they were made public documents and published as an appendix to the Journals. which was not done in this case.

The accounts made up by Mr. Craig, the expert accountant referred to while they are valuable in putting the representatives of the Commonwealth upon a line of investigation and inquiry, are not, of course, evidence against anybody; but the evidence and data upon which the items of those accounts are based would have to be produced, and these consisted of transactions between William R. Smith and hundreds of persons, clerks of county and circuit courts and of the Supreme Court of Appeals, bank officers, owners of delinquent lands and others, in a great number of counties and cities of the Commonwealth, extending through a period of thirteen or fourteen years and back to a period thirty-four years ago.

I have already ascertained that in a great number of instances the clerks and other persons with whom these transactions were conducted are dead. Mr. Craig, the expert accountant, who, if alive, would be of valuable service in connection with such an investigation, unfortunately is dead. Nearly every clerk in the Auditor's office and all the Auditors, except Mr. S. Brown Allen, who were alive at the time of a greater part, if not all, of Smith's criminal transactions, are dead; and it would be now an exceedingly difficult and very expensive thing to again collect the evidence which seems to have been before the special committee of the Legislature in 1884-5-6, or to produce the witnesses whose testimony would be necessary to establish the great number of dishonest transactions of said Smith, or to now ascertain definitely and satisfactorily the amount of his speculations.

I am still making efforts to obtain a copy of the report of said committee and a summary of the evidence upon which it is founded, which doubtless accompanies it; and these, with the book in the Auditor's office, made up under the direction of the committee, may enable me to approximate the amount that was stolen by William R. Smith, deceased. The original receipts given by said Smith, however, and, in some cases, the testimony of the clerks, bank cashiers and tax payers, who paid him money which was not turned into the treasury, would be necessary in order to establish any liability against any one on account of those transactions, and all of the material facts in connection with each transaction would have to be ascertained

in order to determine whether Auditor Taylor, deceased, or Auditor Massey, deceased, or Auditor S. Brown Allen, as the case may be, was charged with such negligence and carelessness in respect to such transactions as to make such Auditor and his sureties civilly liable to the Commonwealth therefor.

Not only has Auditor Taylor been dead for many years, but most of the sureties upon his bonds are also dead, and most of these transactions occurred during the term of Mr. Taylor. Mr. Massey is also dead. Mr. S. Brown Allen is the only Auditor living during whose term, so far as I have yet been able to ascertain, any of the criminal transactions of William R. Smith occurred.

Suit should not be bought under such circumstances, and the legal and personal representatives of these officers of the Commonwealth, long since dead, and their sureties or their legal and personal representatives, harassed by suits, or the Commonwealth involved in costly litigation against them, upon claims which have been allowed by the Commonwealth to sleep for more than twenty years after they were discovered, involving transactions some of which transpired a third of a century ago, upon any slight or uncertain ground of liability.

The investigation of the transactions of Joseph H. Shepherd, being more recent, I hope to be able to get fuller and more accurate information upon which to base a conclusion as to those matters.

I desire, therefore, an opportunity to make as exhaustive and thorough an examination of both matters as is possible before making a report to you or to the General Assembly upon the subject, or coming to a conclusion as to what it is my duty to do in the premises as the legal representative of the Commonwealth.

Unless I can be furnished the assistance of a competent expert accountant, it will be impossible for me, for some time to come, to conduct the investigation to a conclusion, and, without such assistance, any results reached by me will be, especially as to William R. Smith's transactions, necessarily approximate and incomplete.

I know that the charges upon the contingent fund under the control of the executive usually absorb the whole of that fund, but there is no other source from which the requisite means to employ such technical and expert assistance as is necessary for such an inquiry can be provided. If they cannot be supplied from the executive contingent fund, I shall endeavor, as best I can and as soon as I can, without neglecting other duties, to obtain and furnish the information called for by these resolutions of the General Assembly.

Respectfully submitted.

WILLIAM A. ANDERSON.

(A Copy.)

Whereas, it appears by the records of the Hustings Court of the city of Richmond, in the criminal proceedings of said court, which were instituted by the Commonwealth of Virginia against one Joseph H. Shepard, a former clerk to the Auditor of Public Accounts of Virginia, and from other records in the said Auditor's office, that the said Joseph H. Shepard has been guilty of embezzling large sums of public money belonging to the State of Virginia, and whereas it has been brought to the attention

of members of the House of Delegates of Virginia, that several thousand dollars belonging to the said Shepard may be recovered to the State, if legal proceedings are promptly instituted for that purpose. Therefore, be it

Resolved by the House of Delegates, the Senate concurring, That the Attorney-General of Virginia be, and he is hereby, requested to investigate this matter at once, and to institute such legal proceedings as, in his judgment, the facts in the case may warrant, to recover such sum or sums of money as he may find, subject to the payment of any part of the money so embezzled.

Resolved, second, That the Attorney-General of the Commonwealth of Virginia, be, and he is hereby, requested and instructed to investigate the liability, if any, of the said Auditor and his sureties to the Commonwealth, and he shall report to the governor within sixty days his opinion. And if the Attorney-General shall be of opinion there is a liability upon *siad* Auditor and sureties, the governor shall direct the Attorney-General to institute legal proceedings for the recovery of all funds caused by reason of said defalcation.

Agreed to by Senate,
March 10th, 1904.

JOS. BUTTON,

C. S.

Agreed to by H. of D.,
3/10/04.

JNO. W. WILLIAMS.

C. H. D.

(A Copy.)

Whereas, in the consideration before the House Committee of of Courts of Justice of the House of Delegates of Virginia, on the 26th day of February, 1904, of a resolution instructing the Attorney-General of Virginia to institute legal proceedings against the present Auditor of Public Accounts of Virginia and his sureties on his official bonds, to recover the public money of Virginia embezzled by Joseph H. Shepard, late first clerk in the present Auditor's office; the said present Auditors stated, that about three hundred thousand dollars of the public money of Virginia had been embezzled by W. H. Smith, deceased, who was first clerk to three former Auditors of Public Accounts of this State, to-wit: W. F. Taylor, John E. Massy, S. Brown Allen and Martin Marye.

Therefore be it resolved by the House of Delegates, and the Senate concurring, that the Attorney-General of Virginia be, and he is hereby, requested and directed to ascertain the total amount of public money so embezzled by the said W. H. Smith, former clerk as aforesaid, under the three former Auditors; and also under the administration of the present Auditor, and if, in his opinion, there be liability upon the present or any former Auditor of Public Accounts to institute legal proceedings against the said Auditors or their personal representatives, and heirs at law, as the case may be, and their sureties, upon the official bonds of the said Auditors and their sureties for the recovery of the said moneys so embezzled by the said Smith, former clerk as aforesaid.

Passed the Senate with amendments,
Mch. 11th, 1904.

JOS. BUTTON,

C. S.

Agreed to by H. of D.,
3/10/04.

JNO. W. WILLIAMS.

C. H. D.

FINAL REPORT IN RESPONSE TO THE FOREGOING RESOLUTIONS.

First. As to William R. Smith:

Since my former report I have made every effort to secure a copy of the report of the legislative committee made to the General Assembly, session of 1885-6, in regard to the transactions of W. R. Smith.

I had hoped that that report, and the important documents and evidence which accompanied it, might be found when all of the papers and records were removed from the Capitol when it was dismantled before the work of reconstructing the old Capitol and building the new wings was commenced, but these papers were not then found, and I fear they were destroyed.

I have been left, therefore, to the records of the Auditor's office for information as to the extent of said Smith's peculations.

The accounts covering these matters made up by Mr. Craig, the expert accountant employed by the committee, were set out in a book entitled, "Special Settlements with Clerks of Courts, Banks and Others." The accounts stated with great detail in this book show the sums ascertained to have been improperly received by said Smith from the clerks, banks, and persons mentioned therein, and which were never paid into the treasury of the State by said Smith.

There were doubtless other sums so improperly collected by said Smith on account of delinquent taxes, and upon other accounts, but there were no records of such collections, or satisfactory evidence in regard thereto, which would enable the accountant or the committee to approximate the amount so wrongfully appropriated by said Smith.

The matter was evidently carefully and exhaustively investigated at that time by the very able and conscientious men who composed the special committee created by the House of Delegates for that purpose, consisting of Messrs. John B. Moon, of Albemarle; R. T. Barton, of Winchester, and M. W. Hazlewood, of Henrico.

The fact, as will presently appear, is, that neither said Smith nor the Auditor, were authorized by law to receive any one of said payments.

Under the law then, as well as that now in force, neither the Auditor, nor any clerk in his office, were authorized to receive or receipt for a dollar of money payable to the State. A person who desired to pay money to the State had first to get from the Auditor a "pay-in warrant," directing the treasurer to receive the sum stated; to get from the treasurer an order endorsed thereon to one of the banks, which were the bonded depositories of the State, to receive the amount, then to pay the sum to such bank to the credit of the State, bring a certificate of this payment back to the treasurer and get a receipt from him, and then take this treasurer's receipt to the Auditor, who gave him a final receipt.

Such was the cumbrous method then, and for many years before, prescribed, by pursuing which alone a valid payment could be made to the State. (See Sec. 7, Chap. 43, page 410 Code of 1873; Acts 1828-9, page 7, Sec. 1; sup. to Revised Code, page 4, Sec. 14.)

From this it is manifest that the payments made to the said Smith were in no sense payments to the State. As a legal proposition, the State was in

no way bound by them, and the taxes which were attempted to be paid in this way were still due.

Had the law been complied with by these officers, banks, and railroad companies not a dollar of their money could have been appropriated by said Smith.

The State had no cause of action for his embezzlements, either against Smith, or the Auditor, or his sureties, on his official bond, for it was not the State's money which Smith embezzled.

These transactions, so far as the accounts extant show, or I can ascertain, all occurred during the terms of Auditors W. F. Taylor, deceased; John E. Massey, deceased, and S. Brown Allen. If there were any during the term of Morton Marye, I have found no evidence of them.

The peculations of Smith were discovered during the first year of Colonel Marye's first term, and that officer with his usual fidelity to duty was diligent, efficient, and successful in unearthing said Smith's crooked transactions, and in furnishing the Commonwealth evidence upon which he was prosecuted and convicted.

The facts and information which have come to my attention during my investigation of these matters would seem to indicate that these officers, expressly or by implication, authorized the said Smith to receive and receipt for the moneys so irregularly paid him; but it is exceedingly doubtful whether the State would have had a cause of action against them and their sureties upon their official bonds, for the reason that such payments were not payments to the State, and in no sense discharged the taxes thus attempted to be paid.

The State, as a cold proposition of law, could have gone on and required the clerks, and banks, and railroad companies, whose money Smith had appropriated to his own use, to pay the taxes they had intended the payments to Smith to discharge.

After full investigation through its special committee, the General Assembly must have been satisfied that this would not be just.

As will be observed, the mode of payment provided by law was exceedingly inconvenient, particularly to persons living at any distance from Richmond and having no agent residing in this city, and it seems that this irregular and invalid mode of payment had been resorted to for a great many years and acquiesced in by the officials of the legislative and executive departments who were cognizant of the fact that payments were continually being so made. The Act of 1828-9 indeed was to a great extent a dead letter.

For this, or other reasons, the Legislature of 1885-6, upon the coming in of the report of the special committee, enacted three laws upon the recommendation of that committee.

The first of these provided a system of checks so that a more accurate account could be kept of the taxes collected by clerks of courts and notaries, by requiring all such collections to be regularly assessed and reported to the Auditor. Acts 1885-6, p. 101.

The second prescribed a new, simpler, more direct, and more satisfactory mode by which money could be paid into the State treasury. Acts 1885-6, p. 371.

The third provided for the relief of clerks of courts, banks, and others, who had made payments to said Smith on account of taxes, etc., by directing that the accounts upon the book entitled "Special Settlements with Clerks of Courts, Banks, and Others" which had been made up by Accountant Craig under the direction of said special committee should be taken as correct, and the officers and corporations who had made said payments should have credit therefor. Acts 1885-6, p. 409.

By this statute the Legislature, with much fuller information as to all of the facts than it would be possible to obtain now, placed this burden upon the State, and released those upon whom it would otherwise have fallen from the liabilities which rested upon them.

The representatives of the people, with such full information as was obtained through the diligent efforts of the capable gentlemen who composed their committee, aided by an accomplished accountant of the highest character, and prosecuted through two years, concluded that it was just and right that the burden of these great losses should be borne by the State.

At all events, with full knowledge of all the facts, they thus settled those matters, and it is now, after nearly twenty years, too late to reopen the settlement thus made.

The definitely ascertained amounts of said Smith's peculations of sums paid him by clerks, banks, and railroad companies was \$120,361.90:

Besides these there were sums aggregating a large amount which were paid him by the owners of delinquent lands on account of the taxes for which their lands had been returned delinquent. No account was or could have been made of those collections, for the reason that there was no data whatever in the Auditor's office, or which it was practicable to obtain, which would make it possible to state such an account.

It might have been perhaps *possible* at an enormous cost, and after years of inquiry and investigation, to *approximate* the amount so paid on account of delinquent taxes by hundreds of tax payers in the various counties and cities of the State through a period of nearly twenty years by interviewing each tax payer, or the representatives of such as were dead, and getting from them the receipts which the said Smith had given for the sums so paid him; but this was not attempted. Various conjectural estimates were, I have been informed, made of this matter, but they were necessarily wild and doubtless wide of the mark. There was no record in the Auditor's office or elsewhere which gave any evidence of these amounts, or any clue which would lead to their discovery, and the embezzler, of course, left no record of such transactions.

I have gone thus fully into these matters, now of somewhat ancient history, because the resolution adopted by the House and Senate devolved this service upon me, and not because the inquiry can now be of any practical interest, except as a lesson and a warning. This warning was heeded by the Legislature, as we have already seen.

In conclusion of this branch of the inquiry I have to say:

1. That the ascertained amount of Wm. R. Smith's embezzlements was \$120,361.90.

There were payments aggregating doubtless a large sum paid to him on other accounts, and not paid out by him to the State, but of them it is impossible now to make any figures. They may possibly have aggregated as

much as the amounts which were definitely ascertained by the depositions and receipts furnished the committee and Accountant Craig by the clerks and others whose payments are recorded in the book entitled "Special Settlements with Clerks of Courts, Banks and Others."

2. The facts would not justify a suit by the State against the representatives of the dead auditors and their sureties on their official bonds, or their representatives, or against S. Brown Allen, the only one of said auditors who is still living, and his official sureties.

I beg leave to insert here a letter received from Hon. John B. Moon, who was the chairman of the special committee referred to, which gave me the fullest and most definite information as to the action of the General Assembly upon their report, which I have been able to obtain from any one of a number of officials and others to whom I have applied for information on the subject:

CHARLOTTESVILLE, VA., May 17th, 1904.

HON. WM. A. ANDERSON,

Attorney-General of Virginia, Richmond, Va.

MY DEAR SIR:

Your letter of the 13th has not been replied to sooner because of my absence from home for a day or two past.

The investigation you referred to was had just twenty years ago, and I believe most of the work in the matter was done by Mr. Craig, the expert, and myself. Our report was printed as one of the documents of the Legislature of 1885-6, who, in accordance with the recommendations therein contained passed three bills which we drew and returned with our report. One of these bills provided a new method of paying money into the treasury; see Acts of 1885-6, p. 371; another one provided for the assessment and collection of taxes in the hands of notaries and clerks of court, see p. 101 of the same Acts; and the third provided for the relief of Clerks, Banks, etc., by directing that the Book of Accounts which we returned as a part of our report should be taken as a part of the records of the Auditor's office and the accounts therein stated should be taken as correct and the clerks and banks receive credit accordingly See p. 409 of the same Acts.

Prior to the passage of these Acts the method of paying money into the treasury of the State was a very cumbersome one, See pp. 410-11 of the Code of 1873. This method was as follows: The party owing the money to the State reported the amount due to the Auditor, who thereupon gave what was called a pay-in warrant directing the Treasurer to receive the sum stated, and the Treasurer by his endorsement on such warrant required the Cashier of one of the Banks which was a State depository to receive the amount from the party in question, who thereupon paid the amount into the Bank named by the Treasurer, and such Bank certified upon the warrant that the amount had been paid to the credit of the Treasurer; and upon the return of this to the Treasurer he gave a receipt for the amount paid, which was taken to the Auditor, who granted a final receipt. This Act, I believe, was passed in 1839, but owing to the trouble of complying with it practically fell into abeyance, the custom being to pay the money to the Auditor or one of his Clerks, who issued a pay-in warrant and sent the money to the Bank, and after the Bank's certificate had been given and certified to by the treasurer a final receipt

was granted. But in doing this the Auditor or his Clerk who took the money acted as the Agent of the party who paid it, and not as the agent of the State as See p. 411 of the Code of 1873 (Section 8).

In regard to the liability of the Auditor as an officer our theory was that not having the right to receive the money on behalf of the State, his bondsmen were not bound for the transaction. All the defalcations which we discovered and reported on were payments to the Auditor's Clerk, the late William R. Smith, whom we thought personally liable for the amount to the parties whose money he appropriated, and who still remained liable to the State for the amount they had paid Smith.

We took testimony by means of interrogatories propounded to each Clerk and Bank, covering some one hundred and fifty or more depositions, I believe, which still ought to be on file in the Auditor's office. From these depositions and the vouchers returned by the Clerks and Banks we wrote up their accounts in the book above referred to, which was adopted as a part of the records of the Auditor's office, thus granting them relief with respect to payments which the State could have disregarded. Our reasons for so doing was that for a great many years the custom of paying to the Auditor direct had obtained, and this custom was practically known to every department of the Government, Legislative and Executive, to exist, no objection having been suggested thereto.

The Auditors affected were Taylor, Massey and Brown Allen. Very little, if any, accrued under Marye's administration. I have looked for the printed report we made among my papers, but have not yet found it, and do not know that I have a copy. All the material, however, upon which this report was based is given in detail in the Book of Accounts referred to. I will look further among my old and discarded papers for a copy of the report, and if found will send it to you.

Yours very truly,

(Signed) JOHN B. MOON.

EMBEZZLEMENT OF JOSEPH H. SHEPHERD.

After investigating this matter as fully as I could through every avenue of information accessible to me, I have to report as follows:

1. The aggregate amount of said Shepherd's embezzlement was \$37,914.13, as ascertained and shown by the books in the Auditor's office.

2. After diligent inquiry I could learn of no property whatever which said Shepherd had at the time of his conviction and sentence to the penitentiary. The furniture in his house belonged to his wife. While he was serving out in the penitentiary the sentences imposed upon him his wife died, and he became entitled as her sole distributee to any personal estate of which she died possessed, and as to which she died intestate, after the payment of her debts.

I discovered on inquiry that Mrs. Shepherd had left some estate in household and kitchen furniture of no great value; and some stocks or bonds. I had heard a report that she had also left some insurance on her life, but ascertained that there was no truth in this.

I found that she owed a considerable indebtedness. I was also informed that the bonds or stock which she left would be claimed by her children as having been given to them in some way.

Subsequently any such claim was abandoned and her estate was settled up, and the entire balance ascertained by the Commissioner of Accounts to remain after the payment of her debts, funeral expenses, and expenses of administration was paid over to Mr. John S. Eggleston, whom I had appointed as committee for said Jos. H. Shepherd.

The whole sum thus realized, after defraying the legal costs of administration, etc., will amount to about one thousand dollars, and will be paid into the State Treasury by the committee in due course of administration.

This is all, so far as I can learn, which is likely ever to be recovered on account of said Shepherd's embezzlements.

AS TO ANY CIVIL LIABILITY OF MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS,
AND THE SURETIES UPON HIS OFFICIAL BOND FOR THE CRIMINAL ACTS
OF JOSEPH H. SHEPHERD.

3. It is well settled as a general rule that public officers of the government in the performance of their public functions are not liable for the misfeasances or positive wrongs of their official subordinates.

Robertson vs. Sichel, 127 U. S. 507-515.
City of Richmond vs. Long, 17 Gratt. 375.
Sawyer vs. Corse, 17 Gratt. 230.
Dunlop vs. Monroe, 7 Cranch 242.
Tracey vs. Cloyd, 10 W. Va. 9.

Even in cases where they are appointed or removed by their immediate official superior the latter is not liable.

Keenan vs. Southworth, 110 Mass. 474; 14 Am. Rep. 613.
Mechem on Pub. Officers, Secs. 614 and 795.

In the leading case in Virginia upon this question, *City of Richmond vs. Long's Administrators*, 17 Gratt. 378, cited above, the Supreme Court of Appeals of Virginia states the law upon this subject as follows:

"Another exemption from this liability exists in behalf of all public officers of the government in the performance of their public functions, including all grades of officers, whose trust proceeds from and whose responsibility is due to the government. Their immunity from all liability for the misconduct, negligence and omissions of their subordinates rests upon motives of public policy, the necessities of the public service and the perplexities and embarrassments of a contrary doctrine. Still, these officers are held responsible for their own acts in the abuse or transgression of their authority, or in default of proper and reasonable care in the choice of their agents or in the superintendence of them in the discharge of their allotted duties."

And the same court, in *Sawyer vs. Corse*, 17 Gratt. 240, affirms this doctrine in the following language quoted from 1 Am. Leading Cases, 621:

"With regard to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction generally turns upon the question whether the persons employed are his servants, employed voluntarily or privately and paid by him, and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public officer, or private service. In the former case the official superior is not liable for the inferior's acts; in the latter he is."

These adjudications seem to settle the law in Virginia.

The general rule thus established is stated in the synopsis to *City of Richmond vs. Long's administrators* to be, that:

"Public officers of the government, in the performance of their public functions, are not liable for the misconduct, negligence, or omissions of their official subordinates."

The reason for this rule was thus stated in a case in the Supreme Court of the United States, holding that the collector of customs of the port of New York was not liable for the tort of his subordinate with respect to the examination of a passenger's trunk: "Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person." *Throop on Public Officers*, Sec. 592.

This general rule is subject to the following exceptions:

1. Where the superior officer negligently and willfully employs or retains unfit or improper persons.

Wiggins vs. Hathaway, 6 Barb. (N. Y.) 632.
Schroger vs. Lynch, 8 Watts. (Penn.) 453.

2. Or negligently and willfully fails to require them to perform their official duties with fidelity.

Bishop vs. Williamson, 11 Maine 495.

3. Or so negligently or carelessly conducts and oversees the business of his office as to furnish opportunity for the default.

Dunlop vs. Monroe, 7 Cranch 242.
Ford vs. Parker, 4 Ohio State 576.

4. Or has co-operated in or authorized the wrongful act of his subordinate; in which case, of course, he would be liable as *particeps criminis*.

The following are the facts as to said Shepherd's criminal transactions, so far as I have been able to ascertain them:

Shepherd was employed by the first auditor as a clerk in his office upon recommendations of gentlemen of the highest character, who had known him for years.

He was found to be a competent and capable man for the position, and for some years discharged his duties faithfully and efficiently. He established himself in the confidence of people of character and standing in the city of Richmond and elsewhere, and there was no reason whatever to question his fidelity or his efficiency until not very long before his criminal misconduct was discovered by the Auditor.

Then Colonel Marye observed that said Shepherd seemed to be under the influence either of ardent spirits or some drug, and at once spoke to him on the subject. Shepherd replied that he had not been well, and had been taking some medicine containing opium, and the Auditor relieved him of duty for the day and sent him home.

Having further reason to question his entire sobriety, the Auditor took him from the important desk to which he had been assigned as assistant auditing clerk and assigned him to a less responsible duty.

Some time after this was done, the Auditor, in making a personal examination of the books theretofore kept by said Shepherd, discovered some transactions which put him upon inquiry, and on following them up he found conclusive evidence of systematic robbery of the State by Shepherd, and had him arrested and prosecuted.

He was tried upon three indictments. Upon one the jury gave him a sentence of three years, and in the other two of one year each in the penitentiary.

The method adopted by Shepherd for accomplishing his thefts was as follows:

An important part of his duty was to audit claims and accounts due by the Commonwealth to commissioners of the revenue, and to draw warrants to pay the same, attest them by his signature, present these warrants to the Auditor for his signature, and then deliver or mail them to the persons in whose favor they were drawn, taking their receipts for the same if present in person, and when mailed, to certify by his signature in the account of claims paid that he had so paid them.

The Auditor would sign these warrants and hand them back to said Shepherd to be mailed or delivered to the parties entitled to them.

Before the year 1884, when Colonel Marye came into office, the usual, if not uniform, practice of the office was to make these warrants payable to bearer, and the checks signed by the treasurer, endorsed upon the warrants, were made payable in the same way.

Soon after he entered upon the discharge of the duties of his office Colonel Marye, convinced of the un wisdom of such a loose method of conducting business, where a warrant and check had to pass through the mails or were not delivered directly to the payee, changed the practice, directed that no warrants should ever be made payable to bearer where they were not directly delivered to the payee of the warrant; and not then, except in the comparatively few cases where the person entitled to the money called for by the warrant was present in person, and the warrant was given to him payable to bearer, to save him from the trouble of being identified, so as to collect it.

And the treasurer followed the same rule in drawing his checks upon the warrants. That is, when the warrant was made payable to the payee, or

order, the treasurer's check was made payable in the same way; and when the warrant was made payable to the payee, or bearer, the check was drawn accordingly.

Besides the exceptional cases above mentioned, warrants for the per diem, etc., of members and officers of the General Assembly were, for convenience in their collection generally made payable to bearer.

From 1884 to 1901 the warrants made payable to bearer were comparatively few in comparison with the total number of warrants drawn, and yet there were quite a number of them in the aggregate. When so made payable to bearer, the words "or bearer" were frequently stamped upon the face of the warrant, and so also as to the check thereon.

Now Shepherd would, from time to time, manufacture accounts in favor of commissioners of the revenue in different parts of the State and prepare a corresponding warrant therefor payable to such person, attest it, and present it to the Auditor, who, having no reason to question its accuracy, would sign it and hand it back to Shepherd to get the treasurer's check upon it, and forward it to the payee.

After getting the warrant and the check Shepherd would alter both by stamping upon the face of the warrant and the corresponding check the words "or bearer" with an India rubber stamp, after the manner that it was the custom of the office, in the exceptional cases referred to, to make these orders for money payable to bearer. He would then either collect them himself or, more frequently, pass them off to others as cash.

It seems now remarkable that he could have carried on such a system of robbery of the State for years; but upon the surface the transactions all seemed regular and in accordance with the practice of the disbursing offices of the State. It was easy enough to detect the crookedness when it was once suspected, but until then, as is usual in such cases of misplaced confidence and systematic peculation, the trusted official is not suspected until some fortuitous circumstance or some unexpected disclosure puts his superior upon inquiry, and then the hideous truth is speedily discovered.

It would be simply impossible for any one officer to personally examine, verify, and carefully audit the many thousands of accounts and claims that are annually presented in this office for payment, and the Auditor is therefore given a number of clerks and accountants who, under his general direction and supervision, are to critically examine all such accounts and audit them, and if found to be accurate and properly authenticated according to law, enter the same in books kept for the purpose, and then present them, with a corresponding warrant therefor, to the Auditor for his signature to the warrant. There seemed to be nothing upon the face of the warrants presented by Shepherd to the Auditor for his signature, or in the accounts for which they were drawn, to excite suspicion or raise any question as to their regularity.

The warrants were all made payable to the order of local officers all over the State, without whose endorsement they could not be collected, unless indeed they were fraudulently altered by the use of a stamp, a crime which the Auditor had no reason to suppose would be perpetrated, or was contemplated by this then trusted assistant auditing clerk.

In order to hold the superior officer and his sureties liable under such circumstances the burden would be upon the Commonwealth to show that he had been guilty of culpable negligence in the conduct of his office, and the supervision of his subordinates.

Upon this point I am sure I do not exaggerate when I say that the testimony of hundreds of officers and citizens of the State who have had official dealings with the present First Auditor of the Commonwealth, and have had the best opportunities to observe the manner in which he has always discharged his official duties, would agree in the emphatic statement that the Commonwealth has never had in their time a more faithful, a more conscientious, a more vigilant, or a more zealous and capable officer in her service.

Applying the well-established doctrines above formulated to this state of facts, I am forced to the conclusion that Auditor Marye is not liable for the misconduct of Joseph H. Shepherd under the general rule established as the law in the State by the unanimous adjudications of its highest court in the cases above cited; and that there are no proofs known to me, or which, after diligent inquiry, I believe to exist, which would bring a case against him and his sureties upon his official bonds within any of the exceptions to that general rule.

Considering those exceptions in connection with the facts as I believe they can be established, I would say that there is nothing to show:

1. That the Auditor negligently or willfully employed or retained Shepherd, knowing, or having reason to believe, that he was an unfit or improper person; or
2. That he negligently or willfully failed to require said Shepherd to perform his official duties with fidelity; or
3. That he so negligently or carelessly conducted or oversaw the business of his office as to furnish opportunity for such default; or
4. That he co-operated in or authorized the wrongful acts of his subordinate.

This last is only mentioned because it is one of the exceptions to the general rule laid down by the authorities and approved by human experience, for it is impossible for any one who knows the present Auditor of Public Accounts to imagine that this language could ever have any application whatever to him.

The facts upon which the above conclusions are based were obtained by me by such examination as I could make of the accounts in the Auditor's office, and personal inquiry of persons accessible to me who would be likely to know anything which would probably throw light upon the subject matter under investigation.

In this connection, besides my correspondence with Mr. John B. Moon, I addressed letters of inquiry, and had replies thereto, to Mr. J. F. Griffith, the delegate who offered the resolution referring these matters to me; to Mr. C. Lee Moore, first clerk in the Auditor's office, and to others; and so much of this correspondence as is likely to throw any light on the investigation is hereunto appended for your information, and the information of the General Assembly.

My final report upon these matters would have been submitted long ago but for official engagements which occupied my time, and for the farther reason that an earlier response to the resolutions of the General Assembly could not reach that body before the 10th of January, 1906.

LETTERS AND REPLIES ABOVE REFERRED TO.

March 26, 1904.

J. F. GRIFFITH, ESQ.,
Honaker, Russell County, Va.

DEAR SIR:

I learn that you were the patron of two House resolutions recently passed by the General Assembly which impose certain duties upon the Attorney-General, and require him to make certain inquiries and investigations.

As I have no power of compelling witnesses to testify, and must, therefore, rely upon statements voluntarily given, it is important that I should have all the assistance I can obtain from all persons having any information touching the subject-matter of those resolutions.

I write, therefore, to ask that you will kindly place me in possession of all the information you have, and upon which your action in offering said resolutions was based, and also give me the names of all persons from whom any material information in regard to those matters can be obtained, so far as your knowledge or information extends.

Bespeaking your kind and prompt attention to this request, I am,

Very truly and respectfully yours,

WILLIAM A. ANDERSON.

HONAKER, VA., April 7, 1904.

WILLIAM ANDERSON,
Attorney-General of Virginia, Richmond, Va.

MY DEAR SIR:

In reply to yours of March the 26th in reference to information regarding resolutions offered and passed the General Assembly, instructing and directing you to investigate and institute legal proceedings against W. F. Taylor, John E. Massy, S. Brown Allen and *Martin Myre* the present Auditor, and the sureties on their official bonds, to recover the \$337,914.14. I do not know of better evidence than an investigation of the Auditor's office. But the present Auditor made statement before the Commity of Courts of Justice, that Joseph H. Shepherd, while acting as his first clerk, stold \$37,914.14, and that he did not care no more to pay the same than the black under his finger nails, if he on his official bonds was responsible for same. He further stated that he signed most of the drafts that said money was stolen on payable to bearer, and delivered the same to his first clerk, Joseph H. Shepherd. He also stated that about \$300,000.00 had been stolen by W. H. Smith, first clerk to himself and the three former Auditors.

The Attorney for the Commonwealth of the Hustings Court of the City of Richmond informed me that Joseph H. Shepnerd, as he was informed, had some money arising from Life Policy upon his wife, in the hands of her Administrator. And also upon an investigation of the Clerk's office in said City, I found that Joseph H. Shepherd and W. H. Smith had been indicted for the Embezzleing or stealing various small sums of money amounting in the aggregate to large amounts, and I also found, by the records, that there had not been instituted any suits at law against the said Auditors and their sureties to recover one cent of the defalcation of the first clerk to the said Auditors. And I further found, by investigation, that the said Auditors, during the period of the defalcation of the said first clerks, on the various bonds of the said Auditors amounted to about \$450,000.00. The present Auditor and his

first and second clerks produced a book before the Comitty of Courts of Justice, which book or record showed the said defalcations of said clerks, and all the information as to the amounts of defalcation can be obtained from the Auditor and his clerks. The Chairman of the Comitty of Courts of Justice was W. R. Duke, of Charlottesville, Va., who will verify my statement as to the information we obtained from the present Auditor. Any other information you desire from me please write me, and I will gladly give same to you if in my knowledge.

Respectfully yours,

J. F. GRIFFITH.

April 12, 1904.

J. F. GRIFFITH, ESQ.,

Honaker, Virginia.

DEAR SIR:

Your favor of the 7th instant was received this morning, for which accept my thanks.

I regret that you could not give me more definite information in regard to the matters referred to.

I shall do all I can to comply with the request embodied in the two resolutions adopted by the Legislature; but I certainly ought to have been allowed to employ an expert accountant to make the investigations called for by these resolutions, which could be made only by a trained accountant, and it would require several months, I am satisfied, to make it thoroughly, as it would cover a period of twenty odd years, during which, as to many of these matters, no accounts whatever were kept, as I am informed.

However, I have understood that there was an investigation made by the General Assembly in regard to Smith's defalcation many years ago, and that probably the facts were then carefully ascertained. I hope to obtain from the report of the committee which made that investigation most of the facts necessary to the consideration of that case. But I am informed that all of Smith's defalcation was during the terms of Mr. Taylor, Mr. Massey and Mr. S. Brown Allen.

Of course, I could not personally make an exhaustive investigation without dropping and neglecting matters of very great importance to the Commonwealth, which cannot be postponed, and which it is made my duty to attend to; but I will certainly make the investigation as thorough as it is possible for me to do.

Yours truly,

WILLIAM A. ANDERSON.

HONAKER, VA., April 27, 1904.

COL. WILLIAM A. ANDERSON,

Richmond, Va.

DEAR SIR:

In reply to yours of some time ago excuse me for not writing you sooner, I just returned from Grundy court, you say to me that the present Auditor is not responsible for any of the defalcation of Clerk Smith, but the present Auditor stated before the Committie of Court of Justice that Smith had stolen at least \$15,000.00 per year for 2 year under him, making \$30,000.00 that he and his sureties are responsible for, if they are to be held responsible for the shortage of their clerks, which is purely a legal question. There are no doubt but what you can go to the Auditor's office and the present Auditor will be compelled to furnish you with the amount of money stolen under each Auditor, for the present Auditor stated that there had been stolen under himself and the three former Auditors \$337,914.14, and it seems to me that there should of been suits instituted years ago to of recovered this money, but we can use it to an advantage now if we can recover it, it would be well to appropriate it to the free schools.

Yours truly,

J. F. GRIFFITH.

May 11, 1904.

J. F. GRIFFITH, ESQ.,
Honaker, Virginia.

DEAR SIR:

Your favor of the 27th ulto. has been received.

Whenever I could spare the time from more imperative and urgent duties I have been investigating the matters covered by the two resolutions passed by both Houses of the Legislature at your instance, but which were not sent to the Governor, nor approved by him, and, therefore, have not the effect of law.

I find the investigation of William R. Smith's defalcation involves the examination of transactions with hundreds of persons, running back for a period of more than thirty years. It would require any expert accountant months of steady and patient labor and investigation to comply with the request of your resolutions, which, notwithstanding the fact that they were not sent to the Governor and were not approved by him, and therefore did not have the force of law, it is my purpose to carry out as far as I can. I have no power, however, to send for persons or papers, or to compel the attendance or testimony of witnesses; and to collect the evidence would, if the parties were alive, involve a correspondence with a great number of persons scattered all over the State, or else make it necessary for some representative of the Commonwealth to visit a majority of the counties in the State and have personal interviews with clerks, bank cashiers and others who hold or held the receipts given by Smith and which constitute the evidence of his defalcation. I find that a great number of these clerks are dead, and in some cases their administrators or executors are dead. All of the Auditors concerned, except one, are dead. A number of the clerks in the Auditor's office who could know anything about these transactions are dead. So that it would be a great deal more difficult now to show the true state of these accounts than it was twenty years ago, when William R. Smith's crooked transactions were discovered by the *present* Auditor soon after he entered upon the discharge of the duties of his office and in time to prevent him from robbing the treasury during his term to any appreciable extent.

It is exceedingly unfortunate that you did not provide in your resolutions for authority for the Attorney-General to employ an expert accountant in connection with both of these investigations. I am not an expert accountant, and if I was, I could not abandon the other and essential duties of my office prescribed by law for the purpose of conducting investigations which, if made originally, would take months of the time of the ablest accountant in the Commonwealth.

It was perhaps not known to you or to the members of the last General Assembly, when these resolutions were adopted, that the Legislature of 1884 appointed a committee to investigate the matter of William R. Smith's defalcation, with full powers; that said committee made the investigation, and made a report, which I hope to be able yet to find though I have not been able to find it in the Auditor's office or in any of the public documents. As a result of that investigation, one of the ablest expert accountants in the State was employed by the Commonwealth, and it took him two years or more to unravel the tangled skein and show the nature and extent in detail of William R. Smith's robbery of the State treasury. I have examined the accounts made by Mr. Craig, the accountant referred to, which are preserved in a book, and they furnish a clear statement of the transactions; but, unfortunately, these accounts are not evidence against anybody, and the data from which they were made up is no longer accessible here, and Mr. Craig, the accountant who made the accounts, is dead. If he were alive and I could have his assistance, I could do the work perhaps in two or three months, including the enormous correspondence it would involve. I propose to do it as far as I can, however, and as well as I can; but, if it was the purpose that the resolutions should be carried out, certainly the neces-

sary means for their execution should have been supplied. I am sure it could not have been your purpose to require me or any one else to do the impossible, and, if you were here and could give me an hour of your time, I could satisfy you that there is no lawyer, and no half dozen lawyers, on earth that, in sixty days, could do what your resolutions request me to do in that time, if the work was to be done in a thoroughly reliable manner.

You are certainly mistaken in your recollection that the present Auditor stated before any committee that Smith had stolen \$15,000 a year for two years under him. Smith did not serve one whole year under Auditor Marye; but, soon after he came into office, Auditor Marye suspected Smith of some carelessness, and afterwards of some crookedness, and relieved him of duty, had him arrested long before the year was out, and, in the discharge of his duty, had him prosecuted and sent to the penitentiary. My recollection is that Smith died in the penitentiary before Auditor Marye had been in office two years. The records show this, and show further, that it was impossible that he could have stolen anything like \$15,000, or one-tenth of that amount, during Colonel Marye's incumbency; and he was detected by Colonel Marye, as I have stated, very soon after he came into office.

The question as to Joseph H. Shepherd's transactions is very different. All of them occurred during Colonel Marye's incumbency, and, if they were occasioned by his negligence and carelessness, he and his sureties would be responsible.

Yours truly,

WILLIAM A. ANDERSON.

Mr. Craig, the expert accountant, who investigated William R. Smith's transactions, was first employed by the special committee of the Legislature, who conducted that investigation in 1884-5-6, and afterwards by the Auditor of Public Accounts to follow up and complete that work.

W. A. A.

C. LEE MOORE, ESQ.,

First Clerk in Office of Auditor of Public Accounts of Virginia.

SIR:

Desiring to have in writing the information which you, in response to my inquiry, have heretofore given me in reference to the criminal transactions of Joseph H. Shepherd, formerly a clerk in the office of the Auditor of Public Accounts, in his dealings with the treasury, together with any other facts material to the investigation directed by the General Assembly, I ask that you will, at your earliest convenience, furnish me as full and definite answers as possible to the following inquiries:

1. When did the dishonest transactions of Joseph H. Shepherd begin, how long were they continued, and what was the aggregate amount which he purloined from the State?
2. How was his criminal conduct first discovered?
3. What clerkship did said Shepherd hold, and what were his duties, and what his authority in connection with the payment of accounts or claims due by the State?
4. How were his robberies of the State treasury accomplished? Please state fully and explicitly the manner in which he succeeded in securing the large sums he thus obtained. Give in detail the method and *modus operandi* of his criminal transactions?
5. How was it possible for him to conduct transactions of the character you have stated so numerous, aggregating such large sums, continued through so long a time, without being detected or suspected by the fiscal officers of the State, or by the banks which paid the checks which he fraudulently appropriated?
6. Could his criminal appropriation of the money of the State have been prevented, and, if so, how?

7. Please kindly give me any other information possessed by you or by any of the clerks in your office, or shown by any public records accessible to you, which may have any bearing upon this investigation?

Very truly,

WILLIAM A. ANDERSON,
Attorney General.

RICHMOND, VA., May 16, 1904.

HON. WILLIAM A. ANDERSON,
Attorney General of Virginia, Richmond, Va.

DEAR SIR:

I have your letter making inquiries respecting the defalcations of Joseph H. Shepherd whilst a clerk in this office, and reply in the order in which your inquiries are made, viz.:

1st. When did the dishonest transactions of Joseph H. Shepherd begin, how long were they continued, and what was the aggregate amount which he purloined from the State?

The dishonest transactions of Joseph H. Shepherd in the office of the Auditor of Public Accounts began Aug. 24, 1894, and were continued until April 6, 1900, and the amount stolen from the State was \$37,914.13.

2nd. How was his criminal conduct first discovered?

His criminal conduct was first discovered in the spring of 1901 by Colonel Morton Marye, Auditor of Public Accounts, when making an examination of the records of the office to furnish a statement showing commissions of Commissioners of the Revenue on assessments of property in each county and city in each year from 1891 to 1900, both inclusive; also statement showing commissions of Examiners of Records on assessments of property in each year from 1896 to 1900, both inclusive, which Hon. W. H. Boaz, member-elect from Albemarle county, of the Constitutional Convention, had requested the Auditor to send him.

3rd. What clerkship did said Shepherd hold, and what were his duties, and what his authority in connection with the payments of accounts or claims due by the State?

Shepherd was assistant auditing clerk, and during the period covered by his defalcations, was charged with the duty of keeping the accounts of Commissioners of the Revenue for their commissions on taxes assessed; he was charged with the duty of assisting the auditing clerk in auditing and paying all claims against the Commonwealth; he was also charged with the duty of paying members, officers, clerks and employees of the General Assembly. He was authorized to audit claims and accounts against the Commonwealth and to draw warrants to pay the same, attest them by his signature and present them to the Auditor for his signature, and deliver them to the persons in whose favors they were drawn; taking their receipts for same, or mail them to such persons and certify by his signature on the accounts or claims paid that he mailed them.

4th. How were his robberies of the State treasury accomplished?

The Auditor would sign warrants on the treasury in favor of Commissioners of the Revenue, drawn by Shepherd and attested by Shepherd's signature, without personally examining the accounts in payment of which the warrants were drawn, in like manner as he signed warrants drawn and attested by Shepherd in favor of members of the General Assembly, judges and other officers, the Auditor relying upon Shepherd for the correctness of the warrants drawn by him, as he relied on the auditing clerk and pension clerk for the correctness of warrants drawn by them, each being specifically charged with the duty of ascertaining the correctness of the claims and accounts which the warrants were drawn to pay. The Auditor could not personally examine each of the claims and accounts audited and paid by these clerks.

Shepherd would prepare fraudulent accounts in favor of Commissioners of the Revenue, draw warrants on the treasury in payment of same, attest the warrants with his signature and present these warrants, payable to the order of the several Commissioners of the Revenue, to the Auditor for his signature, and after the Auditor signed them and delivered them to Shepherd, Shepherd would so alter them as to make them payable to bearer, and would then secure the money on them at the State depositories or pass them to merchants of this city. Shepherd would, upon the back of the fraudulent accounts, certify that the warrants drawn to pay the same had been sent by him to the Commissioners of the Revenue in whose favors the warrants were drawn and would sign the certificates.

5th. How was it possible for him to conduct transactions, of the character you have stated, so numerous, aggregating such large sums, continued through so long a time, without being detected or suspected by the fiscal officers of the State, or by the banks which paid the checks which he fraudulently appropriated?

The instructions of the Auditor to the auditing clerk, the assistant auditing clerk, and pension clerk (the only clerks in the office charged with the duty of drawing warrants on the treasury) to draw no warrant payable to bearer, were positive and emphatic, and his instructions to myself, his first clerk, to sign no warrant drawn to bearer were as positive.

These instructions were deviated from rarely; an exception was made in the warrants issued to pay members, officers, clerks and employees of the General Assembly for their accommodation; also, in very rare instances, to a citizen of the State not living in Richmond, consequently not known at the banks, but known to the Auditor, was issued a warrant payable to bearer if, on account of the pressure of business the Auditor could not send a clerk to the bank to identify such citizen.

The Auditor had no means of discovering that warrants drawn by Shepherd were altered and made payable to bearer by Shepherd contrary to his instructions, because all warrants drawn by the Auditor's office when cashed by the State depositories are returned to the State Treasurer at the time they have their settlements with him, and remain in his office, hence they are not seen by the Auditor after he signs them.

6th. Could his criminal appropriation of the money of the State have been prevented and, if so, how?

The Auditor had taken the precaution to prevent the stealing of the State's money in the manner employed by Shepherd, by instructing him not to draw warrants on the treasury payable to bearer except in the instances mentioned; it would have been impossible for the Auditor to have discovered that Shepherd was altering the warrants after the Auditor signed them unless he remained at his side. The Auditor cannot personally examine into the correctness of the thousands of claims and accounts he pays, therefore the State employs clerks, his official subordinates, employees of the government for the discharge of public duties under the Auditor.

The mode of keeping the accounts of the transactions of the office has been constantly the subject of consultation between Colonel Marye and his clerks, and what he has deemed the best has been adopted.

During the administration of the present Auditor two clerks in his office have been detected of theft against the Commonwealth, have been convicted and imprisoned in the penitentiary; two deputy county court clerks have been detected of defrauding the Commonwealth by forged court orders, one of such deputies was convicted and imprisoned in the penitentiary, a warrant was issued for the other, who made his escape from the State, the Auditor being unable to secure the criminal with the most strenuous and active help of the police authorities. My information is he died some years ago. No warrant payable to bearer has been issued since the defalcation of Shepherd was discovered, and the State depositories were positively instructed

at that time to pay no warrant drawn on them, thereafter, payable to bearer, and I think in future the Commonwealth cannot suffer loss from transactions similar to those of Shepherd.

Yours truly,

C. LEE MOORE,
First Clerk.

RICHMOND, VA., May 13, 1904.

HON. WILLIAM A. ANDERSON,
Attorney General.

DEAR SIR:

In reply to your letter addressed to Mr. Moore and myself, you will find your questions answered in the order propounded—to the best of my ability.

The first question has been answered by Moore giving all information I have.

2nd. The defalcations were discovered by the Auditor in consequence of investigations made by him.

3rd. J. H. Shepherd was assistant auditing clerk with full authority to draw warrants upon the treasury, having a separate warrant book for his use. His duties were the keeping the accounts of the Commissioners of the Revenue. To pay the members and employees of the General Assembly, and at other times to assist the auditing clerk in the current work of the office.

4th. By drawing warrants upon the treasurer for dues to Commissioners of the Revenue made payable to their order, and after the same had been signed by the Auditor and Treasurer they were changed by him and made payable to bearer which he converted to his own use.

He certified on the vouchers filed for these payments that the warrants had been sent to the addressees given. When the present Auditor was first elected it was customary to make warrants payable to individuals.

This custom was varied for the benefit of individuals who were unknown at the banks, and when it was inconvenient to send a clerk of this office to identify the payee; but receipts were taken from the payee for the warrant. The custom was also varied for convenience of the members of the General Assembly.

It was contrary to the instructions of the Auditor to send checks by mail payable to bearer, and since the defalcations of Shepherd have been discovered he does not allow any checks to be made payable to bearer under any circumstances, and has notified the bank to refuse the payment of any of that kind rendering it impossible to repeat the practice of Shepherd.

5th. Had no warrants been drawn payable to bearer the defalcation could not have occurred. By making all warrants payable to the order of the payee, and instructing the State depositories under no circumstances to pay a warrant drawn by the Auditor payable to bearer, it is believed that no defalcations of this nature can occur. Since the discovery of Shepherd's defalcations no warrant has been made payable to bearer, and the State depositories have been instructed to refuse the payment of any warrant drawn payable to bearer, as stated before.

6th. Answered in reply to 5th question.

7th. The books and papers of this office are open to inspection by any one authorized to do so, or by permission of the Auditor. I suppose Mr. J. B. Woodward, a clerk in this office, could give a more detailed account of the methods used by Shepherd than any one else, as he was deputed by the Auditor to investigate the defalcations of Shepherd.

I am unable to state why his defalcations were not discovered by others.

Very truly yours,

JNO. P. GOSS,
Clerk.

VIRGINIA'S CLAIM AGAINST WEST VIRGINIA.

The commission empowered to bring about a settlement by West Virginia of the part of the debt contracted by Virginia before her dismemberment which should be equitably borne by West Virginia, during the last winter made another earnest effort to bring about such a settlement by amicable conference and negotiation between the representatives of the two States; but the General Assembly of West Virginia failed to provide for any such conference, contenting itself with the passage of a resolution denying West Virginia's liability and declining to recognize any obligation on the part of West Virginia for any part of the debt of the old State, or to enter into any negotiations with anybody in reference thereto.

This matter has assumed an acute, and, from some points of view, a grave aspect. More than six-sevenths of each and every class of all the deferred Virginia certificates have been either actually deposited under the control of the Virginia Debt Commission, or have been agreed to be so deposited, provided the Commission will now agree, with the consent and approval of the Attorney-General, to institute such a suit in the Supreme Court of the United States as will secure an adjudication by that tribunal of the amount of West Virginia's liability; the costs and expenses of such suit to be borne by the certificate holders who will be the chief beneficiaries.

They are willing also to agree to accept such adjudication against West Virginia in full of their claims, and to thereupon release Virginia from any liability on account of said certificates, except as trustee.

The contract between said Commission and the certificate holders will soon expire. Friendly negotiation has been exhausted, and there is no hope of ever effecting an adjustment in that way, or that West Virginia will ever voluntarily recognize and pay anything on account of the Virginia debt.

Unless a suit shall be speedily brought by Virginia to have the amount of West Virginia's just liability ascertained and determined by the United States Supreme Court (the only tribunal having jurisdiction of such a question), the \$12,000,000 or more of said certificates now deposited under the control of the Commission will have to be surrendered to the committee which represents those certificates. The entire arrangement and contract under which, with infinite trouble, this great number of certificates have been deposited will go to pieces and the certificates be delivered up to their original owners and be scattered throughout the civilized world. It will be thereafter impracticable, if not impossible, ever to have them again corralled and deposited in the hands of a committee authorized to act and contract for their owners, for an adjustment which cannot hurt, and may greatly benefit, Virginia.

In addition to these considerations, which point to the duty of prompt and vigorous action in order to protect the interests of the State and secure a definitive settlement with West Virginia, the Commission and the undersigned were apprised of the fact that the great State of New York, following the vicious example of South Dakota, had passed an act making it the duty of the Attorney-General of that State to bring suit in the United States Supreme

Court upon any obligations of any State which might be given to New York.

We were also informed that holders of large amounts of the Virginia deferred certificates proposed to donate a portion of their holdings to New York (as was done in respect to certain repudiated bonds of North Carolina in the South Dakota case), for the purpose of having an adjudication against Virginia and West Virginia of the liability of those States in the premises.

It will be observed that a decree adjudicating the liability of Virginia and West Virginia, respectively, in respect to any \$100,000, or any \$10,000, of the bonds represented by said certificates will necessarily determine the liability of each of these States in respect to all of the bonds of the same character.

For it is to be remembered that in the case of South Dakota *vs.* North Carolina only \$10,000 of the bonds of the latter State were involved or included in the decree which the United States Supreme Court rendered against North Carolina; but the effect of that decree was to determine the status as well of all the rest of the \$250,000 of bonds of that State of the same issue, class, and description, and to fix a liability upon North Carolina therefor.

To be sure, the compulsion of such an adjudication would be a moral one only, particularly as to the bonds not included in the litigation; but that moral compulsion in the case of North Carolina was so strong that she felt constrained to pay the full face value of the principal of the entire issue of bonds, although she had, for reasons satisfactory to her, and which seemed to her just, refused to pay more than twenty-five cents in the dollar thereof.

It will be manifestly to the interest of Virginia, and not to the prejudice of West Virginia, to have the question of the nature and extent of West Virginia's liability determined in a suit brought under a contract by which Virginia is to be released and exonerated from any farther claim or liability, rather than, by failing to avail of an opportunity so favorable, run the risk of litigation in which a large claim may be asserted against this Commonwealth.

The creditors who have deposited their certificates, by the contract they or their representatives are willing to make, are willing to concede that Virginia has already paid and assumed as much on account of the debt of the old State as she should be expected or required to pay. She has already actually paid, or novated and assumed, the enormous sum of over \$73,000,000 on account of the common debt of the two States, and the great mass of the certificate holders evidently think she has done enough.

At any rate they agree that, if Virginia will, at their cost, institute and prosecute to judgment and decree a suit against West Virginia for a settlement, they will release Virginia entirely from liability on account of the unfunded third of the ante-bellum debt.

Of course only those certificate holders who have deposited their certificates with the Virginia Debt Commission under such a contract of indemnity to Virginia will be bound by the stipulations for her release.

This consideration has induced me to insist that no suit should be brought until the great mass of the certificates of 1871, the only ones as to which there is or can be any question as to Virginia's absolute release, shall have

been deposited under such contract. As has been stated, over six-sevenths of these have been so deposited. Whenever nine-tenths have come into the arrangement, it is manifest to my mind that the interest of Virginia, and her duty as well, will demand that such a suit shall be brought. There is great reason to hope that more than nine-tenths of the 1871 certificates will be deposited and come under the provisions of the proposed contract of release and indemnity to Virginia.

The conclusion above expressed is strengthened by the fact that Virginia has paid off, or acquired large sums on account of the indebtedness of the undivided State, for which she has a claim in her own right amounting to a very large sum for reimbursement from West Virginia to the extent of West Virginia's *pro rata* liability on account thereof.

The undersigned is exceedingly reluctant, for obvious reasons, to sanction a suit by Virginia against West Virginia, and would not do so if there was any hope of a settlement of the vexed questions involved in any other way.

Definite action will doubtless be taken in this important matter by the Debt Commission, with my concurrence, within the next month, and a fuller report made in regard thereto by the Commission, in order that the action of the Commission, and the facts and considerations upon which it shall be based, may be laid before the General Assembly.

Respectfully submitted,

WILLIAM A. ANDERSON.

