

ANNUAL REPORT

OF THE

ATTORNEY-GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1906

RICHMOND:
DAVIS BOTTOM, SUPERINTENDENT OF PUBLIC PRINTING
1906

ATTORNEYS-GENERAL OF VIRGINIA

FROM 1775 TO 1906.

Edmund Randolph	1776-1786.
James Innes	1786-1796.
Robert Brooke	1796-1799.
Philip Norborne Nicholas	1799-1819.
John Robertson	1819-1834.
Sidney S. Baxter	1834-1852.
Willis P. Bocock	1852-1860.
John Randolph Tucker	1860-1866.
Thomas Russell Bowden	1866-1869.
Charles Whittlesey (Military Appointee)	1869-1870.
James C. Taylor	1870-1874.
Raleigh T. Daniel	1874-1877.
James G. Field	1877-1882.
Frank S. Blair	1882-1886.
Rufus A. Ayers	1886-1890.
R. Taylor Scott	1890-1897.
R. Carter Scott	1897-1898.
A. J. Montague	1898-1902.
William A. Anderson	1902-1906.
William A. Anderson	1906-

REPORT

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.

*To His Excellency, CLAUDE A. SWANSON,
Governor of Virginia.*

SIR:

In compliance with the statutory requirement, I beg leave to submit a report covering the work of this office for the year ending November 1, 1906.

The cases in which it is the duty of the Attorney-General to represent the Commonwealth, which have been disposed of during the past year, or which are still pending, will be mentioned in order, as follows:

IN THE SUPREME COURT OF THE UNITED STATES.

1. *Virginia v. West Virginia*: As was foreshadowed in my last annual report, this suit has been instituted. The considerations mentioned in that report, which seemed then to render such a suit not only expedient, but necessary for the protection of the rights and interests of the Commonwealth, have been strengthened and the views then expressed confirmed by subsequent events.

After the first of November, 1905, and before the institution of the above suit, large additional amounts of the certificates issued by the State for the unfunded portion of the old debt had been deposited, subject to the control of the Virginia Debt Commission, so that more than six-sevenths of those certificates of all classes, outstanding in the hands of the public, and more than six-sevenths also of the certificates of 1871, which were the only ones as to which there could be any possible claim that there was any liability upon this State to provide for the payment of any part of the bonds represented by such certificates, had been actually so deposited, and assurance given of the deposit of such additional amounts as would place nine-tenths of said certificates of 1871 under the control of said Debt Commission for the purposes of the suit. I am glad now to be able to state that these expectations have been fully realized, as will be seen from the statement of Messrs. Brown Brothers and Company, the bankers who represent the Depositing Committee, following:

REPORT OF THE ATTORNEY-GENERAL.

VIRGINIA DEFERRED CERTIFICATES.

1871 Issue.

Principal		\$11,063,913 35	
Sterling Scrip.....	\$10,716 66		
Dollar Scrip.....	33,867 00	44,583 66	\$11,108,497 01
		<hr/>	<hr/>

1879 Issue.

Principal		\$ 439,106 79	
Dollar Scrip.....	\$40,037 49		
Sterling Scrip.....	5,239 16	45,276 65	\$ 484,383 44
		<hr/>	<hr/>

1882 Issue.

Principal		\$ 771,773 05	
Scrip.		566,565 40	\$ 1,338,338 45
		<hr/>	

1892 Issue.

Principal		\$ 259,945 71	
Scrip.		285,459 54	\$ 545,405 25
		<hr/>	<hr/>
			\$13,476,624 15

(Signed.)

BROWN BROTHERS & CO.
E. & O. E.

October 31, 1906.

After the date of my last annual report, and before any definite or conclusive action was taken in reference to the institution of a suit, the Virginia Debt Commission and the undersigned were reliably informed that one of the New York holders of these Virginia-West Virginia certificates had actually sent some of the certificates which he held to South Dakota for the purpose of arranging to have a suit instituted upon them against Virginia, and probably against West Virginia also, in some such fashion as the recent suit of South Dakota *v.* North Carolina was arranged to be brought.

Under these circumstances, and for the reasons presented in my last report, and more fully set forth in the report of the Virginia Debt Commission to the General Assembly, printed with the Journal of the Senate of 1906, as Senate Document No. 1, the said Commission, with my concurrence and approval, on the 24th of November, 1905, in conformity with the provisions of the act approved March 6, 1900, and in effectuation of the agreements made by the Commission with the Certificate-holders' Committee, on the 18th of September, 1902, and on the 14th of December, 1904, entered into a contract with the said committee representing all the certificate holders whose certificates had been so deposited, in which contract it was, among other things, stipulated that:

3d. The said Virginia Commission hereby stipulate and agree, by and with the advice and approval of the Attorney General of Virginia, that in their judgment it is needful and proper, in order to protect the interest of the State and bring about and carry into effect a settlement in the premises, that a suit should be instituted in the name of the State of Virginia against the State of West Virginia in the Supreme Court of the United States, asking for an adjudication and settlement by that court of the matters aforesaid, unsettled and undetermined between the two States, arising or growing out of the debt of the original State of Virginia before its dismemberment and on account of which said deferred certificates were issued, the same to be brought and instituted as provided in the act of the General Assembly of Virginia, of March 6, 1900, referred in said contract of December 14, 1904; and the said Virginia Commission, acting by and with the advice and approval of the Attorney General of that State, do hereby undertake and agree that such a suit shall be brought against the State of West Virginia for the purpose of obtaining a settlement as aforesaid as soon as the pleadings, papers and documents relating thereto can be conveniently and properly drawn up and prepared for presentation to the said court, which said suit shall be instituted, conducted and proceeded with in all respects in accordance with the provisions of the said act of the General Assembly of Virginia and the joint resolution of the said General Assembly of March 6, 1894, also referred to in said contract of December 14, 1904; but the power to make and carry into effect a settlement and adjustment in the premises by agreement with West Virginia as to the deferred certificates placed subject to the control of the Commission as aforesaid, as provided in the previous contract aforesaid, shall remain vested in the said Commission, notwithstanding the institution and pendency of such suit.

4th. And the Virginia Commission do further undertake and agree that, in accordance with the terms and conditions of the said joint resolution and act of the General Assembly of Virginia, they will account for, pay over and deliver such amount, either in cash or securities as may be realized from West Virginia through any settlement made by the said Commission with that State, either by means of an adjudication or recovery in said suit or otherwise, for or on account of the deferred certificates now or hereafter deposited and placed subject to their control as aforesaid, to the said Depositing Committee in full settlement and satisfaction of all claims under said certificates; and the said Depositing Committee agrees, on behalf of the depositors of said deferred certificates so placed subject to the control of the said Commission and on behalf of those entitled to the benefit of said certificates as assignees of said depositors or otherwise, to accept as aforesaid such amount, either in cash or securities, as may be determined or ascertained in any such suit to be due by, or as may be realized through any adjustment or settlement as aforesaid from the State of West Virginia on account of the said certificates and on account of the bonds represented by and mentioned in said certificates respectively in full settlement and satisfaction of all claims on account of said certificates and on account of the bonds therein mentioned, and to

accept and take such adjudication against the State of West Virginia in full discharge and acquittance of all claims in the premises against the State of Virginia.

5th. It is further understood and agreed that if from any cause the said Commission shall fail or be unable to bring about such adjustment or settlement or to obtain a determination or ascertainment of the liability of West Virginia as hereinbefore provided for, then it shall be the duty of the said Commission to restore to the control of the said Depositing Committee all such deferred certificates as may have been placed subject to the control and disposal of said Commission as aforesaid.

Richmond, Va., November 24, 1905.

JOHN CROSBY BROWN. *Chairman;*
R. P. CHEW,
WM. C. LEGENDRE,
CLARENCE CARY,
J. KENNEDY TOD,
GEO. F. BAKER,
BARTLETT S. JOHNSTON.

Depositing Committee.

JOHN B. MOON.
WM. F. RHEA,
H. D. FLOOD,
H. H. DOWNING,
H. T. WICKHAM,
RANDOLPH HARRISON,
J. THOMPSON BROWN.

Virginia Commission.

Attest:

JOS. BUTTON,
Secretary Virginia Commission.

RO. L. HARRISON,
Secretary Committee.

The foregoing contract of this date was entered into by and with the advice and approval of the undersigned, William A. Anderson, Attorney General of Virginia, as in said contract stated and set forth, and the same is concurred in by him as such Attorney-General.

Richmond, Va., November 24, 1905.

(Signed) WILLIAM A. ANDERSON,
Attorney General of Virginia.

The above mentioned agreements of September 18, 1902, and December 14, 1904, and of November 24, 1905, are set forth in full in the report of the Virginia Debt Commission to the General Assembly and are printed therewith in the Journal of the Senate of 1906, and to them reference is made for fuller information in reference thereto.

Hon. Holmes Conrad, of Winchester, Virginia, had been retained as special counsel on behalf of the holders of the Virginia certificates deposited with the Virginia Debt Commission, and rendered very important services in connection with the preparation of the bill to be filed by the Commonwealth and otherwise. On the first Monday in March, last, as soon as that bill could be prepared, printed and presented to the United States Supreme Court, it was so tendered, and leave asked to file the same. Such leave was thereafter granted, and process thereupon awarded against the State of West Virginia returnable to the October term of the court, 1906. In response thereto, the State of West Virginia appeared by counsel on the second day of the October term and filed her demurrer to the bill, and then, at the request of the counsel for both States, the cause was set down for argument upon the first Monday in March, 1907, upon the questions raised by this demurrer.

I will not, of course, in advance of the consideration of the grounds relied on in this demurrer by the tribunal to which they have been submitted, refer to them farther than to say that they involve the crucial question whether the bill presents any cause of action against West Virginia of which the United States Supreme Court has jurisdiction, and whether, admitting the allegations of her bill to be true, Virginia has presented a case which entitles her to any relief which it is in the power of that court to grant.

If this demurrer shall be overruled, the court will then proceed to hear and decide the case upon its merits, as soon as it can be gotten ready for such decision.

The cause is one of such importance that I deem it proper to append to this report a copy of the bill filed on behalf of the Commonwealth, which succinctly states the facts and the grounds upon which the claims of Virginia rest, and also a copy of the demurrer filed by West Virginia, which states the legal objections relied upon by that State to the suit brought by Virginia upon those claims.

Upon an inspection of the bill, it will be seen that Virginia brings the suit both in her own right, and as trustee for the creditors of the undivided State.

In the first capacity she sues to secure a settlement with West Virginia as to the sum which it is right that that State shall pay on account of the millions of dollars of obligations of the undivided State, which Virginia has, since her dismemberment, paid in full.

In the second capacity she sues to secure a settlement of the amount which West Virginia should pay, in exoneration of Virginia, on account of the portions of the indebtedness of the old State which were not actually funded in the new bonds of Virginia under the acts of 1871, 1879, 1882 and 1892, and on which nothing has ever been paid, which indebtedness is represented by the original bonds which have been deposited with Virginia as trustee under those several acts, and for which Virginia has issued to the persons entitled to said unfunded portions of said bonds her negotiable certificates in accordance with the terms of said acts, respectively.

As to those bonds so held by her, Virginia sustains a fiduciary relation which makes it proper that she should, especially when assured against loss, institute and prosecute such a suit for the benefit of those for whom

she holds these securities. But as to them also she has a very important interest in her own behalf that the debts represented by said bonds shall be settled by West Virginia so that she shall be exonerated from any legal or moral obligation therefor.

In view of the enormous sums which Virginia, notwithstanding the dire disasters and losses from which her people have suffered, has paid on account of the debt of the original State since the territory now constituting West Virginia was wrested from her, and of the farther fact that West Virginia, though enjoying in large measure the benefits of the expenditures of the money borrowed by the original State, has not paid one dollar on account thereof, the creditors represented in the suit, are willing that this State shall not be asked or expected to pay anything more on account of that debt, provided a settlement with West Virginia shall be, had, or decreed, at Virginia's instance or at her suit.

In view of the fact that Virginia has, down to this date, as is shown by her bill, actually paid off or assumed over \$72,000,000 on account of the principal and interest of the debt of the old State created prior to the formation of the State of West Virginia, and that the suit which she has instituted has been brought chiefly for the benefit of the creditors represented by the certificates of 1871, 1879, 1882, and 1892, it would seem to be just and equitable that these costs and expenses should be thus borne by those for whose benefit they are chiefly incurred.

Accordingly, it has been stipulated on behalf of those creditors, the principal beneficiaries of the suit, that they will accept whatever adjudication may be rendered by the United States Supreme Court against West Virginia in full discharge and acquittance of any and all liability of Virginia in the premises, and that they will in any event defray and exonerate Virginia from the payment of any of the costs and expenses of the litigation—the only contribution which she is required to make in the preparation and prosecution of the suit being such services as her Attorney General may be able to render in that behalf.

In the event that the court shall, for any reason, decline to take jurisdiction of the case, and to ascertain by its decree what proportion of said indebtedness it is fair and equitable that West Virginia should pay, then the certificates now deposited under the contract of the Virginia Debt Commission, are to be returned to the Depositing Committee, as it is right and proper should, in that contingency, be done.

Should a result which the counsel for Virginia and for the creditors consider so very improbable of occurrence, be arrived at by the court, the position of the Commonwealth will be in no regard any worse, and in some important particulars it will be decidedly better, than it was before the suit was brought; not only will Virginia have then done all that she could be expected by the most exacting creditor to have done, to bring about a settlement with West Virginia, but such action on the part of the Supreme Court of the United States will demonstrate the futility of any such suit by South Dakota, or any other State, upon any of the Virginia certificates which may be donated to, or acquired by, any such State; for if Virginia cannot maintain a suit against West Virginia upon such righteous claims as she has asserted in the appending cause, then, surely, no other State

which may buy itself into such a controversy, by acquiring or accepting a lot of said certificates for the purpose of securing an adjudication thereon, could have any status to maintain any such suit.

While, therefore, we have an abiding faith that a just and equitable claim for the relief asked for, is presented in the bill, and that the United States Supreme Court, which is given by the Federal Constitution plenary and exclusive jurisdiction of all controversies between the States, unquestionably has jurisdiction of this controversy between Virginia and West Virginia, which that tribunal alone can decide, and that it will settle it by its decree in accordance with the legal and equitable rights of the parties, there is no conceivable result of the case which can, we believe, operate to the prejudice of Virginia. On the other hand, such a conclusion of the litigation as we have a right to anticipate must enure greatly to the benefit of the Commonwealth, not only in the justice which will be done to her own rightful claims and those of the creditors of the undivided State, but in the final and lasting adjustment and settlement, so far as this State is concerned, of this branch of the old Virginia debt question—a question which will not down, and which will never be laid at rest until it shall have been definitely disposed of, either by agreement between the parties, or by the adjudication of the court.

2. *The Cosmopolitan Club v. the Commonwealth.*

The Cosmopolitan Club is "a social club" located in the city of Norfolk, organized under a charter granted prior to April 16, 1903, by the Corporation Court of that city.

That club was proceeded against under section 142 of the Virginia Revenue Law, as amended by the act approved March 12, 1904, (acts of 1904, p. 214), upon the charge that it was being conducted "for the purpose of violating or evading the laws of the State regulating the sale of liquors," and it was adjudged that said club had been so conducted.

That status provides that if it shall be adjudged by the judge or court having jurisdiction of the case, that any such corporation is being, or has been, conducted for such purpose, "the chartered rights and franchises of such corporation shall cease and be void without any further proceedings." * * * *

The case has been carried to the Supreme Court of the United States by writ of error to the Supreme Court of Virginia, upon the contention that the act of March 12, 1904 is in violation of the contract rights of the Cosmopolitan Club under its charter, and therefore in conflict with the inhibition of section ten of article 1 of the Federal Constitution, which declares that no State shall pass any "law impairing the obligation of contracts."

This case is so far down on the docket of the Supreme Court that it is not likely to be reached before October term, 1907.

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

1. *Edgar Poe Lee v. 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, *v.* 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 *v.* 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 the 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 defendant's demurrer shall be sustained, or the plaintiff's demurrer to the defendant's plea overruled, the decision in the United States Circuit Court must be for the defendants; but an appeal will doubtless be taken.

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.

SUPREME COURT OF APPEALS OF VIRGINIA.

1. Jernigan *v.* Commonwealth. Appeal from the Circuit Court of Princess Anne county, on conviction for unlawful fishing, etc. Reversed, and remanded for trial in the Circuit Court.

2. Haynes *v.* Commonwealth. Appeal from the Hustings Court of the city of Richmond, on conviction for attempt to bribe officer. Reversed and remanded for new trial.

3. Johnson *v.* Commonwealth. Appeal from the Circuit Court of Henrico county, on conviction for rape. Reversed and remanded for a new trial.

4. Robinson *v.* Commonwealth. Appeal from the Circuit Court of Warlick county, on conviction for embezzlement. Affirmed.

5. *Harding v. Commonwealth*. Appeal from the Circuit Court of Lancaster county, on conviction for violation of local option law, special for that county. Reversed.

6. *Creameans v. Commonwealth*. Appeal from the Circuit Court of Giles county, on conviction of murder in the first degree. Affirmed.

7. *Hoback v. Commonwealth*. Appeal from the Circuit Court of Floyd county, on conviction of a felony (murder in second degree). Reversed and remanded for a new trial.

8 and 9. *American Can Company and Standard Oil Company v. Commonwealth*. Appeals from the State Corporation Commission. These cases involved the question of the amount of the charter or entrance fee which these two foreign corporations should be required to pay; whether such fee was fixed by section 37 of the tax law, viz: \$3,000 for the American Can Company, and \$5,000 for the Standard Oil Company, or the fee fixed by section 38 of the tax law, viz: \$600 for each company. The finding of the Corporation Commission, fixing the higher fees under section 37 of the tax law, was affirmed.

10. *Curtis v. Commonwealth*. Appeal from the Corporation Court of the city of Roanoke, on conviction of a felony. Error confessed, and case remanded for a new trial.

11. *Satterfield v. Commonwealth*. Appeal from the Corporation Court of the city of Lynchburg, on conviction of a felony. Reversed, and remanded for a new trial.

12. *Cannon, etc., v. Hawkins, Commissioner of the Revenue*.

13. *Whitlock, etc., v. Hawkins, Commissioner of Revenue*.

14. *O'Flaherty Tr. v. Commonwealth*. Appeal from the Law and Equity Court of the city of Richmond, in the case of *Whitlock, etc., v. Hawkins, Commissioner*. These cases, Nos. 12, 13 and 14, involved the legality of the re-assessment of lands made in the year 1905, and the validity of the act of Assembly passed on the 10th day of March, 1906, validating the said re-assessment. The judgment of the Law and Equity Court was affirmed, and the re-assessment of lands declared to be valid.

15. *Anderson v. Commonwealth*. Appeal from the Circuit Court of Scott county, giving judgment in favor of the Commonwealth for \$500, on bond with condition. Affirmed. Argued by Mr. Catlett.

16. *Eureka Club v. Commonwealth*. Appeal from the Corporation Court of the city of Roanoke, revoking the charter of the club. Affirmed. Argued by Mr. Catlett.

17. *Quillen v. Commonwealth*. Appeal from the Circuit Court of Scott county, on conviction for selling liquor in violation of law. Reversed and remanded.

18. *Lewis and Lindsey v. Commonwealth*. Appeal from the Circuit Court of Bath county. Judgment in favor of the Commonwealth for \$500 on forfeited recognizance. Affirmed. Argued by Mr. Catlett.

19. *Commonwealth v. Atlantic Coast Line Railroad Co.* Appeal from the State Corporation Commission. This case involved the validity of the act of Assembly requiring the railroads to sell 500 mile mileage books, etc., and was declared by the Corporation Commission to be unconstitutional. Affirmed.

20. Winchester and Strasburg Railroad Co. and Baltimore and Ohio Railroad Co. *v.* Commonwealth. Appeal from the State Corporation Commission. These cases involved the legal status of the Corporation Commission, and the obligation of the said roads to extend the road from Strasburg Junction to the town of Strasburg. The order of the Commission was reversed in part, and the cases remanded for further proceedings before the Commission. The Corporation Commission was declared to be a legal and valid tribunal, with full power to act in the premises.

21. Bennett *v.* Commonwealth. Appeal from the Circuit Court of Franklin county, on conviction of a felony. Affirmed. Argued by Mr. Catlett.

22. Hatcher, etc., *v.* Commonwealth. Appeal from the Corporation Court of the city of Danville, on conviction of a misdemeanor. Reversed and remanded for a new trial. Argued by Mr. Catlett.

23. Jones *v.* Commonwealth. Appeal from the Corporation Court of the city of Danville, on conviction of a misdemeanor. Reversed and remanded for a new trial. Argued by Mr. Catlett.

CASES PENDING AND UNDECIDED IN THE COURT OF APPEALS.

1. Fletcher *v.* Commonwealth. Appeal from the Circuit Court of Warren county, Argued and submitted.

2. Rose *v.* Commonwealth. Appeal from the Circuit Court of Warren county. Argued and submitted.

3. Jeremy Improvement Co. *v.* Commonwealth. Appeal from the Circuit Court of Charlotte county.

4. Commonwealth, etc., *v.* Hampton Normal and Agricultural Institute. Appeal from the Circuit Court of Elizabeth City county.

5. Watts *v.* Commonwealth. Appeal from the Corporation Court of the city of Danville.

6. Southern Railway Company *v.* Hill.

This is an appeal taken by the Southern Railway Company from the judgment of a justice of the peace for the city of Danville imposing a penalty of nine dollars under Rule II of the Virginia Demurrage and Car Service Rules, enacted by the State Corporation Commission.

The delayed shipment was of a carload of freight shipped from Virgilina, in Virginia, to Danville, Virginia, a distance of 47 miles, which the railroad company took twelve days or more to deliver to the consignee.

The railroad company claims that this was an interstate shipment because its line of railway between Virgilina and Danville passes part of the way through the State of North Carolina, and that the State could not therefore impose any penalty for the slow delivery.

As this case involved important interests of the State, and in one of its aspects the validity of the Car Service Rule in question, and having been requested by counsel for the appellee to appear for him, I have appeared and filed a brief for the appellee, and will argue the case orally upon the hearing.

CIRCUIT COURT OF THE CITY OF RICHMOND.

At Law.

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

The following cases have been instituted since July, 1903:

23, 24 and 25. Three cases. Richmond, Fredericksburg and Potomac Railroad Company *v.* 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 the demurrer overruled.

I have filed answers on behalf of the State, and the cases have been set for argument on the 22d day of December, next.

26. John A. Parker's Administrator and Bernard P. Green's Administrator *v.* 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 *v.* the United States, due for advances made the latter during the war 1812-'15. A demurrer and an answer have been filed to the petition, and the case has been argued upon the demurrer and submitted, and demurrer overruled.

The answer of the defendant was long since filed, and the plaintiffs have begun the taking of their testimony, upon the conclusion of which a number of witnesses will be examined in behalf of the State, and the case will be tried.

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

28. Richmond Passenger and Power Company *v.* Commonwealth.

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

29. Virginia Passenger and Power Company *v.* Commonwealth.

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

30. John Bailey, Jr., *v.* 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.

31. Commonwealth *v.* J. Samuel McCue's Exors. Motion for the recovery of the expense incurred in prosecution and conviction of J. S. McCue.

In Equity.

1. Commonwealth *v.* Samuel M. Page. Suit instituted March, 1870.
2. Commonwealth *v.* Walter Millan. Suit instituted April, 1872.
3. Commonwealth *v.* P. H. Huffman, *et al.* Suit instituted April, 1873.
4. Commonwealth *v.* J. W. Grantham. Suit instituted December, 1874.
5. Commonwealth *v.* James Hilton's administrator. Suit instituted April, 1879.
6. Commonwealth *v.* Martha Goode, etc. Suit instituted April, 1879.
7. Commonwealth *v.* Spencer D. Ivey, etc. Suit instituted April, 1879.
8. Commonwealth *v.* J. T. Young. Suit instituted August, 1884.
9. Commonwealth *v.* A. A. Chapman. Suit instituted February, 1893.

10. Commonwealth *v.* George Dusner's curator and administrator. Suit instituted March, 1897.

11. Commonwealth *v.* B. Vandegrift, *et al.* Suit instituted February, 1898.

12. T. H. Martin *v.* 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, 14 and 15. Three cases. Richmond, Fredericksburg and Potomac Railroad Company *v.* Morton Marye, Auditor. The decision of these cases will follow that of Nos. 23, 24 and 25 of the law side of the court.

16. Commonwealth *v.* John C. Wrenn. This suit was instituted at the request of the Secretary of Virginia Military Records to recover certain documents alleged by the said Secretary to be the original muster rolls and pay rolls of Virginia troops which served in the late Civil War. The case was tried and argued before a jury to which it was referred upon an issue out of chancery, and their verdict was in favor of the *right of the State* to these rolls. This case has been settled by decree of the Circuit Court of the city of Richmond, and \$100 paid by the Governor out of his contingent fund to said Wrenn for said rolls, in accordance with Judge Scott's decision.

17. W. Horace Rose *v.* Morton Marye, Auditor.

IN THE STATE CORPORATION COMMISSION.

1. Commonwealth ex rel Board of Supervisors of Fluvanna county, *v.* Chesapeake and Ohio Railway Company.

This is a proceeding to compel the Chesapeake and Ohio Railway Company, as the successor of the Richmond and Alleghany Railroad Company, to build about nine miles of railroad from Columbia to the locks at Carysbrook on the Rivanna river, which the petitioners claim the defendant company is bound, under its contract with the State to build in the place of the Rivanna canal between those points, which it is claimed has been discontinued.

The chief work of the preparation and trial of this case has been done by Judge J. O. Shepherd and Messrs. Pembroke and Paul Pettit, the counsel for Fluvanna county. The case was argued by those gentlemen and myself for the Commonwealth and for said county, and was decided by the Commission several months since in favor of the petitioners. Notice of appeal has been given by the Chesapeake and Ohio Railway Co., but the case will probably be adjusted by agreement between the parties.

2. Commonwealth ex rel the Attorney-General *v.* the Atlantic Coast Line Railroad Company.

This was a proceeding which I considered it my duty to institute for the purpose of testing the validity of what is known as the Churchman two cent mileage ticket act. Acts of 1906, chapter 256. The Commission, after argument, decided that that act was in contravention of the fourteenth amendment to the Constitution of the United States, in that its

effect was to deprive the railroads of their property without due process of law, and denied to persons within the jurisdiction of the State the equal protection of the laws. The Commission felt constrained to this conclusion by the decision of the Supreme Court of the United States in *Lake Shore and Michigan Southern Railway Co. v. Smith*, 173 U. S., 683.

Believing that the decision of the United States Supreme Court in that case is in conflict with other later decisions of that court, and with important and essential principles as settled by other adjudications of the United States Supreme Court, I carried the case by appeal to the Supreme Court of Appeals of Virginia, where it has been fully argued by the counsel of the railroad company and myself, orally and in print, and has been submitted.

3. The freight rate cases.

These are proceedings instituted by the Commission more than fifteen months ago requiring all the eleven steam railroad companies doing business in Virginia to show cause why a classification and schedule or tariff of rates to be charged for the transportation of freight over their lines between points within the State should not be adopted and put in force.

The adoption of the proposed rates have been most vigorously opposed by the defendant companies, and every objection which the very able, trained and skilful counsel, who constitute the legal staff of the railroad companies, could suggest has been interposed to prevent any material change in the direction of lower charges in the classifications and schedules of rates heretofore adopted and now in force upon the lines of railroads in Virginia, now resisting such reduction.

The hearing of the case before the Commission has already consumed months, and has involved the patient investigation of a great many facts as to the conduct of the business and the earnings of the railroad companies concerned.

A large number of expert witnesses have been examined, and numerous tabulated statements and other documentary evidence have been filed, on behalf of these companies.

The examination of these witnesses and the conduct of these cases on behalf of the Commonwealth has devolved chiefly upon Mr. A. C. Braxton, the special counsel for the State, retained for this purpose, under chapter 279 of the acts of 1906, approved March 15, 1906.

The State has been fortunate in securing the services of a lawyer so well equipped for such service as Mr. Braxton has shown himself to be, the efficient performance of which required a great deal of special and more or less technical, practical information and knowledge, in detail and in general, as to the actual operation of railroads in the matter of the conduct of their freight traffic, which very few lawyers, except the trained and experienced counsel for such corporations, possess.

It would have been simply impossible for the Attorney-General of the State to have rendered this service. He could not have devoted to the preparation and trial of this consolidated cause the time and attention necessary for its proper presentation on behalf of Virginia, without practically giving up other equally important and pressing work in his office and in the courts. He has given as much of his time to the case as was possible, without neglecting other imperative official duties, and the time

thus bestowed, first and last, amounted in the aggregate to several months.

The case involves the consideration and analysis of an enormous mass of facts, figures and intricate statistics, and the consideration, argument and decision of a great number of problems, many of them of great difficulty and complexity.

The task which has been thus devolved upon the State Corporation Commission and upon the special counsel for the Commonwealth is of greater magnitude, probably, than any which has ever fallen to the lot of any tribunal or counsel in the history of the State.

OPINIONS GIVEN FROM NOVEMBER FIRST, 1905, TO NOVEMBER
FIRST, 1906.

EXECUTIVE DEPARTMENT.

OFFICE OF THE
ATTORNEY-GENERAL OF VIRGINIA,

RICHMOND, November 28, 1905.

HON. A. J. MONTAGUE,

Governor of Virginia:

SIR:

The petition of the children of J. Samuel McCrife, deceased, praying that they may be relieved from the payment of costs due to the Commonwealth by their father's estate, and accompanying papers, and the questions submitted to me in connection therewith by your letter of the 25th instant, as to whether or not the application conforms to law, and whether or not the Executive is authorized to release said judgment for costs, have received my careful consideration as soon as I could give the subject my attention.

The law which prescribes the rules and regulations, upon compliance with which the Governor is empowered to remit fines and penalties, is embodied in sections 39, 40, and 41 of the Code of 1887, and sections 738-743 of that Code, as amended by the act approved December 10, 1903, acts of 1802-'3-'*4, page 605. (Pollard's Code Secs. 738-743.)

The act of December 10, 1903 was manifestly passed in pursuance of the following provision of section 73 of the Constitution:

"He (the Governor) shall have the power to remit *fin*es and *penalties* in such cases and under such rules and regulations as may be prescribed by law. * * * * *

It will be observed that the Constitution and this statute mention and embrace only "fines and penalties," which terms cannot be construed to embrace "costs," which are defined to be "The expenses of a suit or action which may be recovered by law from a losing party."—Bouvier's Law Dictionary, title "Costs."

If there could be any question on this point, it is settled by *Anglea, et c., v. the Commonwealth*, 10 Grat. 698, where the Court of Appeals decided that a pardon did not operate a remission of costs.

The costs recoverable by the Commonwealth from persons presecuted and convicted for infractions of her penal laws, become, from the time they accrue by reason of a judgment of conviction, debts, or liabilities due the Commonwealth.

I find no provision, either in the Constitutions or the laws of the Commonwealth, which expressly, or by any fair implication, confers upon the Governor any power to remit costs which the Commonwealth is entitled to recover in any case, from a person who has been convicted of crime in her courts, unless such power can be inferred from section 4087 of the Code of 1887; and such seems to have been the view taken by the learned judge of the Corporation Court of the city of Charlottesville, in the opinion filed by him in the above matter.

The question was probably not argued before him, or the consideration in favor of a different construction of the statute presented, though the answer filed for the Commonwealth by the capable and faithful attorney for the Commonwealth for that city, presented other ample grounds for refusing the application.

Construing section 4087 as applying to chapter 31 of the Code, as amended long since the enactment of section 4087, which seems to have been the course pursued by the judge of said Corporation Court, it is by no means clear that section 4087 has any such meaning or effect as it is claimed to have.

Let us examine these two enactments; first, section 4087, and then chapter 31, as they now stand.

It is clear that the object of section 4087 was to provide a mode and process for collection of costs in such cases. The whole scheme and design of the first branch of the section is manifestly that, and nothing else. No other reasonable construction is possible. After prescribing in special terms what shall be done for the purpose of securing or coercing the payment of all such costs "in every criminal case," the statute commands that "execution for the amount of said expenses shall be proceeded with." How proceeded with? That is provided for by the concluding words of the section as follows: "and chapter 31 shall apply *thereto* in like manner as if, on the day of completing said statement, there was a judgment in such court in favor of the Commonwealth against the accused for the said amount as a fine."

By this language, chapter 31 is made applicable "*thereto*," that is, to the scope provisions and purpose of section 4087, which are, as we have seen, exclusively confined to the procedure for securing and collecting the Commonwealth's costs in all criminal cases.

The language used plainly limits the adoption of chapter 31 to the purpose of section 4087, which was to secure the collection of such costs in all cases.

Now when we look to chapter 31, we find that its main (and, until recently, its sole) purpose, as declared in its title, was to prescribe the "mode of recovering fines and enforcing payment into the treasury."

Nine-tenths of the chapter, even as it stands to-day, is devoted to providing and commanding how fines shall be collected by execution and otherwise, and how they shall be paid into the treasury, and particularly how their collection upon execution shall be proceeded with; which was evidently the thing and the only thing which was intended to be supplied by the reference to chapter 31; for they are the only provisions of that chapter which apply thereto.

About one-tenth of chapter 31, as it has been recently amended, prescribes the mode of procedure to be adopted for obtaining the remission by the Governor of fines and penalties, but these sections have no connection with the object and design of section 4087, and it would require a very violent inference to justify a construction which would make the sections of chapter 31, which relate to the remission of fines and penalties, apply to section 4087, which relates to the collection of costs.

When another statute is adopted by general reference, "only such portion is in force as relates to the particular subject of the adopting act."—Sutherland on statutory construction, section 257, and cases cited.

It will not be gainsaid that an act authorizing the remission of a debt due the State must be construed strictly; that such a power will not be implied unless the implication is necessary; and that if there is a doubt as to whether the language relied on confers the power, the Commonwealth must be given the benefit of the doubt.

There is, to say the least, a very grave doubt whether the meaning and effect of section 4087, relating exclusively to the collection of costs, was to make the provisions of that portion of chapter 31, which relates exclusively to the proceedings for the remission of fines and penalties, apply to the release of costs.

But any possible doubt as to what is the meaning and effect, and legal operation of section 4087 will be removed by briefly tracing its history and applying to it well-established and just rules of construction.

When that section was enacted in its present shape in the Code of 1849, the chapter to which it referred, then chapter 43, contained no provision whatever in respect to the remission of fines. Its provisions were confined to measures for securing and collecting them. And so as to chapter 43 of the Code of 1860, and chapter 41 of the compilation called the Code of 1873, the numbers of which chapter have been changed to 31 in the present Code.

When chapter 31 was last re-enacted, which was with the enactment of the Code of 1887, there were embodied in it some provisions, then recently enacted, prescribing the preliminaries and mode of procedure to be pursued when a person desired to apply to the Legislature to pass a special law for the remission of a fine against him. This was merely a Legislative regulation, to control the mode of procedure in reference to relief bills to exonerate persons from fines—which requirements could be disregarded by the Legislature whenever it chose to do so, and which were continually disregarded by the Legislature.

That was the state of chapter 31 at the time section 4087 was last re-enacted.

It did not contain any enactment whatever as to the remission of fines by the Governor, or indeed for the remission of fines by any officer or body; but merely a preliminary procedure by which a person desiring to apply to the General Assembly for the remission of a fine, could fortify his application to the Legislature.

Now that chapter, just as it was embodied in the Code of 1887, was the chapter adopted by section 4087, enacted in and with the same Code..

The well settled rule upon this subject seems to be that:

"An act adopting by reference the whole or a portion of another statute, means the law as existing at the time of the adoption, and does not adopt any subsequent addition thereto or modification thereof." Endlich, on the Interpretation of Statutes, sec. 85, page 115; Sutherland on Statutory Construction, sec. 257; *United States v. Paul*, 6 Peters 141; *Kendall v. United States*, 12 Peters, 625; *In Re Heath*, 144 U. S. 94; *Culver v. People*, 161 Ill. 97, (43 N. E. 814); *University Regents v. Auditor*, 109 Mich., 137, (66 N. W. 957).

Applying this wise and well-settled rule of construction to section 4087 of the Code of 1887, we find that the chapter 31 which it adopted was the chapter 31 as it is found in the Code of 1887, and not that chapter as radically amended by the act of December 10, 1903.

The chapter, the provisions of which were in part incorporated into section 4087, conferred no power on the Governor, or any other officer or body to release or remit fines or penalties, though it did then, just as now, enact certain rules of procedure for their collection, which, in so far only as they were in that chapter as it is found in the Code of 1887, are still in force.

So that it follows that section 4087 confers no power on the Governor under any circumstances whatever to remit any costs to which the Commonwealth may be entitled in a criminal case.

There was some suggestion in the proceedings in this matter before the judge of the Corporation Court, that the provisions of section 4087, making the estate or property of a person convicted of crime liable to the Commonwealth for the costs incurred by her in connection with his prosecution and conviction, were novel and unreasonable; and the grounds relied upon for asking relief against liability for the costs legally incurred by J. Samuel McCue, consisted really of criticisms of the law which made said McCue's property liable for those costs.

The justice and reasonableness of the law complained of needs no vindication from any one, but the arguments relied upon should be addressed to the Legislature, rather than to a court, whose function it is to construe the law, or to the Chief Executive, whose duty it is to enforce it.

I deem it proper, however, to call attention to the fact that this statute is not novel.

The Code of 1819 contains the following provision upon this subject:

"Where the prisoner shall be convicted, and hath estate sufficient to pay the charges of the prosecution, the whole shall be paid out of such estate, and the public only made chargeable where there is no estate, or not sufficient, to be found; and the auditor is hereby directed to transmit to the sheriff of the county, where the estate of the prisoner shall be, an account of the said expenses, and the sheriff shall distrain and be accountable for the same as for public taxes."—Code 1819, page 608, sec. 31. (1 R. C.)

And that continued to be the law, with immaterial modifications, down to the enactment of section 4087, as embodied in the Code of 1849, and afterwards in the Code of 1860, re-enacted in the act of 1867, re-enacted in the act of March 14, 1878, again embodied in the Code of 1873, and finally

re-enacted in the Code of 1887, and now embodied in Pollard's Code of 1904.

These costs, accurately speaking, do not constitute a charge on any property of the children of J. Samuel McCue, deceased. They do constitute a charge on the estate of their father; one of the liabilities of the estate which must be paid before his children inherit anything.

Their condition is one, the sadness of which must appeal to every human heart not devoid of feeling, but it constitutes no ground for any relief at the hands of your Excellency, which you are authorized by law to accord to them.

The debt due by their father's estate to Virginia is a legal liability and one which is as just, doubtless, as those of other creditors whose claims, to the extent of thousands of dollars, have been asserted against the estate of J. Samuel McCue, and there is no ground upon which a release of that liability could be asked, which could not be urged with equal force upon the other creditors to surrender to these petitioners all, or some part, of their claims against the estate of said decedent.

Very respectfully,

WILLIAM A. ANDERSON.

February 24, 1906.

HON. CLAUDE A. SWANSON,

Governor of Virginia, Richmond, Virginia.

SIR:

Your favor of the 22d instant has been received, in which you submit the following question:

R. H. Beazley, of Halifax county, was appointed by Governor Montague in January, 1906, a member of the Board of Trustees of the State Female Normal School at Farmville, to fill a vacancy occasioned by the death of C. E. Vawter. No commission was issued to Mr. Beazley, but Governor Montague, on the 16th of January, 1906, in a communication to the Senate of Virginia, informed that body that he had appointed Mr. Beazley to fill said vacancy.

Your inquiry is, whether, in case the Senate fails to act upon this appointment within thirty days after notification thereof, or of its assembling, said appointment fails, and a new one should be made by the Governor.

The appointment is made under section 1608 of the Code of 1904, which provides that vacancies in the Board of Trustees of the State Female Normal School at Farmville "caused otherwise than by the expiration of the term of office, shall be filled by the Governor for the unexpired term by appointments which shall be subject to ratification or rejection by the Senate at the next session of the General Assembly."

The power to fill vacancies conferred upon the Governor by the Constitution is expressed in section 73 of that instrument, which provides that "the Governor shall have 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 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."

I do not think that this provision of the Constitution applies to the appointment in question, for the reason that that appointment was made to fill a vacancy, for the filling of which the laws make another provision; so that in determining the effect of an appointment to fill a vacancy made under section 1608 of the Code, we need only consider the text of that section.

In considering the question thus presented, I find an absolute paucity of authority, after searching the digests and examining a number of cases, decided both by the courts of the United States and of the several States, which I had hoped would throw light upon it.

The conclusion which I have reached as to the appointment under such circumstances is that it is, in the language of the statute, "subject to ratification or rejection by the Senate at the next session of the General Assembly," and that it may be ratified or rejected by the Senate at any time during such session, and that it is not necessary to make such appointments by commission from the Governor, and the limit of thirty days prescribed in section 73 of the Constitution does not apply to it.

The question as to what becomes of it if the Senate should adjourn *sine die* without acting upon the appointment, either by rejecting or ratifying it, is a more difficult one.

If the appointment was made *de novo*, and not to fill a vacancy, there would be, to my mind, no question that the appointment would fail if the Senate adjourned *sine die* without either confirming or ratifying it. Such a *de novo* appointment would be inchoate, vest no right or title whatever to the office in the appointee until the appointment was confirmed by the Senate, and it could, I take it, be withdrawn at any time by the Governor.

At all events, upon the failure of the Senate to confirm such *de novo* appointment, the Governor could, I think, certainly make a new appointment after the adjournment of the Senate. But this is a case of the filling of a vacancy, and I am not prepared to say that the appointment so made would fail absolutely upon the adjournment of the Senate without having ratified the appointment. However, I am strongly inclined to the opinion, after careful consideration, that it would be competent for your Excellency, in the event that the Senate shall fail, either to reject or to ratify the said appointment, to revoke it and make a new one after the adjournment of the Senate. Indeed, it seems to me that it would be within the power of the Executive who made such an appointment, or his successor, after the expiration of his term of office, to recall such an appointment at any time before the Senate had acted upon it.

In my view of the statutes on this subject, all such appointments to fill a vacancy caused otherwise than by expiration of the term of office, are provisional, the implied proviso being that the appointment shall be either ratified or rejected by the Senate at the next session of the General Assembly. It would seem that it was contemplated by the statute that the Senate would act upon the appointment one way or the other.

I am conscious that the question is not free from difficulty; that it may be claimed with great plausibility that the appointment in such case is not distinctly *provisional*, but that it is merely *conditional*; to be avoided or terminated only upon the happening of the subsequent event of its rejection by the Senate at the next session of the General Assembly; and that if not so terminated, it continues in force and the appointee becomes entitled to the office until the expiration of the unexpired term for which he was appointed. It will thus be seen that the answer to the inquiry turns upon whether such an appointment is *provisional*, to be ended if the Senate shall fail either to ratify or to reject it, at the next session of the General Assembly, or whether it is *conditional*, to become absolute upon failure of the Senate to act upon it at all.

I am inclined strongly to the former view.

All uncertainty or doubt can be avoided only by action by the Senate upon the appointment before its adjournment, or by a decision by the courts.

Very truly,

WILLIAM A. ANDERSON.

March 21, 1906.

HON. CLAUDE A. SWANSON,

Governor of Virginia, Richmond, Virginia.

DEAR SIR:

The question submitted in your favor of the 20th, enclosing the letter of Mr. Milton E. Marcuse, president of the Board of Directors of the Virginia penitentiary, has been carefully considered.

The following are the facts, as I understand them, from the letter of Mr. Marcuse, and from statements made to me by him and by Mr. T. H. Ellett, of said Board:

There is no standing timber, or other supply of wood, upon the penitentiary farm.

There is needed over 500 cords of wood per annum, or its equivalent in coal, for the necessary purposes of the farm.

This wood cost last year, and, if gotten from any other source than that hereinafter mentioned, it is believed will cost for the future, \$4 a cord.

Over 400 cords of wood (besides a considerable quantity of coal) were actually purchased last year for the use of that farm, at a cost of over \$1,600 for the wood alone.

The penitentiary board has now, if immediately availed of, an opportunity to buy over 3,000 cords of wood standing on a tract of 236 acres of land, together with the land upon which that wood is growing, and an excellent quarry so situated that it is the key to the quarry already on the State farm, at the price of \$2,000.

This land, without reference either to the wood or quarry, will be a valuable addition to the State farm for grazing purposes; and, with the cut wood off, the land, including the quarry, would be well worth to the State the price at which the board can now purchase the entire property.

The wood land referred to is in about half a mile of the principal buildings on the State farm, and the wood could be cut and delivered by

the convicts at the point of consumption, at a cost which would net a saving, as compared with what the State would otherwise have to pay, of, at least, \$3 a cord on all the wood taken from the land.

The law appropriating the public revenue for the years ending, respectively, February 28, 1907, and February 29, 1908, appropriates \$18,000 per annum, or so much thereof as may be needed, for the maintenance of the penitentiary farm.

I am informed that the board will be able to meet the other charges for the maintenance of the State farm, and also purchase the land referred to, without exceeding this appropriation.

By making this purchase, the board would, as I understand, secure a sufficient supply of wood for the State farm for about six years, for a sum less than a two years' supply will otherwise cost, and would, after the wood is run out, have a tract of land and quarry belonging to the State, worth more than the entire purchase price paid for both the timber and the land.

The inquiry submitted is whether, under these circumstances, the board would have authority to purchase this land, with the wood upon it, for the State, and whether it would be justified in making the purchase.

In reply, I beg leave to say that it seems to me that it is not only proper that the penitentiary board should acquire this property for the State, but that it will be rendering a valuable service to the Commonwealth, and will not be transcending its authority in doing this.

While there is no authority given by the law to the board to purchase land for any purpose in connection with the penitentiary farm, it is authorized, and it is its duty, to purchase whatever wood is needed for fuel, or other necessary purposes, at the State farm, and if it can get that fuel, upon better terms for the State, by buying standing timber, and at the same time, without additional cost to the State, and without any possible risk of loss to the State, acquire 236 acres of land adjacent to the State farm, with a valuable quarry upon it, it seems to me that it is not only within the scope of the authority vested in the board to consummate such a purchase, but that the members of this board would deserve the commendation of the people, and their representatives for planning and carrying through a transaction so advantageous to the State.

I would advise that the land, when purchased, be conveyed to the Commonwealth of Virginia for the use of the State farm, or for such other uses as may be prescribed by law.

Very respectfully yours,

WILLIAM A. ANDERSON.

March 29, 1906.

HON. CLAUDE A. SWANSON,

Governor of Virginia, Richmond, Virginia.

SIR:

I am in receipt of your letter of the 28th instant inquiring as to your authority to send Joseph H. Copenhaver, a convict in the State penitentiary, and who is believed to be insane, to an asylum; what effect such action would have on his sentence, and whether he could be returned to the peni-

tentiary in case his mind improved.

In reply, I beg to say that ample provision for the identical case mentioned by you is made in section 4123 of Pollard's Code, 1904, (acts 1902-'03-'04, page 296, section 4123), that part of this section which is applicable reading as follows:

"If at any time there is reasonable ground to doubt the sanity of a convict, the superintendent shall report to the Governor, who shall order such convict to be brought before the circuit court of the city of Richmond, which is hereby charged with the trial of the fact as to his sanity,, in the manner provided in section four thousand and thirty-two, and if the jury find him insane, he shall be transferred to one of the lunatic asylums, as provided in section sixteen hundred and seventy-two and sixteen hundred and seventy-three, and when restored to sanity he shall be returned to the penitentiary in the manner prescribed in section four thousand and thirty-three."

You will note that the method of procedure in this case is fully set forth, and

(1) That the question of the sanity of the convict is to be determined by a jury;

(2) That you have no authority to "have him sent to an asylum," but only to order him brought before the Circuit Court of the city of Richmond for trial as to his sanity, when the superintendent shall report to you reasonable grounds of doubt as to such sanity;

(3) That when restored to sanity, the convict shall be returned to the penitentiary.

The sections referred to in the statute quoted direct the method of trial and of transfer from the penitentiary to the asylum and from the asylum to the penitentiary, in case the convict is, by the jury, declared insane, and in case, after being taken to the asylum, he shall regain his sanity.

N. B.—In the view expressed above, I am not unmindful of the provisions of section 1682 of the Code, as amended and re-enacted by the act of April 7, 1903, (acts of 1902-'03-'04, page 129), in the act for the regulation of the insane and of State hospitals, which provides as follows:

"If any person convicted of crime and sentenced to confinement in the State penitentiary become insane during the term in which he has been so convicted and sentenced, he shall be confined and treated in a special ward in the State penitentiary to be set aside and reserved for such insane criminals."

This requirement is in direct conflict with the mandate of section 4123 of the Code, as amended by the act approved May 5, 1903 (acts of 1902-'03-'04, page 297), quoted above.

Both acts were passed by the same General Assembly, but the act amending and re-enacting section 4123 was passed after the act amending section 1682, and the second section of the act of May 5, 1903, expressly repeals all acts or parts of acts inconsistent with it.

Upon the well-established rule in regard to the construction of statutes

in a case where there is an irreconcilable conflict between two statutes, the latest enactment will prevail. Both will be given effect as far as that is practicable.

Fox's Administrators *v.* Commonwealth, 16 Gratt., page 1;

Warder *v.* Arrell, 2 Wash., page 282.

Applying this rule to the two acts in question, a person convicted of crime and sentenced to confinement in the penitentiary, who becomes insane during the term of his sentence, should be confined and treated in a special ward in the penitentiary to be set aside and reserved for such insane criminals, until he can be removed to a State hospital for the insane in the manner expressly required by section 4123 of the Code, and then removed to the hospital as therein directed.

Very respectfully,

WILLIAM A. ANDERSON.

April 21, 1906.

HON. CLAUDE A. SWANSON,

Governor of Virginia, Richmond, Virginia.

MY DEAR SIR:

Your of the 7th instant, with the letters attached thereto (and herewith returned), has been received.

In response to your request that I give you my conclusions as to the right of the Maryland authorities to have the fines collected by Virginia refunded, I beg leave to say that I have examined the letters referred to and considered the facts therein stated, and am of opinion that the State of Maryland has no valid claim to the fines collected by Captain Hudgins in February last, under the circumstances as stated in these letters. No facts appear on the Maryland side of the case, hence this opinion is based on these *ex parte* statements.

The offense for which the fines were imposed and collected was for the violation of the "Cull Law," and Captain Hudgins says he acted in the premises under section 5 of an act of March 2, 1894, found in the acts of 1893-'04, p. 612. This act, by its sixth section, was not to take effect until adopted by the General Assembly of the State of Maryland. I shall, for the purposes of this opinion, assume that it has been so approved or adopted by the Maryland Legislature, as those specially charged with its execution must be advised of this fact.

On the facts stated, I think it doubtful that the act of March 2, 1894, had been in fact violated, or, in other words, whether the mere possession of uncultured oysters is a violation of that act; but this is immaterial, as no such point has been made by the alleged offenders who paid the fines.

As the State of Maryland claims these fines, the only question is whether Captain Hudgins, or the Virginia authorities, had the right to collect these fines. The statement of facts shows that the offenders were found and captured by the Virginia authorities in the waters of Virginia, and, in the absence of proof to the contrary, it may be assumed that the offense was committed within the territory and jurisdiction of this State.

I therefore conclude that these fines, if legally imposed, rightfully belong to the State of Virginia, and should not be refunded to the State of Maryland. Both Captain Hudgins and Inspector Price endeavor to differentiate this case from that referred to in the complaint of the Board of Public Works of Maryland, but the facts of that case are not sufficiently given to justify a comparison with this case or the expression of an opinion thereon. I fail to find any correspondence of my predecessor on the subject.

It is impossible to arrive at a very satisfactory conclusion from the facts stated in Captain Hudgins' letters. There may be facts not mentioned by him, which would lead to a conclusion different from the one above indicated.

I take the liberty, therefore, of suggesting that if you think the complain of sufficient gravity to affect the comity of the two States, or that such an investigation would subserve the ends of justice, it may be well to refer the whole matter to the Board of Fisheries for full investigation and recommendation, as that board can get all the facts necessary to be considered.

Very truly yours,

WILLIAM A. ANDERSON.

June 27, 1906.

HON. CLAUDE A. SWANSON,

Governor of Virginia, Richmond, Virginia.

MY DEAR SIR:

The inquiries made in your letter of the 25th instant have received my careful consideration.

The act approved March 15, 1906, known as "The Churchman Act," has a twofold object: *First*, to require "the State Corporation Commission to fix and prescribe a schedule of rates for the transportation of passengers by all transportation companies or corporations;" and second, "until such rates are prescribed by the Commission" to require that "all transportation companies and corporations, operating by steam, shall at all times keep on sale at each and every station mileage books of five hundred miles and over, which books may contain such reasonable conditions and restrictions as may from time to time be approved by the State Corporation Commission."

The act contains various provisions designed to give it effect.

My information confirms your own as to the purpose of the railroad companies of the State not to comply with the provisions of this act.

If it is a valid enactment, compliance with its requirements should, of course, be enforced; and if, for any reason, it is not a valid enactment, that question should be determined.

The act, in its sixth section, provides a penalty for the failure of any railroad company to comply with its terms in the following language:

6. Any transportation company, corporation or person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than two hundred dollars for each offense."

I am informed by the Commonwealth's Attorney of the city of Staunton that proceedings have been instituted in the Corporation Court of that city against the Chesapeake and Ohio and Baltimore and Ohio Railroad companies, for refusals by each of those companies to comply with the requirements of the act, to enforce against those companies, respectively, the penalty prescribed therein. Any question as to the validity of the act will, doubtless, be raised, and can be decided, in the cases thus instituted, though a decision by the Corporation Court of Staunton would not settle the question except for that court and for the cases which it decided.

By section 156 of the Constitution, and by clause 19 of section 1313-a of the Code of 1904, plenary jurisdiction is conferred upon the State Corporation Commission to compel proper compliance by the transportation companies of the Commonwealth with her laws, and the power and duty of justly redressing any infraction of those laws, are thereby devolved upon that Commission.

There are no other officers and no other department of the State government which are clothed with any such power or duties.

The matter of the refusal of any railroad company of the State to comply with the requirements of the "Churchman Act," has not, so far as I am advised, been as yet officially presented to the Commission, by any petition or formal complaint.

I will avail myself of the first opportunity to file a formal complaint on behalf of the Commonwealth before the Corporation Commission, setting forth the fact of such refusal and failure to comply with the law by some one of the recusant companies, and asking that the Commission will take such action and adopt such measures as may be necessary and proper, to compel compliance with the requirement of the statute, in the premises.

Any question as to the validity of the act is essentially one for the courts and can be finally decided only by the Supreme Court of Appeals of Virginia, or by the Supreme Court of the United States, if carried to that court.

It is manifest that the public interests will be subserved by a speedy settlement of the matter, and it will be my pleasure, as it is my duty, to do all in my power to bring about a final adjudication of the important questions involved, at the earliest practicable moment.

Very truly yours,

WILLIAM A. ANDERSON.

August 22, 1906.

HON. CLAUDE A. SWANSON,

Governor of Virginia, Richmond, Virginia.

MY DEAR SIR:

In reply to your inquiry of July 31, 1906, as to the payment of certain claims against the State, for services rendered by officers in going from the State to bring prisoners arrested in other States back to this State, and for going with requisition papers from the Governor to make arrest and bring back prisoners to this State to answer for offenses committed, I beg leave to say that I have fully considered the subject and find it very diffi-

cult to arrive at an entirely satisfactory conclusion as to the proper construction of section 767 of the Code of 1887, and clearly define the claims which were (are) intended to be paid out of the State treasury under this section.

Col. Catlett has traced the Legislative history of this section back to its inception, and herewith submit notes showing the same, which have, I think, some bearing on the construction of this section.

I have reached the conclusion that claims for services rendered and expenses incurred (by officers of the law) for the actual arrest of a criminal, or about a criminal prosecution, for which no particular provision is made by law, can be paid out of the State treasury by direction of the Governor, when such claim is laid before him by the Auditor of Public Accounts; but the Governor can give no such direction for the payment of any claim until the Auditor takes the initiative and lays such claim before him. Applying these views to the special objects of your inquiry, I would say that I am of opinion that claims presented by officers of this State for services rendered and expenses incurred in going *out of this State* to bring prisoners arrested in other States back to this State, are not within the provisions of section 767 and should not and cannot be paid thereunder.

There must be some legal ground as the basis of such claim, and it is perfectly clear that an officer of this State has no legal authority, nor can any court or officer of this State, other than the Governor, give such authority, by process or otherwise, to go out of this State to make arrest in another State, or to take into his custody a person arrested in any other State, and bring them back to this State for trial or for any other purpose; hence, in such cases there can be no legal claim against the State for either services or expenses so incurred.

I am of opinion that payment for both services and expenses can be made under this section to persons going out of this State with requisition papers duly issued by the Governor to bring to this State persons accused of crime committed here; and the proper officers of the law acting under legal process within this State may properly incur expenses and be entitled to payment for services as well in cases for which no special provision is made.

I would say in a general way that this section contemplates the payment of claims other than such as are above referred to, but it is impossible to enumerate every class of claim that can be paid under this section, as each and every claim presented must stand on its own merits and be of such character that the Auditor shall be of opinion that the same should be paid, in which opinion the Governor must concur.

I concur in your view that the Legislature has made appropriations broad enough and specific enough to cover all payments directed to be made out of the treasury under the section above referred to.

I am,

Very truly yours,

WILLIAM A. ANDERSON.

II. STATE CORPORATION COMMISSION.

March 6, 1906.

HON. BEVERLY T. CRUMP,

Chairman State Corporation Commission, Richmond, Virginia.

DEAR SIR:

Your favor of this date this instant received, in which you submit the following question:

"A corporation made no report for the year 1904 and has also made no report, and, of course, no tax has been assessed against it, or been paid, for the years 1905 and 1906. That corporation now makes a request of the Commission that the Commission shall furnish it forms upon which it may make a report for the registration fee for the three years just mentioned, and that the Commission shall make the assessment of the registration fee for these three years in order that the fee for each of these three years may now be paid into the treasury."

Under the terms of the statute, is the Commission authorized to comply with this request?"

It is provided in section 41 of the Revenue Law that:

"The failure of any corporation for two successive years to pay its annual registration fee, or to make such report, shall, when such failure shall have continued for ninety days after the expiration of such two years, operate as a revocation and annulment of the charter of such corporation, if it be a domestic corporation, or if its certificate of authority to do business in this State, if it be a foreign corporation." * * * * *

According to my view of this statute, the forfeiture does not take effect until and unless the initial default shall have continued for two years and ninety days from the time when the registration fee should have been paid or the report required by said statute should have been made by such company.

It seems to me, therefore, that your Commission has the same right to accept the belated reports and assess the unassessed registration fees from such company, after the expiration of the period of two years from the time that the default began, and before the expiration of the period of ninety days from the end of such two years' period, that it would have to receive such reports or payments after the default was made and before such period of two years had expired.

This conclusion is not based upon any strained construction of the language of the statute, but is a reasonable deduction from the text and context of the law: but, following the rule established for the construction of statutes involving a penalty or a forfeiture, if there was any uncertainty as to the meaning and effect of this act, that construction should be given to it which is least exacting to the citizen, provided the language of the law will justify such an interpretation.

I cannot find that section 41 of the Revenue Law imposes any penalty upon a corporation for failing to make the report and pay the registration fee therein prescribed, unless such failure shall have continued for the full period of two years and ninety days.

Section 42 of the Revenue Law does distinctly impose a penalty upon a corporation which shall fail to make the report required in section 41 within the time therein prescribed, and this circumstance is confirmatory of the opinion above expressed.

Respectfully submitted,

WILLIAM A. ANDERSON.

III. AUDITOR OF PUBLIC ACCOUNTS.

January 16, 1906.

COL. MORTON MARYE,

Auditor Public Accounts, Richmond, Virginia.

DEAR SIR:

In response to your request that I shall advise you as to what is the proper construction of the following language at the close of section 444 of the Code, which prescribes the remedy for the correction of an erroneous assessment of the lands or lots—"but no cost shall be taxed against the applicant or the Commonwealth"—I beg leave to give you my views as follows:

This language has been re-enacted in the several acts for the assessment of real estate in the Commonwealth at least from 1873 to the present time, and may have been embodied in laws prior to 1873.

Acts in force March 13, 1872 (acts of 1872-'03, p. 155).

Acts approved Nov. 27, 1884 (acts of extra session 1884, p. 155).

Code of 1887, sec. 444.

Act approved December 10, 1903 (acts 1902-'03-'04, p. 613), and

Acts of 1904 approved March 15, 1904 (acts 1904, p. 310).

I take it that the meaning and effect of this language is simply to provide that no judgment for costs shall be entered up either against the applicant if the Commonwealth shall prevail, or against the Commonwealth if the applicant shall prevail.

The object of the taxation of costs in any suit or proceeding is to determine what costs shall be embraced in the judgment which may be rendered against the losing party.

I do not think that the purpose of the Legislature in using the language in question was to direct that no costs should be charged against the applicant, or that the effect of that language is to exonerate the applicant from the payment of such legal costs as the officers of the court are authorized by law to charge for any services which they shall render him in connection with the proceeding for the correction of an erroneous assessment of his lands.

I understand that the practice of the officers of the courts of the Commonwealth has been in accordance with these views during the many years that this law has been in force, and I think that this practice is sustained by a fair construction of the statute.

Very truly and respectfully yours,

WILLIAM A. ANDERSON.

April 30, 1906.

COL. MORTON MARYE,

Auditor Public Accounts, Richmond, Virginia.

DEAR SIR:

Your favor of the 28th instant submits the question "whether a person who has paid the tax on a license as a private banker is subject to taxation on the capital employed in that business."

It is to be observed upon the threshold of any such inquiry that a license tax under our law is not a tax upon property or upon capital, but it is a tax upon the business, and a tax which, in the language of the Constitution, section 170, the General Assembly may levy "upon any business which cannot be reached by the *ad valorem* system."

The property used in a licensed business may be, and is, taxed, notwithstanding the fact that a license tax is levied on such business.

This is the invariable rule, so far as I can now recall, under the Virginia system of taxation, except in respect to the tax on merchants.

By section 46 of the Revenue Law, prescribing the license tax to be paid by merchants, it is provided that:

"The sums imposed under and by the virtue of this section shall be lieu of all taxes for State purposes on the capital actually employed by said merchant or mercantile firm or corporation in said business, except the registration fee and franchise tax."

There can be no question that but for this proviso in said section 46, merchants would have to pay a tax upon the capital invested in their business, in addition to the payment of the license tax levied upon such business.

It is true that section 78 of the Revenue Law, which prescribes the tax which a private banker shall pay for his license to do business provides that such banker shall pay as follows:

"Fifty dollars on a capital of five thousand dollars or under; one hundred dollars on a capital exceeding five thousand dollars and not exceeding ten thousand dollars; one hundred and fifty dollars on a capital from ten to twenty thousand dollars; two hundred and fifty dollars on a capital of over twenty thousand dollars and not exceeding thirty thousand dollars, and an additional sum of five dollars per thousand on every thousand dollars in excess of thirty thousand;" but this tax is not a tax on the capital, but a tax on the license, and the amount of capital is merely used as *the measure* for determining what shall be the amount of the license tax imposed. The whole law has to be taken and construed together, and when this is done it will be seen that various *measures* are prescribed for the purpose of determining the amount of the license tax, levied in particular cases.

In this, as in all other cases, the license tax is levied not on the *property* used in the business, nor on the *capital* used in the business, but is a privilege tax on the business which, in the case of a private banker, consists largely in handling other people's money deposited with such banker, and of transactions which in themselves involve little or no capital, but, nevertheless, are lucrative.

I conclude, therefore, that it is the duty of the Commissioners of the Revenue of the State to ascertain the amount of capital, as well as to

ascertain the amount or value of any other property belonging to a private banker used by him in that or any other business, and to assess the same with the taxes imposed by the Revenue Laws of the State upon property liable to taxation.

I am aware that a good deal can be plausibly said against this view, but it seems to me that, although the question is not entirely free from doubt, the meaning and effect of the Revenue Law of the State upon this subject justifies the conclusion I have indicated, and that you should instruct the Commissioners of the Revenue accordingly.

Very truly yours,

WILLIAM A. ANDERSON.

June 12, 1906.

COL. MORTON MARYE,

Auditor Public Accounts, Richmond, Virginia.

DEAR SIR:

The inquiry has been submitted to me as to the date at which the acts of the General Assembly, which adjourned on the 15th day of March, 1906, will take effect.

By section 4 of the Code, as amended by the act approved February 3, 1904, following section 53 of the Constitution, it is provided that:

"Every act of Assembly, except a general appropriation act, shall take effect ninety days after the adjournment of the session of the General Assembly, at which it was enacted, unless in case of emergency (which emergency shall be expressed in the body of the act), the General Assembly shall otherwise direct by a vote of four-fifths of the members voting in each house.

As the session of the General Assembly of 1906 ended, by adjournment *sine die*, on the 15th day of March, all laws which were enacted by that General Assembly, except the general appropriation act and emergency acts, will take effect on Wednesday, the 13th day of June, 1906, which is the ninetieth day after such adjournment.

Very truly yours.

WILLIAM A. ANDERSON.

June 23, 1906.

COL. MORTON MARYE,

Auditor Public Accounts, Richmond, Virginia.

DEAR SIR:

The accompanying letter of the 21st instant from Mr. John L. Douglas, a postal clerk in the Postoffice Department of the United States Government is respectfully referred to you.

The question he submits is whether the State can levy an income tax on the salary of a United States postal clerk.

The question has not been definitely or expressly decided, so far as I can find, by the Supreme Court of the United States, though in Dobbins

v. Commissioners of Erie county, 16 Peters, page 436, that court held that:

Any law of any State imposing a tax upon *the office* of an officer of the United States Government and thus diminishing his recompense, is in conflict with the law of the United States which secures such compensation to such officer.

The court, in effect, held that it was not competent for a State to tax the salary of a United States officer. The tax in that case, however, was not an income tax, but a tax upon the office itself.

The case just cited is but an illustration of the rule that it is not competent for the State governments to tax governmental agencies of the United States Government, nor is it competent for the United States Government to tax governmental agencies of the State governments.

In *Melcher v. Boston*, 9 Met., page 73, it was held that a clerk in a postoffice was taxable by the State on his income. This case does not appear to have been carried to the United States courts.

I am inclined to think that it is not absolutely certain that the State cannot levy an income tax on the salary of a United States postal clerk, though the weight of authority seems to be against the validity of such a tax.

Very truly yours,

WILLIAM A. ANDERSON.

IV. SUPERINTENDENT OF PUBLIC INSTRUCTION.

March 6, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

Yours of the 5th instant, enclosing letter of Mr. C. G. Massey to Mr. Charles G. Maphis, dated the 26th ultimo, and copy of Mr. Maphis' reply, dated the 2nd instant, this instant received.

The transactions mentioned by Mr. Massey between a school trustee who is a merchant, and his district school board, are plainly in violation of paragraph or clause one of section 1472, and also of the second paragraph or clause of that section.

There may be possibly a question as to whether a Commonwealth's attorney, though ex officio a member of the school electoral board of his county, is a "school officer" in the meaning of section 1472, but it would be far better and safer for him not to have any contract whatever with the school authorities for insuring school property, or anything else.

I return you the letter of Mr. Massey and the copy of the letter of Mr. Maphis referred to.

Very truly yours,

WILLIAM A. ANDERSON.

(Enclosure.)

April 11, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

Your favor of the 10th, enclosing correspondence with Mr. J. M. Beckham, superintendent of schools for Culpeper county, and accompanying papers, this instant received.

The facts are not stated as explicitly in this correspondence as is desirable.

I gather from these letters the following facts, that:

1. The school board of Catalpa District of Culpeper county purchased from a certain William D. McKinley two alleged "Rand & McNally 12" globes and stands, for \$15 each; but that said globes and were made by C. F. Weber and Company, of Chicago;

2. The trustees or school boards of Salem District and of Jefferson District of Culpeper county each purchased eight "Rand & McNally 12" globes for \$15 apiece, and gave a warrant of \$120 at twelve months;

3. The trustees of Jefferson District bought some blackboard material and gave a warrant therefor for \$25.92 at twelve months.

The above transactions were palpably in violation of law in several particulars.

- I. The State Board of Education had selected, as it alone was authorized to do under the Constitution, the globes to be used in the public schools of the State, and, as will be seen from their published list adopted June 24, 1904, they had selected the globes of Rand, McNally & Company, and had made a contract with that company, by which the highest price to be paid for a 12" full mounted globe was \$8.25 for each globe.

These school boards had no authority, therefore, to pay more than \$8.25, nor would Rand & McNally have the right to have exacted any higher price, and if these were Rand & McNally globes, the difference in the price should be refunded to the districts, either by the trustees or by Rand & McNally.

- II. District boards have no authority in law to issue warrants payable twelve months after date, and to bind their respective districts to that payment.

They have no authority in law to contract a debt in any such way, and if they can issue a warrant at twelve months, they could issue one at five or ten years' time.

- III. I understand from statements in some of the letters you enclose (though this is not clear from Mr. Beckham's statement) that these were not Rand & McNally's globes; that William D. McKinley had no authority to represent, and was not, in any sense, the agent of Rand & McNally, and that he induced the trustees of these respective school districts of Culpeper county to purchase the globes upon false representations.

If these facts can be shown, McKinley should be indicted in Culpeper county, in the case in which he has obtained any money upon such representations, for obtaining money under false pretences under section 3722 of the Code, and in cases in which he has not received, but has attempted to obtain, any valuable thing for such sales, he should be indicted for an attempt to obtain money or other valuable things upon false pretences.

I think he should be indicted for obtaining the warrants under false pretences, though there may be a question whether a prosecution against him for that could be sustained, inasmuch as these warrants were issued without authority of law.

In addition to the above criminal proceedings against McKinley, suit should be brought at once to enjoin the collection of the warrants and pro-

hibit their payment, because of the fraud and illegality with which they are affected, and the trustees should be enjoined from paying these warrants, as being illegal.

If the trustees of the school districts in which these illegal warrants have been issued will not bring such a suit, then any one or more citizens and tax payers of the districts, after stating the facts to the district school board, and requesting them, in writing, at once to institute such proceedings as may be necessary to protect the district against these illegal warrants and the payment of the fraudulent claim arising out of the transaction, would have a right to institute and maintain such a suit, if the trustees fail or decline to prosecute the same.

The statute law imposes no penalty whatever upon the members of the district school boards for violating the law in this regard, though the law would make them personally liable for an unauthorized and unlawful transaction in the matter of the purchase of school appliances.

I have no doubt that the trustees in this case acted without due consideration and without any bad motive whatever, and it is their duty now to do all in their power to protect the school districts which they represent against such fraudulent and unlawful claims.

It may be that the school trustees have issued negotiable warrants. If so, they have in this also transcended any authority vested in them by law.

The twelfth clause of section 1466 contains so much of the school law as authorizes the district school boards to issue warrants, and prescribes precisely how they shall be issued, and that they shall be "payable to the person entitled to receive such money."

It does not authorize them to be issued payable to order, or to be made in any way negotiable, and if the school boards of the districts referred to have undertaken to issue negotiable warrants, they have transcended their authority and done an unlawful thing, as they did in issuing a warrant payable twelve months after date.

In no case should the district school board issue a warrant for school appliances until the appliances have been delivered, and in no case should they issue one payable at any future day.

The law presumes warrants to be issued against money already in the treasury to the credit of the school authorities, just as it presumes that a man who gives a check upon a bank draws it against the money already to his credit in the bank.

I return herewith the correspondence you sent me.

Very truly yours,

WILLIAM A. ANDERSON.

If the warrants have already been transferred to an assignee for value, as I presume is the case, then the respective district school boards which issued them should notify the holder that they will not be paid. If the district board proposes to pay them, that would be a ground for an injunction at the suit of citizens and tax-payers to enjoin the district board from paying the warrants.

Very truly yours,

WILLIAM A. ANDERSON.

April 16, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

In response to yours of the 13th instant, and the inquiry submitted in the letter of Superintendent Hannah, of Appomattox county, of the 6th instant addressed to you, and herewith returned, I beg leave to say that in accordance with the rules of construction laid down in *Fox's Admr. v. the Commonwealth*, 16. Gratt., p. 1, and other cases decided by the highest court of this State, I am satisfied that the special act approved March 2, 1896, acts of 1895-'06, 603, authorizing compensation to be made to school trustees in the county of Appomattox, and in certain other counties named therein, is still in force, at least, as to the county of Appomattox, notwithstanding the general laws passed upon that subject since its enactment.

Such special provisions and discriminating local laws are, perhaps, contrary to the spirit of the present Constitution, but I am not prepared to say that they have been repealed either by that instrument or by the general laws enacted and in force as to the compensation of school trustees.

Very truly yours,

WILLIAM A. ANDERSON.

June 15, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

Your favor of the 12th instant would have received an earlier reply but for the pressing character of other engagements.

Under the Constitution and laws of Virginia, a town, though a distinct political sub-division of the State, constitutes also an integral part of the county in which it is situated; and, in my opinion, where such a town becomes a separate school district under the provisions of section 1469 of the Code referred to by you, it is subject to the same rules and regulations which apply to other school districts of such county.

I am satisfied, therefore, that in such case, the taxable property in a town so constituting a separate school district, is liable to the county tax levied by the Board of Supervisors of such county for such purposes, to the same extent, and in the same manner that the property of any other school district in such manner is, or would be, so liable.

Very truly yours,

WILLIAM A. ANDERSON.

June 25, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

Yours of the 21st instant has been received.

Replying to your inquiry whether or not the Literary Fund can be invested in bonds issued under chapter 255 of the acts of 1906, I beg leave to say that I am of opinion that the bonds issued under chapter 255 (act

of March 15, 1906) do not meet the specific requirements of sub-section 1433 of the act approved March 15, 1906. Bonds issued by school districts under section 2 of chapter 255 are to be secured by a lien upon the school property erected and procured with the proceeds of such bonds, which lien may be further extended to all of the property of the district, if so stated on the face of the bonds.

Sub-section 11 of section 1433 (acts of 1906, page 434) provides that the Literary Fund may be invested in bonds made by school district boards, secured by deed of trust on the school property in said districts.

I conclude, therefore, that the lien provided by section 2 of chapter 255 (acts of March 15, 1906) is not strictly or specifically such security, as is required by sub-section 11 of section 1433, as there is an essential difference between a lien by deed of trust and the lien provided by chapter 255.

I would suggest that the provisions of the two acts referred to are not consistent, and that the permission given under sub-section 11 may be entirely abortive, for the reason that authority is nowhere plainly conferred upon the district school boards to give the security required by sub-section 11, and such authority would have to be conferred in unquestionable terms. At all events, taking the two acts together and considering their provisions in the light of all the legislation upon the subject, there is, to say the least, a grave question as to whether an investment of any portion of the Literary Fund can, under clause 11 of section 1433, be validly made in the bonds of a district school board issued under chapter 255.

Very truly yours,

WILLIAM A. ANDERSON

July 21, 1906.

HON. J. D. EGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

The answer to the inquiry made in your favor of the 16th instant is furnished by the second clause of chapter 166 of the Code, as found in the act approved March 15, 1906, page 440, which provides:

"that no district school board shall employ or pay any teacher from the public funds if said teacher is the brother, sister, wife, son, or daughter of any member of said board. Any member of any district board who shall violate any of these provisions shall be personally liable to refund any public funds paid in violation of this section, to be recovered from him by suit in the name of the Commonwealth at the relation of the attorney for the Commonwealth; such funds, when recovered, to be paid into the county school fund."

There is no qualification of this prohibition. It was intended to tear up nepotism, which had gotten to be one of the curses of the school system of the State, by the roots, and it prohibits school boards from either employing or paying the daughter of any member of the board. It would be a flagrant violation of the law for any school board to pay the daughter of any member of such board.

Very truly yours,

WILLIAM A. ANDERSON.

July 23, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

I have considered the question submitted in the letter of F. F. Bowen, Esquire, Attorney for the city of Danville, dated the 18th instant, addressed to the State Board of Education, and referred to me by Governor Swanson's letter of the 20th instant, and I beg leave to respond thereto as follows:

Prior to the passage of the act approved December 31, 1903, entitled "An act to amend and re-enact chapter 67 of the Code of Virginia, in relation to public free schools in cities and in towns constituting separate school districts," acts of 1902-'03-'04, uage 825, the boards of school trustees for cities were not clothed with the same powers devolved upon the district school boards in counties, in reference to providing, acquiring and erecting school houses for the use of the public schools in such cities.

The tenth clause of section 1538 of the Code, as amended and re-enacted by said act of December 31, 1903, and as re-enacted by the act approved March 17, 1906, acts of 1906, pages 514 to 516, defines the duties of the city boards of school trustees in respect to the building and control of school houses, as follows:

"Tenth. To provide suitable school houses, with proper furniture and appliances, and to care for, manage and control the school property of the city. For these purposes it may lease, purchase or build such houses according to the exigencies of the city and the means at its disposal. No school house shall be contracted for or erected until the plans therefor shall have been submitted to and approved, in writing, by the division superintendent of schools, and no public school shall be allowed in any building which is not in such condition and provided with such conveniences as are required by a due regard to decency and health; and when a school house appears to the division superintendent of schools to be unfit for occupancy, it shall be his duty to condemn the same, and immediately to give notice thereof, in writing, to the chairman of the school board, and thenceforth no public school shall be held therein, nor shall any part of the State or city fund be applied to support any school in such house until the division superintendent shall certify, in writing, to the city school board that he is satisfied with the condition of such building and with the appliances pertaining thereto."

Taken in connection with other provisons of chapter 67, and particularly with the other provisions of section 1538 as amended, it was the evident purpose of the General Assembly to vest the entire control of the subject of acquiring and building suitable school houses, and of caring for, managing and controlling all the school property of each city, in the city school boards, respectively.

The acts of December 31, 1903 and of March 17, 1906, were evidently intended to regulate the entire subject to which they relate, and they make a distinct departure from, and constitute an important amendment of, the law in this regard, as it stood prior to the enactment of those statutes. It was plainly the purpose of the General Assembly to conform the law as to

the acquisition and control of the school houses and school property in the cities, to the requirements of the statutes which, prior thereto, had regulated that subject in reference to school buildings and school property in the counties of the Commonwealth.

By reason of this legislation, the question submitted by city attorney Bowen has arisen as to the effect of section 20 of the charter of the city of Danville, approved February 17, 1890, acts of 1889-'90, page 419, (not acts of 1899-'00, as mentioned by Mr. Bowen), which section is as follows:

"20. The council shall have power, and the authority is hereby given, to build school houses, and to provide and aid in the support and maintenance of public free schools, to appoint the trustees or school board, designate the age of pupils to be admitted to the public schools, and the grade of such schools."

It is impossible to reconcile the provisions of this section of the charter of Danville with the explicit provisions of chapter 67 of the Code, and particularly of section 1538 thereof, as amended by the acts of 1903 and 1906 aforesaid.

There being such a direct conflict between the general law of the State, which was evidently designed to be universal in its application, and the special law contained in the charter of the city of Danville enacted prior thereto, the latter must yield to the positive provisions of the general law upon the subject.

I am of opinion, therefore, that section 20 of the charter of the city of Danville is repealed by the acts of 1903 and 1906 referred to, in so far as said section undertakes to clothe the Council of the city of Danville with authority to build school houses, except through the agency of the school authorities of said city; and that the duty and power of acquiring, equipping and controlling school houses and school property in the city of Danville is vested exclusively, under the law, in the city school board and school authorities of said city, in the manner prescribed by chapter 67 of the Code, and the acts amendatory thereof.

There is, of course, nothing in chapter 67 of the Code as now amended, or in any other school law of the State, which denies to the councils of each city the power to provide the money which may be needed from time to time for the purpose of securing school houses adequate to meet the wants of the public schools, and of the children in such city. On the contrary, it is the appropriate function, and an important duty, of the Council to provide the funds needed for such purpose, either by taxation, or by loans in the manner authorized by the general law, or by the charter of each city; but all funds provided for such purpose must be expended under the direction of the city school board, in accordance with the requirements of section 1531 of the Code, as re-enacted by the act approved March 17, 1906, acts of 1906, page 514, which is as follows:

"§1531. Apportionment of State funds; how and by whom kept and disbursed.—The State school funds shall be apportioned to cities separately from their counties; *and all funds designed for the benefit of public free schools therein shall be deposited with the treasurers of such cities, and kept by said*

treasurers in separate accounts, and disbursed only on order from the city school boards, respectively."

It may not be improper for me to call attention here to another particular in which section 20 of the charter of the city of Danville is repugnant to the general school law of this State, in that it authorizes the Council of said city to "designate the age of pupils to be admitted to the public schools, and the grade of such schools." The general law prescribes the age of pupils to be admitted to the public schools, and the school authorities are clothed with the exclusive authority of determining the grades of such schools. In this regard, also, said section of the charter of Danville is in direct conflict with the general school law of the State, and is repealed thereby.

Respectfully submitted,

WILLIAM A. ANDERSON.

August 1, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

Yours of the 31st ult., requesting me to advise you "whether or not chapter 252 of the acts of 1906 applies to cities as well as counties," this instant received.

From an examination of the act referred to, it is not absolutely clear that it was intended to apply to school districts in cities.

Section 5 of the act, which directs how provision shall be made for paying the interest and principal of the bonds authorized by the preceding sections, would seem to confine the operation of the act to the counties, for its provisions apply only to Boards of Supervisors of counties.

Of course, the bonds would be worthless, unless some provision was made for their payment, and this section would therefore seem to confine the operation of the act to the counties.

Again, to have made it clear that the cities were intended to be included in the operation of the act, there should have been proper designation therein of the school boards of the cities, in accordance with the provisions of section 1525 of the Code, where their legal designation is given as "the school board of the city of——."

Construing the act in connection with the general law in regard to the school boards of cities, I would say therefore, that its language is not sufficiently comprehensive to include the cities of the Commonwealth.

Very truly yours,

WILLIAM A. ANDERSON.

August 2, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

Your letter of the 1st instant, addressed to the Attorney-General, has been received and noted.

In reply thereto, I beg leave to say that the subject of your inquiry therein was answered by the Attorney-General in a letter addressed to you on April 16, 1906, from which I quote:

"In response to yours of the 13th instant, and the inquiry submitted in the letter of Superintendent Hannah, of Appomattox county, of the 6th instant addressed to you, and herewith returned, I beg leave to say that, in accordance with the rules of construction laid down in Fox's Admrs. vs. the Commonwealth, 16 Gratt. p. 1, and other cases decided by the highest court in this State, I am satisfied that the special act approved March 2, 1896, acts of 1895-'06, 603, authorizing compensation to be made to school trustees in the county of Appomattox, and in certain other counties named therein, is still in force, at least, as to the county of Appomattox, notwithstanding the general laws passed upon that subject since its enactment.

Such special provisions and discriminating local laws are, perhaps, contrary to the spirit of the present Constitution, but I am not prepared to say that they have been repealed either by that instrument or by the general laws enacted and in force, as to the compensation of school trustees."

It seems to me that the case presented is fully covered by that communication, in which I fully concur.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

August 21, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

Yours of August 20th has been received and noted.

In reply to your request for an opinion as to the effect of the repeal of section 1504 of the Code of 1887, by the act of March 15, 1906, on the regulation of the State Board of Education concerning the consolidation of schools, I beg leave to say that sub-section 7 of section 1433 found in the act of March 15, 1906 is in the exact language of section 1504 repealed as aforesaid; hence, it is the duty of the State Board of Education to guard by regulation, against amultiplication of schools; and it seems to me that the regulation of the board quoted by you is in conformity with said sub-section 7 of section 1433 above referred to.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

September 26, 1906.

HON. J. D. EGGLESTON, JR.,

Superintendent Public Instruction, Richmond.

DEAR SIR:

The letter of Mr. H. M. Clarkson, division superintendent of schools for Prince William county, to you, of the 19th, referred to me by your letter of the 21st instant, has been received.

I infer from Mr. Clarkson's letter that there are no longer any trustees for the "Jones Legacy Fund" mentioned by him. If so, by the fourth clause of section 1447 of the Code, as amended by the acts of 1906, page 437, the control of said fund, and the management and application of the profits thereof, are vested in the county school board of Prince William county, provided that the disposition they may make of the fund shall not be "in conflict with the will of the grantor or testator."

Our statutes repeatedly recognize and respect the principle that the will of the donor shall in all cases be carried out. See sections 1421, 1423, 1447 and 1483 of the Code, as amended.

It is, therefore, the duty of the county school board of Prince William county to see to it that the "Jones Legacy Fund" shall be used in accordance with the will of the testator, and, therefore, it can be appropriated only for the benefit of the children residing in that portion of the territory embraced within the limits of what was Dettingen parish; and it should be, as far as possible, appropriated for the benefit of all of the poor children of that parish. It would seem that no more equitable or satisfactory use could be made of the fund, in execution of the will of the donor, than to appropriate the interest derived therefrom to the education of the children living in that territory, and I take it that such is the disposition which the school board makes of the fund.

The investment of this fund would seem to be under the direction and control of the county school boards, and but for chapter 255 of the acts of 1906, approved March 15, 1906, I take it that there could be little or no question that it would have been competent for the county school board to have loaned all, or a portion, of the money to the school board of Occoquan School District, the interest realized from such loan being, as far as practicable, of course, appropriated for the common benefit of all the school children in what was Dettingen parish.

The act of March 15, 1906, published as chapter 255 of those acts, seems to be an act to regulate the entire subject of the making of loans and the issuance of bonds by district school boards, for the purpose of erecting and furnishing school houses. Upon a careful reading of the statute, it impresses me that such is its purpose and effect.

If this is a correct view, the doctrine of *expressio unius, exclusio alterius* would apply.

In *Fox's Administrators v. Commonwealth*, 16 Gratt. 1, this principle was applied to conflicting statutes and to the subject of implied repeal, and the Court of Appeals of Virginia held that:

"Where it is manifest that a law is intended to embrace and include the whole legislation on the subject to which it refers, provisions of former laws on the subject, not embraced in it, are repealed by implication."

Syllabus to *Fox's Administrators v. Commonwealth*.

Here the act in question appears to be intended to include the whole legislation upon the subject of loans by district school boards, for the erection and equipment of school houses, and the case is a stronger one for the application of *exclusio alterius* than was the case of *Fox's Admin-*

istrators, for I know of no statute the provisions of which are in conflict with those of chapter 255 of the acts of 1906. This act appears to be the only declaration, in general and in particular, of the legislative mind upon the precise subject to which it relates.

Chapter 252, being in *pari materia* and not only enacted at the same session, but approved the same day with chapter 255, would be treated as practically part of one and the same enactment. Its provisions are not in conflict with those of chapter 255, for chapter 252 relates to loans made by district boards from the "Literary Fund" of the Commonwealth, while chapter 255 relates to, and was intended to regulate, such loans when made from the general public, or sources other than the Literary Fund.

A grave question would arise as to the validity of any loan which was not made in conformity with the requirements of this act.

I recognize that this would put both the school district and the people thereof to considerable inconvenience and to no little cost, but this is a matter which cannot be considered when the question arises as to whether the requirements of the law shall be complied with.

Very truly yours,

WILLIAM A. ANDERSON.

October 13, 1906.

SUBJECT.—In reference to the power of district school boards to appropriate any portion of district school funds to the pay of the salaries of teachers.

HON. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction, Richmond, Virginia.

DEAR SIR:

Your favor of the 10th, postmarked the 12th, in reference to the above subject, this instant received.

From it I learn that the Commonwealth's Attorney for Culpeper county has advised the Board of Supervisors of that county that district school funds cannot be used, under any circumstances, for the pay of teachers.

While it is evident from an examination of section 1466 of the Code, as amended by the act approved March 15, 1906 (acts of 1906, pages 439-441), and from an examination of section 1506 of the Code of 1904 (acts of 1902-'03-'04, page 819), that it is the purpose and effect of the school law of the State, that school houses, and the proper furniture and appliances therefor, and text-books for indigent children shall be provided and paid for by each district school board out of the district school fund for such district and that this should be done before the funds of said district could be appropriated by the district school board to the payment of the salaries of teachers, it is equally apparent that after these necessary primary charges are provided for, it is not only competent for such district school board, but it is made expressly its duty, to provide for the pay of the teachers in such district. Indeed, by the eleventh clause of section 1466, it is expressly enacted that it shall be one of the duties of each school board:

"Eleventh. To provide for the pay of the teachers and of the clerks of the board, the cost of providing school houses and the appurtenances thereto and the repairs thereof, school furni-

ture and appliances, as provided for in section fourteen hundred and thirty-three, subsection six of this act, necessary, text-books for indigent children attending the public free schools, and any other expense attending the administration of the public free school system, so far as the same is under the control or at the charge of the school district or its officers."

I do not find anywhere any limitation upon the power of the district school board in the matter of the pay of the salaries of teachers, except taking the whole school law together and also the regulations of the Department of Education, as set forth in circular 283, it is incumbent upon the district school boards to first provide necessary and suitable school houses and appliances, furniture and text-books for indigent children, before any part of the district school fund for such district could be appropriated to paying the salaries of teachers.

Such is my construction of the law, and I am sure it is in accordance with the long-continued practice and precedents throughout the State upon this subject.

If there could be any question in regard to this matter under the former Constitution there cannot be any under the present, for by section 136 of the present Constitution it is provided as follows:

"Sec. 136. Each county, city, town, if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, not to exceed, in the aggregate, five mills on the dollar in any one year, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided, that such primary schools as may be established in any school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The boards of supervisors of the several counties, and the councils of the several cities, and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes."

Here again, there is no limitation upon the powers of the district school boards to appropriate the district school funds to the payment of the salaries of teachers, but authority is distinctly invested in them, to apportion and expend the district school fund raised by a tax on property in the district in establishing and maintaining such schools as, in their judgment, the public welfare may require.

I would feel absolute confidence in the views here expressed but for the fact that so competent a lawyer as the Commonwealth's Attorney for Culpeper county has, as I learn from you, expressed a different opinion. If he is correct, there must be some provision of law which has escaped my attention; and yet, in view of section 136 of the Constitution, it seems to me to be, as a legal proposition, impossible that district school boards are not fully empowered, if they shall consider that the public welfare requires it, to appropriate any surplus remaining after providing for school houses and appliances, furniture, etc., to the pay of the salaries of teachers. Any statute which would deny to them this power would be plainly in conflict with this section of the Constitution.

Very truly yours,

WILLIAM A. ANDERSON.

V. COMMISSIONER OF INSURANCE.

August 24, 1906.

COL. JOSEPH BUTTON,

Commissioner of Insurance, Richmond, Virginia.

MY DEAR SIR:

I have considered the letter of the Fidelity & Deposit Company of Maryland handed me on yesterday, and in reply to the suggestion therein made, that you submit the same to the Attorney-General for an opinion as to the constitutionality of the act of the General Assembly of Virginia establishing a Bureau of Insurance, etc., in so far as such act imposes upon insurance companies a tax of one-tenth of one per cent upon gross premiums, for the maintenance of such bureau, I beg leave to say that the same is constitutional.

The Constitution of Virginia contains no provision restraining the Legislature of Virginia from imposing what is commonly called a double tax, even on tangible property; and as the tax referred to is a license tax for the privilege of doing business in this State, I see no reason why such tax cannot be imposed for separate and distinct purposes by several distinct acts of the Legislature. I repeat, therefore, that I am of opinion that sections 28, 29, and 30 of the said act are constitutional, and a valid exercise of legislative authority.

I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

September 14, 1906.

COL. JOSEPH BUTTON,

Commissioner of Insurance, Richmond, Virginia.

MY DEAR SIR:

Yours of the 6th instant, addressed to the Attorney-General, enclosing a letter of Mr. Taylor, bearing date on the 4th instant, referring to the National Mutual Relief (Company, I presume), has been received and noted.

In reply thereto, I beg leave to say that the company referred to must be classed as a "legal reserve" or "old line" company, and not as a fraternal beneficiary association, order or society, as defined by section 1 of chapter 5 of the act of March 9, 1906.

This view is based on the statement made in the third paragraph of Mr. Taylor's letter of the 4th instant; namely, "This company offers a surrender value, both in cash and paid-up insurance."

I therefore conclude that if a company makes or offers a contract of insurance embodying any of the provisions mentioned in section 24 of chapter 11 of the act of March 9, 1906, it cannot be classed as a fraternal beneficiary association under section 1 of chapter 5 of the said act.

I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

September 14, 1906.

COL. JOSEPH BUTTON,

Commissioner of Insurance, Richmond, Virginia.

MY DEAR SIR:

Yours of the 6th instant, addressed to the Attorney-General, enclosing copy of the charter of the American Security & Protective Association, has been received.

In reply to your inquiry, if this, or such companies, are subject to the provisions of chapter 4 of the act of March 9, 1906, and are subject thereunder to the supervision of the Bureau of Insurance, I would say that the charter of this company is a "mongrel" and not covered by any provision of any chapter of the said act. It is not a fraternal beneficiary association as defined by chapter 5; nor is it such a company as is contemplated by chapter 7. I am of opinion that your conclusion is correct and that this company should be classed under chapter 4 of the said act, and be subject to the provisions thereof so far as they *can be* applied thereto; but I am frank to say that the word "casualty," as used in that chapter, seems, from the context, to apply only to insurance on persons and not on stock of any kind.

This answer to your inquiry is not at all satisfactory, but I have been unable to reach any other conclusion after a careful reading of the whole law; and if this is not the correct view, I am constrained to say that the law makes no adequate provision for the supervision and control of such companies.

I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

September 14, 1906.

COL. JOSEPH BUTTON,

Commissioner of Insurance, Richmond, Virginia.

MY DEAR SIR:

Yours of the 6th instant, enclosing copy of report of Mr. Charles G. Taylor, Jr., in the matter of the Security and Equity Bond Company of Virginia, and copy of bond and leaflet issued by the said company, has been received.

In response to your inquiry, first, "Are companies of this class placed under the supervision of the Bureau of Insurance, as suggested in the attached letter, first paragraph of same?" Second, "If this company is under the supervision of the Bureau of Insurance, has the Commissioner of Insurance the power to establish a standard of reserve for their outstanding obligations; or, in other words, establish a basis for determining their outstanding and contingent obligations, this latter point being fully covered in the report addressed to me?" I beg leave to say that the questions raised are rather difficult of satisfactory solution; but, after careful consideration of the bond and the specifications and conditions thereon, I am strongly of opinion that if the specimen bond exhibited is the only form of contract made and issued by the said company, its operations are not

subject to the supervision of the Bureau of Insurance, nor to the insurance laws requiring deposit of bonds with the State treasurer. I don't think the *mere issue* of bonds of the character shown by that exhibited places this company, or companies making similar contracts, under the control or supervision of the Bureau of Insurance.

To bring such companies within the provisions of section 1 of chapter 11 of the act of March 9, 1906, they must conduct a business "including any of the features or principles of insurance."

This is very broad language and makes the construction of such contracts a very difficult question; but, giving the terms used the most liberal construction and applying this clause to the bond under consideration, I am of opinion that this contract does not contain "any feature or principle of insurance" in the ordinary and usually accepted meaning of these terms.

Insurance, primarily defined, is a contract for a consideration, to pay a specific sum or sums upon the occurrence of a given contingency of loss, damage, accident or death; in other words, and indemnity against loss upon the occurrence of a specified contingency. The contract herein considered is certain, determinate and depends upon no contingency of life, death or loss of any kind. I have therefore reached the conclusion, as hereinbefore expressed, that none of the usual features or principles of insurance enter into the bond exhibited with your communication.

If this view is sound, the answer to your second question is unnecessary

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

September 27, 1906

COL. JOSEPH BUTTON,

Commissioner of Insurance, Richmond, Virginia.

MY DEAR SIR:

Yours of the 25th instant, addressed to the Attorney-General, with Mr. Taylor's letter of the 24th instant attached thereto, has been received and noted.

In reply to your inquiries:

First, "Whether the law (our law) permits a valuation on the preliminary term method," and

Second, "Whether this department can use as a basis for valuation any standard other than that mentioned in the law referred to," I would say:

First, That the act of March 9, 1906, makes no special provision for the valuation of this special form of policy, and in the absence of such provision, I am of opinion that the position which Mr. Taylor seems to take—namely, that the valuation of "one year term" contracts should be made from the year of issue, and on the basis of the contract at the time, without consideration of the one year term—is correct.

Of course, if the contract ends with the "one year term," the question raised cannot arise; but if continued after the end of the "one year term," as provided in the contract. it should be treated as a continuous contract from the date of its issue; and I think your department has authority to so construe such contract.

Mr. Taylor's discussion of this subject is so full and satisfactory I deem it unnecessary to say more than state the conclusion reached and above given.

As to your second inquiry, I think your department is confined to the use of the American table of mortality with four per cent. interest, in its calculation of reserves, as this is the only method of calculation mentioned in our law; and I construe these provisions as mandatory and exclusive.

I therefore conclude that where insurance companies are required to make report of reserves to your department, the table referred to should be used; that is to say, you have a right to require such reports to be made under this standard.

I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

October 17, 1906.

J. N. BRENAMAN, ESQ.,

Deputy Commissioner of Insurance for the State of Virginia.

DEAR SIR:

I have considered the question submitted in the letter of Mr. Fred S. Axtell, of Baltimore, Maryland, dated October 13, 1906,

Whether deposits of surety companies made in this State are to be classed as "special"; that is, for the benefit of the policy holders residing in Virginia, or as "general"; that is, for the benefit of policy holders residing anywhere,

and beg leave to say that it is clear to my mind that by the terms of section 7 of chapter 8 of the Virginia insurance law, approved March 9, 1906, the deposits required by section 4 of that chapter to be made with the State treasurer are deposited with that officer as security for the faithful performance of the obligations and undertakings of Guaranty, Trust and Indemnity companies to the citizens of this State, and should, therefore, be regarded as "special," being clearly made, primarily, at least, for the benefit of the Virginia policy holders.

I return Mr. Axtell's letter.

Very truly yours,

WILLIAM A. ANDERSON.

October 20, 1906.

J. N. BRENAMAN, ESQ.,

Deputy Commissioner of Insurance, Richmond, Virginia.

DEAR SIR:

Your favor of the 17th instant just received, submits the question whether chapter 162 of the acts of 1889-'90 approved March 3, 1890, entitled "An act to exempt marine insurance companies from making a deposit of securities with the treasurer," is still in force.

Section 14 of chapter 2 of the general insurance law of the State, enacted by the General Assembly of 1906, approved March 9, 1906 (acts of 1906 page 134), provides that, "Unless otherwise provided in this chapter,

every insurance company" shall make the deposit prescribed in that section with the treasurer of this State.

I do not find any exemption or exception made in favor of marine insurance companies anywhere in said chapter, or anywhere in the act of which said chapter forms a part.

The act nowhere in express terms repeals the act of March 3, 1890, which is carried forward in Pollard's Code as section 1271a, and yet this general statute of March 9, 1906 appears to have been designed to embrace the legislation of the Commonwealth upon the subjects covered by that act, both in general and in particular. It is a carefully prepared and elaborate enactment, apparently intended to embrace all of the requirements of the law upon the subjects to which it relates.

This being the case, I am inclined to the opinion that under the doctrine of implied repeal, the effect of this statute of March 9, 1906, was to repeal the act of March 3, 1890, now published as section 1271a of the Code of 1904.

The doctrine of such implied repeal is thus stated by the Supreme Court of Appeals of Virginia in *Fox's Administrators v. the Commonwealth*, 16 Gratt., pages 1, 11, quoting from the opinion of the Supreme Judicial Court of Massachusetts in *Bartlett, etc., v. King*, 12 Mass. R., 537, 545:

"A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former, according to the cases of the *Ren. v. Cator*, 4 Burr. R. 2026, and the *King v. Davis*, 1 Leach's cases 306."

If I am correct in the view above indicated, the act of March 9, 1906 (which I construe to have been intended to be a compilation, enactment and re-enactment of the general law of this State covering the entire subject of insurance and of the deposits to be made by insurance companies doing business in this Commonwealth), operated to repeal all of the previous statutes upon those subjects, and to prescribe the rules and regulations and requirements which should control in every case to which the language of the statute will apply.

Of course, all questions upon this subject would have been obviated had the General Assembly, in express terms in this act of 1906, repealed section 1271a of Pollard's Code, or chapter 162 of the acts of 1889-'90.

However, taking the law as it stands, I think that marine insurance companies doing business in this State are now required by law to make the deposit prescribed in section 14 of chapter 2 of the general insurance law of March 9, 1906.

Very truly yours,

WILLIAM A. ANDERSON.

October 20, 1906.

COL. JOSEPH BUTTON,

Commissioner of Insurance, Richmond, Virginia.

DEAR SIR:

Your favor of the 19th instant, and copy of the contract or policy of

the United Security Life Insurance and Trust Company of Pennsylvania accompanying the same, have been received and considered.

Upon careful examination of this contract, I find that it is one, the form of which "gives to patrons of said company in advance all that will ever be due them from said company, so that nothing is left to be secured to said patron," and that, therefore, it is a contract which comes within the language of the proviso in section 14 of chapter 2 of the act concerning the Bureau of Insurance, and that by the terms of that proviso said company is not required to make any deposit of bonds with the treasurer of the State.

This provision was evidently made by the General Assembly because there was no occasion for requiring a company to deposit with the treasurer security for the performance of its contracts when its patrons already had in their own hands all that they could receive under the contract.

The contract is an unusual one, and while it is a contract of insurance in some of its aspects, it is, in some of its features, very similar to a contract for the payment of an annuity, the only difference being that, in the ordinary contract for the payment of an annuity, the company, in consideration of a fixed sum paid it, agrees to pay an annuity to its patrons so long as he shall live, while in this case, for a fixed sum paid to its patron, the patron of the company agrees to pay the company an annuity so long as he shall live, and gives a mortgage upon real estate or other collateral security for the faithful performance of his contract. In either case, if the annual payments are made as stipulated, the contract is discharged by the death of the person with whom the company's contract is made.

Ever since the insurance law of this State was amended so as to excuse companies of the character above defined from the obligation to make any deposit of bonds with the treasurer of the State (which was first done by the act approved March 15, 1904, amending section 1271 of the Code), I have been at a loss to know what sort of a contract of insurance it would be which would give the insured in advance all that would ever be due to him under such contract. The contract above mentioned, a copy of which you have sent me, furnished an answer to this inquiry.

Very truly yours,

WILLIAM A. ANDERSON.

VI. SUPERINTENDENT OF PUBLIC PRINTING.

December 6, 1905.

DAVIS BOTTOM, Esq.,

Superintendent of Public Printing, Richmond, Virginia.

DEAR SIR:

Replying to your letter of inquiry of the 4th instant, I beg to say that the distribution of the 500 copies of the report of the State Corporation Commission, provided for by section 280, Pollard's Code, is absolutely controlled by the provisions of that section.

If the Commission desired additional copies, it could have had the same printed by request to you, and provisions could be made in your con-

tract for printing reports referred to, for printing such additional copies, all of which is provided for in said section 280.

That section provides that the account for printing such additional copies, "when approved by the superintendent, shall be paid by the department or institution ordering said extra printing."

Considering section 280 by itself, there can be no question that the cost of printing such extra copies as might be ordered by the State Corporation Commission would have to be paid for by that department.

Section 275a of Pollard's Code seems to be inconsistent with this mandate, but it will be seen upon examination of the two acts that the statute embodied in section 290 was approved December 31, 1903, and that embodied in section 275a was approved December 8, 1903. Both of these statutes were, of course, passed by the same General Assembly and they must be construed together.

I am inclined to think that the provisions of the one last enacted, in so far as in conflict with those of the prior enactment, would prevail.

Very truly yours,

WILLIAM A. ANDERSON.

April 18, 1906.

DAVIS BOTTOM, Esq.,

Superintendent of Public Printing, Richmond, Virginia.

DEAR SIR:

Your favor of the 17th, enclosing copy of the letters of Senator A. F. Thomas and Judge W. S. Gooch to you in reference to Senate Bill No. 6, dated, respectively, the 14th and 11th instant, has been received.

So far as I know, or have ascertained from such investigation as I have been able to give to the matter, no case like the one presented by Senate Bill No. 6 of the General Assembly of 1906 has ever been passed upon by the highest court of this State.

Similar cases have arisen elsewhere.

The following, I think, are the principles and rules which would control in a matter of this kind:

A statute cannot be proved, corrected or impeached by parol testimony.

A statute may be proved in Virginia *presumptively* by the printed acts of Assembly published according to law.

The printed copy as set out in such acts may be corrected by the enrolled act as signed by the Governor, or which has become a law without his signature, under the Constitution.

The enrolled bill, even though signed by the Governor, may be shown by the records of the two houses of the General Assembly, as set out in their respective journals, not to have been, in fact, the bill which was passed by the General Assembly; and upon such a question, not only would the journals of the two houses be evidence, but authenticated copies of the original and engrossed bills would also, I think, generally be competent evidence.

If a material change has been made in a bill after its passage by the General Assembly, and before or at the time of its enrollment, which affects the bill in a particular essential to its object, so that the bill which is presented to the Governor, and which receives his signature, is essentially a different bill from that which was actually passed by the General Assembly, and this is shown by the records of the General Assembly in connection with its passage, then upon the adjudicated cases in other States, it would seem that, upon such proof of these facts, the courts would hold that such a bill never became a law.

For obvious reasons, it would not be proper for me to undertake to pass upon these questions in respect to Senate Bill No. 6 and what purports to be the act into which it has been carried, published as chapter 107 of the acts of 1906.

There is strong authority for the position that if an alteration or unwarranted change made in the bill after its passage by the Legislature and before its presentation and approval by the Governor, is distinguishable and separable from, and independent of, the rest of the statute, the residue of the statute may be good.

One reason why it would not be proper for me to pass upon this act, or any act in like position, is that, as a rule, the duty of the Attorney-General, where the law devolves upon him the duty of appearing in a case at all, is to defend the act, and to show that it is a valid act, if that can be done, or, if not valid in whole, that the valid part can be separated from that which is invalid, and the rest of the act enforced.

In other words, the Attorney-General ought not to be put in the position of attacking the validity of an act of the General Assembly of a general nature; and he has no official connection whatever with local acts or acts which only affect counties and municipalities.

The act referred to seems to relate entirely to counties, and, therefore, does not come within the jurisdiction of this office, but it gives me pleasure thus informally, at your request, and at the request of Senator Thomas, communicated through you, to present my views as far as I am prepared to do this.

The following are some of the cases in which the above rules, or some of them, have been adjudicated:

State v. Deal, 24 Fla. 293; 12 Am. St. Rep., 69;

State v. Platt, 2 S. C., 150; 16 Am. Rep., 647;

Berry v. Baltimore & Drum Point R. R. Co., 41 Md., 446; S. C. 20 Am. Rep., 69;

Moody v. State, 48 Ala., 115; 17 Am. Rep., 28.

I will enclose you a carbon copy of this letter, which you can forward to Senator Thomas.

Very truly yours,

WILLIAM A. ANDERSON.

N. B.—I deem it proper, in full response to your inquiry and that of Senator Thomas, to add that there is no way shown by any precedent known to me, and no way which occurs to me, by which a fatal or material alteration of a bill thus made can be cured after it has been signed by the Governor.

I will add that it is clear to my mind that it would not be safe to proceed under chapter 107 of the acts of 1906, or to lend money upon any bonds issued pursuant to its provisions.

Very truly yours,

WILLIAM A. ANDERSON.

July 28, 1906.

DAVIS BOTTOM, Esq.,

Superintendent of Public Printing, Richmond, Virginia.

DEAR SIR:

In response to the inquiry made by Martin P. Burks, Esq., reporter for the Supreme Court of Appeals, to you in his letter of the 11th instant referred by you to me, permit me to say that I have examined the legislation law upon the subject and have come to the conclusion expressed below:

The law, as expressed in section 280 of the Code of 1887, required the superintendent of public printing to secure a copyright for the reports of the decisions of the Supreme Court of Appeals, in his own name, and assign the same to the Commonwealth.

The acts approved April 2, 1902, acts of 1901-'02, page 707—printed also at page 761 of same acts—prescribed what should be done by the superintendent of public printing in reference to contracting for printing of the volumes of Virginia Reports of the Supreme Court of Appeals, but this act contains no reference to section 280 of the Code of 1887, though it repeals all acts, or parts of acts, inconsistent with its provisions. This act of 1902 was silent upon the subject of a copyright for said reports, and there is a question whether it operated to repeal so much of section 280 of the Code of 1887 as required a copyright to be obtained.

The Legislature of 1902-'03-'04, by act approved May 13, 1903, acts of 1902-'03-'04, page 326, ignoring the Code in the title to the act, but undertaking to amend it in the body of the act, amended section 280 of the Code of 1887 so as to omit any reference to obtaining a copyright for the Virginia Reports. The number of the section relating to that subject, however, is changed in that act from 280 to 281.

By the act approved December 31, 1903, acts of 1902-'03-'04, chapter 532, page 845, the General Assembly revised, amended and codified the statutes of the State in reference to the duties of the superintendent of public printing, and in reference to the printing to be done for the Commonwealth.

Section 280 of the Code of 1887 is amended and carried forward into this act as section 281, and again omits any reference whatever to obtaining a copyright for the reports of the decisions of the Supreme Court of Appeals.

Finally, by act approved March 14, 1906, acts of 1906, chapter 216, pages 254 to 264, the General Assembly again revised and re-enacted the statutes of the State in reference to the duties of the public printer and the printing of public records and documents, and in this act, which is the last statute upon the subject, section 281 (enumerated as 280 in the Code of 1887) is carried forward and re-enacted without any reference whatever to any copyright for said reports.

I conclude, therefore, that there is no statute of the Commonwealth which requires or authorizes a copyright to be obtained by any one for the reports of the Supreme Court of Appeals.

Very truly yours,

WILLIAM A. ANDERSON.

P. S.—The General Assembly seems thus, by the four statutes recited, to have interated and reiterated its purpose that no copyright for the reports of the decisions of the Supreme Court of Appeals shall be secured.

August 11, 1906.

DAVIS BOTTOM, Esq.,

Superintendent of Public Printing, Richmond, Virginia.

DEAR SIR:

Your letter of the 10th instant, addressed to the Attorney-General, has been received and noted.

In reply to your inquiry "whether, in your opinion, the law contemplates that the printing for the commissioner of insurance shall be paid out of the general printing fund, or out of the tax assessed against the insurance companies by the commissioner for the expense of maintaining the Bureau," I beg leave to say that I am of opinion that, under sections 27, 28 and 29 of the act of March 9, 1906, the cost of all printing done for the Insurance Bureau or Department is payable out of the funds assessed upon insurance companies under section 29, and by them paid into the treasury of the Commonwealth. I find nothing in section 5 of the said act in conflict with this view.

I, therefore, conclude that, while such printing shall be done by and under the direction of the superintendent of public printing, etc., the cost thereof should be paid out of the fund assessed against, and paid into the treasury by, insurance companies. In my opinion, sections 27, 28 and 29 very clearly disclose the intention of the Legislature to make all expenses of maintaining the Bureau of Insurance payable by the companies.

I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

August 21, 1906.

DAVIS BOTTOM, Esq.,

Superintendent of Public Printing, Richmond, Virginia.

DEAR SIR:

Yours of the 17th instant has been received and the inquiries therein made carefully noted.

As to your inquiry about printing for the Department of Agriculture, including its annual reports, I would say that it seems to me that the proviso contained in section 2 of the act approved March 14, 1906, in relation to the duties of the public printer, entirely eliminates printing for that department, except its annual reports. It seems to me this proviso was

not intended to affect the printing of the annual report of the department, as it is the duty of the Governor, to whom the report is made, to deliver the same to the superintendent of public printing, whose duty it is to have it printed, etc., and distributed in accordance with the provisions of the said act. I am further inclined to the opinion that you are not obliged to furnish this department even with printed stationery, as that, in a sense, is printing for that department, and comes within the proviso of section 2 of said act.

As to the printing for the executive, I would say that you are obliged, by section 275 of the said act, to supply the executive with such stationery, printing, lithographing, engraving, ruling and binding as may be required for the proper conduct of the business of the State, in that department, and that the Governor cannot order work to be done for other departments and have the same charged to the executive account.

As to the printing of the annual reports of the various departments, I would say that of those named by you, to-wit: State Entomologist, through the Board of Crop Pest Commissioners; State Highway Commissioner, and State Board of Fisheries, as these reports are made to the Governor, if delivered by him to you for printing, they should be printed with the other annual reports. The report of the commissioner of insurance is required to be made to the State Corporation Commission, and I take it will be included in the Commission's report, which you are authorized by law to print. The State Board of Health is not required to report to the Governor, or any other officer, but only to the Legislature, and, if printed, it must be by order of that body.

It is a rather difficult question to decide what reports are included in the terms "department chiefs and heads of institutions of the Commonwealth," but it seems to me that all departments, institutions, and boards required to make reports to an officer of government (who is usually the executive) are required to be delivered to the superintendent of public printing, whose duty it shall be to have them printed; and the only general rule I am prepared to state is that all reports delivered to you by the Governor, with directions to print, you are warranted in having the same printed with the annual reports.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

VII. COMMISSIONER OF HIGHWAYS.

October 3, 1906.

GEORGE P. COLEMAN, ESQ.,

Asst. to the State Highway Commissioner, Richmond, Va.

DEAR SIR:

Your favor of the second instant, and the question therein submitted, has received my careful consideration.

I learn from it that upon application of the Norfolk county authorities the state highway commissioner has caused plans, specifications and esti-

mates of cost for a public road from the limits of the city of Norfolk to the Jamestown Exposition ground, to be prepared, as provided in section 9 of the act establishing a State Highway Commission, approved March 6, 1906; that the estimated cost of building such road between the points indicated was \$60,000; that the agreement signed by the board of supervisors of Norfolk county, in pursuance of the requirements of said act, contains the following proviso, namely: "that the county of Norfolk shall not expend a sum exceeding fifteen thousand dollars, the balance to be supplied from other sources;" that the State Highway Commission is informed that the board of supervisors of Norfolk county believe that an organization, known as a boulevard commission, composed of certain citizens, will supply the balance of the money necessary to complete said road; and that the said board of supervisors will, at a meeting to be held on the 9th instant, authorize such boulevard commission to act for the board of supervisors in connection with the construction of said road.

Your request is that I will advise you whether you can disregard any agreement between the board of supervisors and the boulevard commission, and begin work on the road on the statement of the supervisors that the county now has \$15,000 available for the prosecution of the work, and proceed with same until funds are no longer obtainable, or until the road is completed.

I beg to submit the following reply to your inquiry:

1. It is proper that I should call your attention to the provisions of the act approved March 1, 1894 (acts of 1893-'04, pages 127-132), entitled "An act for working and keeping in repair the public roads in Norfolk county."

I do not find that this act has been repealed, or amended, either by a general or local statute, passed since its enactment. Its provisions seem to have been kept in force by section 44 of the general road law of the State (acts of 1904, page 191,) section 944a of Pollard's Code) and by the acts approved March 17, 1906, and March 19, 1906, amendatory of said general road law.

The act approved March 17, 1906 (chapter 318 of said acts), provides in clause 1 of section 944a, as therein amended, that:

"(1) Except in the counties where some special road law is in force, the boards of supervisors, county superintendents of roads, road subdistrict boards, road subdistrict surveyors of their respective counties, and the State engineer shall have the control, supervision, management and jurisdiction, as is or may be hereafter provided by law, over all of the county roads, causeways, bridges, landings and wharves constructed or repaired in this State."

This makes it clear who, under the general law of the State, the local road authorities of any county are, but, unfortunately, by its expressed terms, it does not apply to those counties where some special road law is in force, as seems to be the case in respect to Norfolk county.

Now, by the special road law for Norfolk county above referred to, it is provided that a board of trustees appointed by the county court (or, under the general law as it now stands, by the circuit court of Norfolk county)

"shall have control of all public roads within the county, etc."; and by that act, the only function of the board of supervisors is to levy and appropriate, as therein prescribed, the road levies and capitation taxes for the support of such roads. It would thus appear that the local road authorities of Norfolk county are not the board of supervisors, but the board of trustees, and the two road commissioners appointed under said act of February 1, 1894, unless that act has been repealed by some statute which has escaped my investigation.

2. State aid and the benefit of the State convict road force can only be availed of in the construction of said highways under the terms prescribed in section 10 of an act to establish a State Highway Commission, namely, that the county, through its local road authorities, shall make application to the State highway commissioner, as provided in section 9, shall agree to supply all necessary materials, tools and teams required by the plans and specifications of the State highway commissioner, and shall agree also to have the work performed according to the plans and specifications of the State highway commissioner, and under the supervision of a civil engineer to be supplied by the State highway commissioner, whose salary is not to exceed the sum of \$1,200 a year, to be paid by the county having the benefit of his services, which consent and agreement shall be in writing and forwarded to, and filed with, the commissioner in his office.

Upon such application and agreement in writing, executed by the duly authorized local road authorities of Norfolk county, being filed with the State highway commissioner, requisition may be made upon the superintendent of the penitentiary for such number of the State convict road force as the commissioner may deem necessary, under the plans and specifications agreed upon aforesaid, for the proper and economic work on said road.

It will thus be seen that the act requires that the local road authorities shall agree that the work shall be performed according to the plans and specifications of the State highway commissioner, and under the supervision of the civil engineer supplied by said commissioner, but whose salary shall be paid by the county.

3. The only authorities which the act recognizes and authorizes to carry out its provisions in the particulars above referred to, are the State highway commissioner, or his assistant, the engineer whom he may designate to supervise the building of the road, and the local road authorities of the county.

The act makes no provision for any contracts or arrangements with any private corporation, or with any voluntary or other association of citizens, whether it be a boulevard commission or other organization.

I cannot see, however, that there could be any possible objection to the local authorities of a county, or the State highway commissioner, or the engineer appointed by him in charge of the work, receiving assistance, in the construction of any such road, from individuals or organizations, whether voluntary or otherwise.

4. It will be observed that the act to establish a State Highway Commission does not limit the assistance for which it provides to a case where

the whole of any main travelled road is to be permanently improved, but by section 9 thereof expressly authorizes the aid provided for in that act to be extended in a case where a part of such road is to be so improved; and so it would be competent, it seems to me, for the State Highway Commission to extend the State aid provided for by law in the construction of the proposed road from Norfolk city to the Jamestown Exposition grounds, even though a sufficient sum had not been provided by the county to build the whole of said road, and other sources had to be looked to and relied upon to supply such additional sum as might be necessary to improve and complete the entire highway; but so far as any part of the State convict road force could be assigned to said road and State aid given thereto, as contemplated by the act, it can only be availed of upon compliance with the plan of requirements of sections 9 and 10, as above set forth.

Very truly yours,

WILLIAM A. ANDERSON.

P. S.—Of course, it would be well to have the board of supervisors of Norfolk county approve any contract which may be made with the local road authorities of the county, and the views of that board should be consulted in regard to any action which may be taken. Nevertheless, it is important to proceed regularly and in accordance with law.

VIII. SUPERINTENDENT OF THE PENITENTIARY.

December 18, 1906.

To the Board of Directors of the Virginia Penitentiary.

GENTLEMEN:

To my surprise and regret, I find that the General Assembly has amended section 225 of the Code, by act approved December 10, 1903, acts 1902-'03-'04, pages 579-580, so as to leave out the provision which prescribed the penalty of the bond to be given by the superintendent of the penitentiary, and, so far as I have been able to discover, leaving no provision in the law upon that subject.

The best that can be done, so far as I can see, is for your board to adopt a resolution or order fixing thirty thousand dollars as the penalty of the bond which the superintendent shall give, and let him furnish me a copy of this order with his bond, and I will then endorse such certificate upon the bond as the facts will justify.

Section 232 of the Code requires the superintendent of the penitentiary to give the bond prescribed by law, acts 1902-'03-'04, page 581, but the same Legislature struck out of section 225 the only provision which prescribed the penalty of his bond.

Very truly yours,

WILLIAM A. ANDERSON.

July 19, 1906.

CAPTAIN E. F. MORGAN,

Superintendent Virginia Penitentiary, Richmond, Va.

MY DEAR SIR:

Yours of the 17th instant has been received, making the following inquiries:

1. Section 11, chapter 74, acts of 1906: Does this section authorize me to clothe all the members of the State convict road force in the same uniform that we now use for convicts?

2. Section 4144 of the Code of 1904: Does this section apply to convicts sentenced to the State convict road force?

In reply thereto, I would say that the law governing your first inquiry is found in chapter 58, acts of 1906, page 50; chapter 74, acts of 1906, page 74, and in section 4124 of the Code of 1904, with the provisions of all of which I know you are familiar.

Taking all of these laws together, I am of opinion that, under the letter thereof, you have the legal right and authority to clothe all members of the State convict road force in the distinctive uniform required by section 4124 of the Code of 1904, and, as such uniform has been adopted, you may use that which is in present use.

I am not prepared to say, however, that the enforcement of this rule as to all prisoners and persons constituting the State convict road force will be wise or proper. I think that such requirement may be properly applied to all persons convicted of felonies and sentenced to labor on the public roads; but I am loathe to think that the Legislature intended to place such persons as are confined in jails on conviction of misdemeanor, or for the non-payment of fines, on the same footing with convicts generally; indeed, I cannot think the possible effect of the act of March 6, 1906, constituting the State convict road force, was considered by the Legislature, or some provision specially exempting such persons would have been made. I therefore suggest that you exempt this latter class from wearing stripes, if it is practicable to do so.

As to your second inquiry, considering section 4144, I would say that this section is clearly applicable to convicts sentenced to labor in the State convict road force. They are placed under the absolute control of the superintendent of the penitentiary, and are liable at any time to be confined therein, should their entire term of service be not consumed by work on the public roads.

Very truly yours,

WILLIAM A. ANDERSON.

August 8, 1906.

CAPTAIN E. F. MORGAN,

Superintendent Virginia Penitentiary, Richmond, Va.

MY DEAR SIR:

Your letter of July 30th, addressed to the Attorney-General, has been received.

In reply to your inquiry as to what disposition is lawful and proper to be made of the bodies of persons serving jail sentences who may die while serving on the State road force, I beg leave to say that the bodies of such persons cannot be lawfully disposed of under the provisions of chapter 80 of Pollard's Code, 1904; hence, there is no provision of law on the subject. In the absence of such provision, I am of opinion that should any person serving a jail sentence, or received by you from a jailer,

who is not convicted of a felony, die while serving on the State road force, that it will be your duty to notify the relatives of such person, if practicable, and ship the body to the place where they were received, at State expense; and, in the absence of request by relatives or friends, how the body should be disposed of, the same should be buried where death occurs, at the expense of the State.

Very truly yours,

ROBERT CATLETT,
Assistant to the Attorney-General.

September 26, 1906.

CAPTAIN E. F. MORGAN,

Superintendent Virginia Penitentiary, Richmond, Va.

MY DEAR SIR:

Yours of the 27th instant, making inquiry as to the appropriation you may draw upon for the maintenance of prisoners sentenced in accordance with the act of February 27, 1906 (acts of 1906, page 74), to labor on the public roads, has been received, and your inquiry carefully noted.

I am of opinion that section 14 of the act approved March 6, 1906 (acts of 1906, page 77), requires that the cost of the maintenance of convicts, sentenced to labor on the public roads, under the act of February 27, 1906, as well as the cost of the maintenance of the prisoners required to labor on such roads under said act of March 6, 1906, shall be paid out of the appropriation of \$25,000 and out of the fund arising from the fees provided for in section 3 of the act of March 6, 1906, accounts for such costs should be kept, and payment thereof made, as prescribed by section 5 of said act.

When this class of convicts are actually confined in the penitentiary, under section 4 of the said act, whilst not working on the roads, they must be maintained out of the general appropriation for the support of the penitentiary, as other convicts are.

Very truly yours,

WILLIAM A. ANDERSON.

October 28, 1906.

MR. T. J. DAVIS,

*Superintendent State Penitentiary Farm,
Lassiter, Goochland County, Virginia.*

DEAR SIR:

Your request, communicated by telephonic message from Dr. E. L. Hobson, this instant received, and to it I hasten to reply.

The question which you submit to me is, as I understand it, as follows:

A quantity of corn upon the State farm belonging to the Commonwealth was swept down by the flood two days since and deposited upon the lands of a neighboring owner, and what you wish to know is, what are the rights of the Commonwealth and your rights as her representative in respect to that corn?

The question is fortunately settled by the laws of Virginia as embodied in section 2067 and 2068 of the Code, which are as follows:

"Sec. 2067. *Who entitled to drift property.*—When any property, not mentioned in section twenty hundred and sixty-two, is drifted on any of the waters of this Commonwealth, and deposited and left on the lands of any person other than the owner of such property, the owner of such land shall, as against all persons other than the owner of such property, be deemed and treated, and have the same rights and remedies relating thereto, as such owner thereof. (1876-'07, p. 273.)"

"Sec. 2068. *Conditions on which owner may remove it.*—The owner of such property, after he shall have paid to the owner of the land a just compensation for any proper care, labor or expense bestowed, done or incurred by him about such property, but not before, may enter upon the land, and, doing as little injury as possible thereto, remove the property therefrom, but shall pay to the owner of the land for any damage caused to him by such entry and removal. (1859-'60, p. 175.)"

This law needs no interpretation. The owner of the land upon which the corn has been lodged has no title or claim to it whatever as against the State, and you have the right, and it is your duty, to go upon the land and reclaim this corn at once; but the owner of the property will be entitled to be paid for any damage caused to him by your entry upon his land and the removal of the corn therefrom.

Very truly yours,

WILLIAM A. ANDERSON.

P. S.—The only property mentioned in section 2062 is estrays and boats or vessels adrift or stranded.

IX. BOARD OF FISHERIES.

April 30, 1906.

W. McDONALD LEE, Esq.,

Chairman State Board of Fisheries, Irvington, Virginia.

DEAR SIR:

Your favor of the 27th received to-day.

I regret to find that there is no statute in force which authorizes inspectors of oysters to give bond before any judge in vacation of his court.

Section 8 of the act approved February 7, 1898, acts of 1897-'98, 250, provided that each inspector should qualify before the judge of the county or corporation court of the county or corporation in which his district may be; but that section was, under the principles laid down in *Fox's Admr. v. the Commonwealth*, 16 Gratt. 1, and other cases following that decision, amended or repealed by the act approved February 7, 1900, acts of 1899-1900, 306, section 2131, Pollard's Code, in so far as the former act was in conflict or inconsistent with the act of latest date, and the last mentioned act amending section 2131 of the Code prescribes that: "Every inspector shall, before the county or corporation court within the jurisdiction of which he resides, take the oaths and give bond prescribed by chapter thirteen of the Code of Virginia;" so that the last statute on the subject requires the qualification to be before the court, and not before the judge in vacation.

By the act approved February 9, 1904, acts of 1904, section 3058b, Pollard's Code, it is provided that: "The jurisdiction and powers which were vested in the county courts and the judges and officers thereof, respectively, on the thirty-first day of January, 1904, by the laws of this State * * * shall be vested in, exercised by and imposed upon the circuit courts and the judges thereof, except when otherwise specially provided."

Under the statutes of the State now in force, therefore, every oyster inspector is required to qualify and give bond before the circuit or corporation court within the jurisdiction of which he resides.

It is unfortunate that there is no statute of the State which authorizes any officer required to give any bond before any court of the Commonwealth to give such bond before the judge of such court in vacation.

Very truly yours,

WILLIAM A. ANDERSON.

June 7, 1906.

W. McDONALD LEE, Esq.,

Chairman State Board of Fisheries, Irvington, Virginia.

DEAR SIR:

Your letter of the 5th instant, addressed to the Attorney-General, has been received. As the Attorney-General is so closely occupied with the Corporation Commission, he has directed that I reply to your inquiries:

It seems to me that sub-section 5 of section 2153 of the Code of 1904 allows the taking of oysters with patent tongs on the payment of a license tax of \$5, and that the act of March 10, 1906, limits the time in which such tongs may be used to the months of October, November and December. Section 2178c of the Code of 1904 authorizes the taking of clams with such tongs by any resident of Virginia who has paid the tax and complied with the other requirements of section 2153, without any reservation as to the time such tongs may be used, unless such limitation is found in section 2178c in the provision quoted, "for a period of one year from the beginning of the period fixed by law for taking and catching oysters from the natural rocks, bays and shoals in the waters of the Commonwealth with ordinary tongs." This you can doubtless construe much better than I can, being familiar with the general subject.

As to the matter of insuring the State's floating property, it seems to me that under section 2082a of the Code of 1904, the Board of Fisheries may, by reasonable inference, do all that is necessary and proper to be done for the maintenance and preservation of the oyster fleet, provided the expenditures therefor do not exceed the appropriation made for such purpose, to-wit, the sum of \$20,000 per year. See acts of 1906, page 178 (top) for appropriation. If, however, you have no fund out of which such insurance can be paid, authority so to do does not relieve the situation. I have examined the law conferring powers, etc., upon the Corporation Commission, and find nothing to warrant making application to the Commission in the premises; indeed, I do not see that the Commission has anything whatever to do with this species of State property.

I conclude, therefore, that there is no fund out of which this property can be insured other than that hereinbefore above mentioned, nor has any one such authority, unless vested in the Board of Fisheries.

Very truly yours,

ROBERT CATLETT,
Assistant to the Attorney-General.

July 19, 1906.

HON. S. WILKINS MATTHEWS,

Secretary State Board of Fisheries, Assawoman, Va.

DEAR SIR:

I. The questions as to guts, creeks and oyster shoals presented in your letter of the 18th were passed upon by me, at the request of the State Board of Fisheries, in the opinion rendered to them on the 6th of June, 1905, which you will find in my annual report for the year 1905, at page 29, a copy of which I send you by this mail. That opinion related to other matters, and you will find so much of it as refers to the areas of the creeks or guts and the edges of the thoroughfares in the second division of the opinion on pages 30 and 31 of the report.

That opinion referred to certain bottoms on the ocean side of Northampton county, but I find on examination of the oyster records, Baylor's report, and the notes and chart of the shoals and waters on the ocean side of Accomac county, that the facts are the same as to the creeks or guts and edges of thoroughfares on the ocean side of Accomac county that they are to like oyster bottoms on the ocean side of Northampton county, and my opinion, therefore, applies as much to Accomac county as it does to Northampton county.

In the copy of the oyster records of Accomac county, and the description given in the report of the natural oyster rocks, beds and shoals on the ocean side of that county, the edges of the thoroughfares and the small creeks or guts are defined and described precisely as they are in reference to Northampton county, and will be found on page 62 of that pamphlet.

II. In regard to the issuance of patents for marsh lands lying on the eastern shore of Virginia, that is expressly prohibited by chapter 219 of the acts of 1887-'88, page 273, (approved February 24, 1888); and if such marshes be natural oyster shoals, beds or rocks, it is also prohibited by section 2341 of the Code, and by section 175 of the Constitution; and it is also provided by section 1338 of the Code that "no grant shall hereafter be issued by the register of the land office to pass any estate or interest of the Commonwealth in any natural oyster bed, rock or shoal, whether the said bed, rock or shoal shall ebb bare or not."

Any such grant would be voidable, if not void, and would be annulled in a proper suit by the circuit court of your county.

The register is prohibited from issuing a patent covering oyster shoals, and I take it for granted that he would not do this, and has not done it, in any case, unless he has been led into error by the survey furnished him by the surveyor of the county in which the location was made.

Any person aggrieved could prevent the issuance of such a patent by filing a caveat with the register of the land office, at any time before the patent is issued, or he could have the patent vacated and annulled by a proper suit for that purpose, brought in the circuit court of the county in which the shoals lay.

These are the only remedies that I know of that are provided by law to give redress against any such wrong.

Such a violation of the law could not be accomplished if the surveyor of the county did his duty. The surveyor should, of course, refuse to survey any oyster marshes, shoals or rocks, but if such a survey is regularly made and certified by the surveyor, and the affidavits endorsed thereon, as required by section 2341 of the Code, and there is nothing in said survey to show that it embraces marsh lands or oyster shoals, such as are excluded from entry, survey and grant by the sections above referred to, and if the fees prescribed by law were paid, the register would have nothing to do but to issue the patent. The only way to prevent it would be by caveat, or, if the patent was issued, to have it avoided by a decree of court.

Very truly yours,

WILLIAM A. ANDERSON.

October 18, 1906.

HON. W. McDONALD LEE, ESQ.,

Chairman State Board of Fisheries, Irvington, Virginia.

DEAR SIR:

Your favor of the 2nd, in some way delayed, has this instant reached me.

The question you submit is whether, under the laws of Virginia, boats propelled by gasoline can be used for dredging in the waters of the State.

While I can see that the evil you point out from the use of such boats in dredging is a serious one, I regret to say that I do not find any *express* inhibition upon their use in the statutes of the Commonwealth.

The only general prohibition against the use of any particular kind of boat for the purpose of dredging for oysters is that which is contained in section 2164 of the Code, and that simply prohibits the use of a boat propelled in whole or part by steam.

Steam is defined to be "the elastic fluid into which water is converted when heated to a boiling point," and a vessel propelled by steam is one propelled by such vaporized water.

Of course, a vessel propelled by gasoline is not one propelled by steam any more than a vessel propelled by electricity, or by a gas engine, or by a hot air engine would be.

The statute (section 2164) seems to plainly contemplate that a vessel which is authorized to be used in dredging shall be rigged with a main sail, for it requires that the number of the boat shall be on the "main sail, to be placed above the balance reef in the center of the sail, half way between the gaff and said reef, on the jib above the bonnet in center of the jib and on the opposite side to that of the main sail."

It would seem, therefore, that in order to satisfy this requirement on the statute it would be necessary that the boat should be rigged with sails.

At any rate, I am inclined to think that your board would be justified in requiring that every boat engaged in dredging, under section 2164, should be rigged as provided in that section.

I do not think that you or your board would have the right to prohibit the use of a sail boat because it was equipped with a gasoline engine and could be propelled in whole or in part by gasoline.

The above may be regarded as a somewhat rigid construction of this law, but the case is probably one in which such strict interpretation and application of its implied meaning would be justifiable.

I regret that I cannot be more definite and positive in my response to your inquiry as to the meaning and effect of this statute.

I hope that the above suggestion will furnish you a solution for the difficulty you mention.

If it is proposed to use a gasoline dredge on private grounds under section 2165a, the remedy, I think, perhaps, would be in the hands of your board, which, under that section, is authorized to revoke such privilege of dredging or scraping such oyster grounds whenever, in their judgment, it is proper or necessary to do so.

Very truly yours,

WILLIAM A. ANDERSON.

X. BOARD OF HEALTH.

March 24, 1906.

DR. PAULUS A. IRVING,

*Secretary Virginia State Board of Health,
301 West Grace St., Richmond, Virginia.*

DEAR SIR:

Your favor of the 23rd, enclosing the letter of the Hon. R. E. Boykin, commonwealth's attorney of Isle of Wight county, of the 29th instant, to you, this instant received.

The following facts are therein presented by Judge Boykin:

There is a dilapidated house in Isle of Wight county belonging to a corporation doing business there, which the board of health regards as dangerous to the community, because of its infection with smallpox, by reason of the fact that there has been recently a case of smallpox in said house.

The building is so open that the local board of health finds that it cannot be disinfected, and the quarantine which has heretofore been established, is continued at the expense of the county.

The county board of health is convinced that the only way to rid the community of the menace to its health, occasioned by this dilapidated building, is that it shall be destroyed by fire.

That board is prepared to advise the county to pay the company \$50 for the building if it is destroyed, but the company owning the building refuses to consent to its destruction unless it was paid \$200 for the house.

The question submitted is whether the local board of health has the right to cause the house to be destroyed, and if so, what, if any, compensation should be made to its owners, or how the matter should be proceeded with.

There can be no question but that the State may go even to the length of destroying a house or other building, which is, as is stated to be the case here, irretrievably unhealthy, and consequently a menace to the public health.

Tiedman on State and Federal Control and Police Power, section 152 and cases cited.

In *Davenport and Morris v. Richmond city*, it was held by the Supreme Court of Appeals of Virginia that it was competent for the proper authorities of the city to cause certain powder magazines to be removed, at the expense of the owners, to a safe and more remote locality, and that, even though the land on which such magazines had been erected had been conveyed by said city to the parties under whom *Davenport and Morris* claimed, for the purpose of erecting powder magazines thereon, subject to such regulations relative to storage, receipt, delivery and transportation of powder as the council may prescribe.

See, also, Freund on Police Powers, section 565.

Coates v. the Mayor, etc., of New York, 7 Cow., page 585;

City of Salem v. Eastern Railway company, 98 Mass., p. 431.

It has been held that where personal property is lawfully destroyed the owner cannot claim compensation for its destruction.

Dunbar v. city of Augusta, 90 Ga., page 390.

It would seem that there could be no question that the owner would not be entitled to any compensation if he was responsible, either by reason of his negligence or otherwise, for the nuisance which had become a menace to the health or safety of the community.

The exercise by the government of a power to destroy or remove nuisances, because of danger which it threatens to the community, is based upon the same principle upon which the public authorities may destroy a building in order to prevent the spread of a conflagration.

There can be no question that where the owner of the building is responsible for the nuisance or conditions which render it a menace to the community, that it is his duty at once to remove it at his own expense, and if he does not so remove it or destroy it, if its destruction is necessary for the safety of the community, then the State may cause its destruction without any liability to make compensation.

There may be some question as to whether the owner of such a structure would not be entitled to fair compensation for its destruction, if such owner has not caused, either by his positive acts or by his neglect, the nuisance or the conditions which render the existence of such building a public peril; but, in the cases of *Dunbar v. city of Augusta*, and *Davenport and Morris v. city of Richmond*, above cited, it was held that the owner of the property destroyed or removed was not entitled to compensation, though it does not appear in either case that the owner of the property had wrongfully or unlawfully caused the conditions which rendered that property dangerous.

In the Georgia case, the property which was removed consisted of a large quantity of grain stored in a warehouse, which had been flooded by a recent freshet in the Savannah river, and had become dangerous to the public health.

In order to exercise this essential power and duty of government, it is necessary that some officer or agency of the government should be clothed with the duty and power of enforcing this public right.

There seems to be no trouble on this score in the cities and towns of the Commonwealth, the councils of which are given, either by their charters or by general law, ample power to provide for the protection of their respective municipalities in regard to all such matters.

There can be no question but that the nuisance complained of here can be abated under section 1729a of the Code of 1904, but a more summary remedy than that is needed for an evil such as we are now *considering*.

While sub-section 5 of section 1713d and section 1715 give to the county and to the State boards of health very broad powers, neither section expressly authorizes either board to cause the destruction of any building. The case would have to be an extreme one which would justify the destruction of a dwelling house, and the General Assembly would properly be very slow in conferring the power upon any board to destroy a man's home.

By sub-section 5 of section 1713d, each local board of health is given "control of the prevention and eradication of contagious and infectious diseases."

This is a very broad grant of power, and, I think, under the circumstances of this case, the county board of health of Isle of Wight county would be justified in causing the infected old building referred to to be destroyed by fire, and then it would be for the board of supervisors to determine, under the advice of the commonwealth's attorney of that county, what, if any, compensation it would make to the owners of the building.

There is another question suggested by Mr. Boykin's letter; namely, whether the county should make any compensation to the owner of infected clothes destroyed.

I think it is well settled that the State board of health not only has the power, but that it is its duty, if necessary for the protection of the public health of the community, to cause the destruction of bedding and clothing which has been used by a sufferer from some deadly, infectious or contagious disease, and in such case the owner of such clothing is not entitled to any compensation.

See Tiedman on State and Federal Control and Police Power, section 169.

Very truly yours,

WILLIAM A. ANDERSON.

XI. BOARD OF PHARMACY.

October 2, 1906.

T. A. MILLER, ESQ.,

Secretary State Board of Pharmacy, Richmond, Va.

DEAR SIR:

Your letter of the 1st instant submits the inquiry, whether, under chapter 78 of the Code of Virginia, and particularly under section 1757

thereof, as amended by the acts of 1902-'03-'04, page 716, it is necessary, in order to a prosecution for a violation of that chapter, and particularly of sections 1759, 1760 and 1766 thereof, that such prosecution shall be begun by, or prosecuted at the instance of, the State board of pharmacy.

In reply, I beg leave to say that there is nothing in the provisions of section 1757, or of any other section of that chapter, or of the Code of Virginia which would justify any such conclusion.

The enforcement of this law is not dependent in any respect upon any action or inaction of the State board of pharmacy.

It is true that by section 1756 it is provided that:

"The board shall have authority to transact all business relating to the legal practice of pharmacy, to examine into all cases of abuse, fraud, adulteration, substitution or malpractice, and report all violations of the provisions of this chapter to the Commonwealth's attorney of the county or corporation in which they occur, who shall investigate and prosecute the same when brought to his attention;"

but this does not make the enforcement of the law dependent upon the action of the board or any failure of the board to act. Any citizen could institute the prosecution by making complaint before a justice of the peace, or any person violating the act could be indicted before a grand jury without any action whatever on the part of the State board of pharmacy, or any officer thereof.

The language of section 1757, above quoted, merely authorizes that board to report to the Commonwealth's attorney any violation of the provisions of this chapter. It doesn't even make it the duty of the board to do this thing. Still less does it condition prosecutions for the enforcement of this law and the punishment for its violation in any way, or to any extent, upon any action by the board.

Section 1766 makes any violation of the provisions of sections 1759, 1760, 1762, 1763 and 1764, each respectively, a misdemeanor; and the matter and manner of their prosecution is governed by the general criminal law of the State.

Very truly yours,

WILLIAM A. ANDERSON.

XII. ELECTIONS, REGISTRATION AND VOTING.

November 29, 1906.

W. M. LYBROOK, Esq.,
Blacksburg, Virginia.

DEAR SIR:

Your favor of the 27th instant just received.

Although the Attorney-General is not required or authorized to advise or give an official opinion as to any county, municipal, or other local question, it gives me pleasure, unofficially and personally, to answer your inquiry.

The only poll tax, the payment of which is or can be made a pre-requisite to the exercise of the right to vote, is the State poll tax. See section 18 of the Constitution.

There can be no question that all registered voters of Blacksburg who, six months or more before December 12, 1905, have paid the State capitation tax with which they were assessed or assessable for the years 1903 and 1904, will be entitled to vote at an election to be held in that town on the 12th of December next.

And, generally, any registered voter of said town, who voted, or was qualified to vote, at the election held on the 7th of November last, will be a qualified voter at any election held in December, 1905.

Very truly yours,

WILLIAM A. ANDERSON.

December 6, 1905.

E. W. CARPENTER, Esq.,

Harrisonburg, Virginia.

DEAR SIR:

In regard to the subject of our conversation over the long distance 'phone this morning, and in fuller explanation of what I then told you, I will say that the acts of Assembly, following section 122 of the Constitution, provide that the mayor and council of cities and towns shall be elected on the *second Tuesday in June*.

See acts of 1902-'03-'04, page 506, section 98; page 423, section 1033b; page 743, amending section 98; and page 889, amending section 1033b, relating to cities, and relating more specifically to towns, as follows: page 421, section 1028a, and page 419, section 1021.

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

As there are no officers required to be chosen at an election on the Tuesday after the first Monday in June, there are none to which the provisions of section 109, as amended at page 923 of the said acts, can apply. The inevitable conclusion is, therefore, that the conflicting provisions of section 109 are inoperative.

Very truly yours,

WILLIAM A. ANDERSON.

March 16, 1906.

JOHN J STEWART, Esq.,

Abingdon, Virginia.

MY DEAR SIR:

Your favor of the 15th instant received. As the law stood before the recent meeting of the General Assembly, it was difficult for any one to say with absolute certainty whether the pre-payment of the capitation tax six months before a special election was necessary to entitle any person to vote at such an election.

I am told that two of the best judges in the State (Judge Grimsley and Judge Saunders) had decided that such pre-payment was not necessary; that any one who was qualified to vote at the November election, for instance, could vote at a special election held in the preceding August, and I am under the impression that Judge Saunders decided that any voter who was qualified to vote at a November election could vote at a special election in the succeeding January or February.

While the question is a debatable one, I think it would be pretty safe to follow the decisions of two such excellent judges.

I do not know that the question was raised in the recent senatorial election in Halifax county, but, whether it was raised or not, I am sure that any voter who could have voted at the preceeding November election was allowed to vote at the special election held in Halifax county something over a month ago. I hope the question has been put at rest by amendments to the election law passed at the recent session of the Legislature, but I will be unable to learn anything as to that until the acts are printed.

In reference to the posting of the list of qualified voters required by section 38 of the Code and the statute passed in pursuance thereof, I think their requirements relate to general elections only, as will appear upon examination of the text of the Constitution. It has no application to special elections, except in so far as said list determines who are entitled to vote at the preceding regular election, if that be taken as a test of the qualification of voters at a succeeding special election, as was, I understand, decided by Judge Saunders.

As to whether the voters may be registered up to the day on which a special election is held, there is some uncertainty by reason of the apparent conflict between section 73 and section 78 of Pollard's Code. By section 73, the registrar is only required to register voters up to "thirty days next preceding the election." By section 78, the registrar is required to register a voter at any time previous to the regular day of registration, except, I am inclined to think, his books must be closed between the regular registration day before the November election and the day of that election. Taking the two sections together and construing them so that both may stand according to the rules for construction of the statutes, I would say that the election referred to in section 73 should be taken to mean a regular election. In accordance with this view, a voter should be allowed to register at any time up to the day of your special election, to be held on the twelfth of April next.

With kind regards,

Very truly yours,

WILLIAM A. ANDERSON.

May 5. 1906.

J. C. STAPLES, ESQ.,

Registrar, Harrisonburg, Virginia.

DEAR SIR:

Your favor of the 3rd instant has been received. I don't know that I entirely understand your question.

Under section 80 of the Code, as amended by the act of December 8, 1903 (acts of 1902-'03-'04, 80, Pollard's Code, '49), a voter registered at a

precinct in Rockingham county would have a right to have a certificate by which he could be transferred to a precinct in the town of Harrisonburg, after he has moved into that town, *at any time*.

I am inclined to think that such a voter would have a right to be registered on such transfer at a precinct in the town of Harrisonburg at any time between the 15th of May and the 12th of June.

Of course, he could not vote in a town election in Harrisonburg until and unless he had resided in that town at least twelve months before the election at which he offered to vote.

Of course, there is a separate registration for the town from that of the magisterial district in which the town is located, and if the voters to whom you refer live in the town of Harrisonburg, of course, they should be registered upon both sets of registration books, and should not be transferred from one to the other. They are entitled to have their names upon both registrations, if they are qualified voters of the town; and if a resident of the town is already registered on the district or county registration books, he ought to allow his name to remain there, and at the same time be registered on the registration books for the precinct in the town in which he resides. In other words, this isn't double registration. It is necessary that he should be registered independently upon each of the registration books; namely, one for the precinct in the town and one for the precinct in the magisterial district, so that he may vote in each.

He would, of course, be entitled, if already registered on the books for the magisterial district, to be registered on the books for the precinct in the town in which he lives without a transfer. In other words, the law does not require a man to give up his right to vote in his magisterial district in order to acquire a right to vote at elections in the town in which he resides.

Very truly yours,

WILLIAM A. ANDERSON.

May 15, 1906.

WALTER M. PIERCE, Esq.,

Attorney at Law, Christiansburg, Virginia.

DEAR SIR:

Replying to your favor of the 9th instant. I beg to say that you will find, upon an examination of the statutes on the subject, that section 109 of the Code, as amended by the acts of 1902-'03-'04, is inoperative in so far as it relates to the election of officers in towns or cities, for the reason that there are no officers to which its provisions can apply.

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

If you will examine section 122 of the Constitution and the acts recited, you will see that there can be no question that elections of mayors and councils in cities must be held on the second Tuesday in June.

I am at a loss to understand why section 109, as found at page 923 of the acts of 1902-'03-'04, was ever enacted.

As there are no officers "required to be chosen" at an election on the Tuesday after the first Monday in June, there are none to which the pro-

visions of section 109, as amended by the act of 1902-'03-'04, at page 923, can apply.

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

It gives me pleasure to thus give you my views on this subject, though, as you will see from the Code, I am not authorized to give an opinion upon any question of county or municipal concern, or to any individual citizen on any question.

Very truly yours,

WILLIAM A. ANDERSON.

May 30, 1906.

W. G. DULLARD, Esq.,

Treasurer, Partlow, Virginia.

DEAR SIR:

Yours of the 25th received.

Section 38 of the Constitution, and the statute made in pursuance thereof, requires the treasurer of each county and city, at least five months before each regular election, to file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city who have paid, not later than six months prior to such election, the State poll taxes required by the Constitution during the three years next preceding that in which such election shall be held.

The election referred to is the regular election to be held in the county or city in which the certificate is required to be filed, and that election in all the counties of the State is the election to be held on the Tuesday after the first Monday in November next.

It makes no difference whether such person paid his State capitation taxes six months before any election heretofore held or not. If he has paid those State capitation taxes assessed or assessable against him for 1903, 1904 and 1905, six months before the 6th day of November next, he is entitled to have his name placed upon the list to be furnished by you to the clerk.

Very truly yours,

WILLIAM A. ANDERSON.

May 30, 1906.

W. H. GRAVELY, Esq.,

Martinsville, Virginia.

MY DEAR SIR:

Your letter of the 25th instant, addressed to the Attorney-General, has been received and noted. The Attorney-General is not authorized by law to give official opinions to others than to certain officers at the seat of the government, but it gives me pleasure to answer your inquiry unofficially, and give my personal construction of the law referred to. Under an act of March 2, 1903, acts of 1902-'03, page 68, it seems that registrars for towns, at least by reasonable deduction, are not governed by the general law fixing

certain days for registration, and can register voters in towns after the regular days fixed by the general law; that is to say, he may register and enter transfers up to the day of town elections. As the Constitution provides that a voter must reside in a town for twelve months prior to the election at which he offers to vote, I conclude that in the case you state the residents of the annexed territory cannot vote in the town election to be held on June 12th next.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney-General.

May 30, 1906.

H. G. GILMER, ESQ.,

Norton, Wise County, Virginia.

DEAR SIR:

Your favor of the 28th received.

The Attorney-General is not authorized or required to give advice or an official opinion to local officers.

As there are 17 cities, about 300 towns, 100 counties, and some 500 magisterial and school districts in the State, you can see very well that it would be impossible for a dozen men to pass upon the thousands of questions which arise in all of the political sub-divisions of the State.

It gives me pleasure, personally and unofficially, to answer any inquiries of local officers, when I can do so without neglecting the duties which are devolved upon me.

Section 1022 of Pollard's Code (acts of 1902-'03-'04, page 419) prescribes the duties of a registrar in a town. It is made his duty to register all voters who are residents of such town, and who shall have previously registered as voters of the county in which the town is situated.

From this you will see that you can only register upon the registration books of your town such persons as are already registered upon the registration books of the county, and who are residents of the town, and that it is your duty to register all voters who are residents of your town and who are already registered in the county.

As I understand the law, you would simply transfer from the registration books (not poll books, as you suggest) of Norton precinct the names of all voters who are registered in Norton precinct of Wise county, and who are residents of the town of Norton; and I am inclined to think that such men can be so transferred up to the day of the election in your town. I think this is the practice in other towns, and I know of nothing in the law to prevent it.

Of course, if a man applies to be registered, he can only be registered on the town books, provided he is already registered on the county books.

Very truly yours,

WILLIAM A. ANDERSON.

May 30, 1906.

A. W. BOHANNON, Esq.,

Treasurer of Surry County, Surry, Virginia.

DEAR SIR:

Yours of the 25th instant received on my return here to-day.

The voter whom you mention has clearly entitled himself to vote at the next election, and it is unfortunate that the law does not provide some way in which his name can be put upon the list required to be furnished by you to the clerk.

As you have to make oath to that list, and as the law does not make any provision for entering on such list the name of any person who has paid his capitation taxes to the treasurer of another county, I would not advise you to enter his name upon the list, except for the years the capitation taxes for which he has paid to you; namely, 1904 and 1905.

I think the voter ought not to be deprived of his vote without any fault of his, and his remedy would be to apply to the judge of your court to have his name added to the list, as is provided for in section 38 of the Constitution. I feel sure the judge would have his name placed upon the list.

No other way occurs to me, by which he could secure his right to vote at the election next fall.

Very truly yours,

WILLIAM A. ANDERSON.

June 11, 1906.

MR. L. R. GILLS,

Bedford City, Virginia,

DEAR SIR:

Yours of the 9th instant received.

I am always glad to serve my fellow-citizens, but the Attorney-General is not authorized, as you will see from chapter 155 of the Code, to give an opinion in any such case or to any individual. He is particularly not authorized to pass upon a question as to the right of any particular registered voter to vote. That is a question which must be decided in the first instance by the officers of election, or by the courts. I will say, however, that, by the express language of the Constitution, an inmate of a charitable institution cannot be regarded as having gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution.

If the judges of election of the precinct will call on me for an official opinion as to whether inmates of a charitable institution, who were not residents and qualified voters of the precinct, county or town in which they offer to vote before they became inmates of such institution, are qualified voters of such precinct, I will endeavor to answer their inquiry.

Very truly yours,

WILLIAM A. ANDERSON.

September 27, 1906.

JAMES CASKIE, Esq.,

Chairman Electoral Board City of Richmond, Richmond, Va.

DEAR SIR:

Your favor of this date has been received, in which you state that quite a number of the judges and clerks of election, appointed by your board in May last, have failed to qualify, and that your board desires to know from me whether it has a legal right to declare vacant the said offices and to make new appointments, and, if not, who are the election officers for the respective election districts for which these appointments were made?

I do not know of any statute which requires judges and clerks of election to qualify, by taking and filing any oath, except the oath required by section 118 of the Code.

By section 69 of the Code, your board is authorized "to remove from office any and every judge of election, registrar, or clerk, upon notice, who fails to discharge the duties of his office according to law."

Any of the judges and clerks appointed by your board, who failed to act as judge or clerk of election at the election held in June last, it seems to me, thereby brought himself within the terms of the language just quoted, and that your board would have the right to remove him at once, upon notice, for such failure, and to appoint a judge or clerk in his place.

In such case, the judges and clerks of election for the city of Richmond, at the election to be held in November next, would be those who were appointed by your board in May last and who discharged their duties as such by conducting the election held in June last, and such other judges and clerks of election as your board may appoint in the place of those who failed to discharge their duty at the last June election.

Very truly yours,

WILLIAM A. ANDERSON.

October 17, 1906.

W. S. ROSE, Esq.,

Big Stone Gap, Virginia.

DEAR SIR:

Your favor of the 9th instant received.

As well as I understand your inquiry, the answer to it is this: that a young man who comes of age after the first of February of any year is not assessable with a capitation tax for that year.

For instance, if a young man comes of age on the first day of March, 1906, he will not be assessable with any capitation tax until the first of February, 1907, but he will be entitled to register any time after March 1, 1906, except when the registration books are closed, upon paying \$1.50 to his county or city treasurer, and such payment will discharge the capitation tax assessed against him in the year 1907.

Very truly yours,

WILLIAM A. ANDERSON.

October 23, 1906.

C. J. ROBINETTE, ESQ.,

Blackwater, Lee County, Virginia.

DEAR SIR:

Yours of the 18th instant has been received.

I ought not to give an opinion as to the right of any individual to vote. I am not authorized to decide any such question as to any particular citizen, and if I were authorized to do so, I would not do it without giving him an opportunity to be heard. It is a question which the local officers and courts must decide after getting all the facts, which it is impossible generally to get satisfactorily by letter.

I can only give you the general rules which would govern in the decision of such matters.

1. The matter of a man's residence is a question of intention, but also a question of fact.

For instance, if a man residing in Lee county and who is a qualified voter of that county, moved from that county into Scott county, with the intention of making his home in Scott county, and without any intention, therefore, of returning to Lee county, he cannot, if he returns to Lee county, vote in that county until he has resided in Lee county for twelve months before any election at which he shall offer to vote.

As a rule, a man's home is where his family lives, but that is not always the case, for there are circumstances under which his legal domicile would not be the same with that of his family, though the presumption is that it is. But if, in the supposed case, the citizen of Lee county moves with his family into Scott county with the purpose of remaining there temporarily and returning to Lee county, he does not thereby acquire a domicile in Scott county or lose his domicile or right to vote in Lee county; but it ought to be clear in such case that it was his purpose to come back to Lee county when he moved temporarily into Scott county.

2. The fact whether a man is married or single or owns land or property in a county, does not at all determine the matter of his residence or legal domicile. For example, if a single man has once acquired a residence in Lee county and a right to vote there, he does not lose it by going temporarily into Scott county to engage in work there, if, when he goes into Scott county, it is his purpose not to make his home there permanently, but to reside there only temporarily and to return to Lee county, which he still claims as his home.

I could not, in justice to them, pass upon the right of either of the citizens that you mention, to vote, without getting from them or others fuller information than your letter gives.

I beg leave to send you by this mail, copy of my report for 1903, on pages 13, 14, 15 and 16, of which you will find opinions which I have given, in which the principles by which the question of residence for the purpose of voting is to be determined, are fully given.

Very truly yours,

WILLIAM A. ANDERSON.

XIII. MISCELLANEOUS.

November 17, 1905.

CHARLES CURTIS

v.

COMMONWEALTH

Upon Writ of Error from the Corporation Court of the City of Roanoke.

The indictment in this case was for malicious stabbing, cutting and wounding under section 3671 of the Code. The verdict of the jury was as follows:

"We, the jury, find the prisoner not guilty of malicious assault, but guilty of unlawful assault, as charged in the indictment, and fix his punishment at two years in the penitentiary at Richmond, Virginia."

The jury could have found the prisoner guilty either of the malicious stabbing and wounding, or of unlawful stabbing and wounding of William Wimbush, and fixed his punishment at confinement in the penitentiary, in the one case, for not less than one and not more than ten years; and in the other case, for not less than one and not more than five years; or confinement in jail not exceeding twelve months and a fine of not exceeding \$500; or, as was held in Canada's case (22 Grat., 899), they might have found him guilty of assault and battery, and imposed upon him a fine, or a fine and imprisonment.

They found him guilty of "unlawful assault," which is a misdemeanor, and imposed for it the punishment of felony. They doubtless intended to find him guilty of unlawful assault and wounding, as charged in the indictment, but the verdict omits so to state.

This statute does not make any assault, whether malicious or unlawful, a felony. It only denounces a punishment for malicious or unlawful shooting, stabbing, etc., and, while the charge involves an assault, and it was entirely proper for the indictment to charge an assault, the gravamen of the charge defined in section 3671 was shooting, cutting, etc., with intent to maim, disfigure, disable or kill; and if it was the intent of the jury, as was probably the case, to find the accused guilty of wounding, their verdict failed so to state. There could have been an assault without wounding.

I am forced to this result by the carefully considered and conclusive opinion of this court in Canada's case (22 Grat., 899), which, if anything, is strengthened by this court's opinion in Jones' case (31 Grat., 836), and still further by the explicit language of section 4042 of the Code, which plainly prescribes the verdict which the jury should have rendered in the case in order to convict the prisoner of unlawful wounding.

For these reasons, I am forced to the conclusion that it is my duty to confess error in this case, for the Commonwealth.

Very respectfully,

WILLIAM A. ANDERSON,

Attorney-General.

To the Supreme Court of Appeals of Virginia.

November 18, 1905.

E. PERKINS, ESQ.,

Commonwealth's Attorney, Roanoke, Virginia.

MY DEAR SIR:

The Court of Appeals had the record in the case of Charles Curtis v. Commonwealth, from the corporation court of your city, in which a writ of error had been allowed, submitted to me (as they sometimes do in cases where the court is convinced that there is reversible error), for my consideration as to whether there should not be a confession of error.

After careful consideration and examination, I am brought most reluctantly to the conclusion that the verdict cannot stand, for the reasons stated in the memorandum which I have filed with the court, and a copy of which I enclose.

When I read this paper to the court, I was informed that the judges were unanimously of the opinion that the verdict was plainly erroneous, and that my action in confessing error in the case was fully approved.

It is a responsibility which I have not taken, and will not take, except in a plain case, where I think the judgment of the lower court will be, and ought to be, reversed. Then, to save time and costs, and trouble to all parties, it is often important to the ends of justice that the new trial, if there is to be one, shall be had speedily.

I can see very well how, in the hurry of business in the trial courts, a slip of this kind may be made by the jury, and, through inadvertance, overlooked by the court and counsel. Had attention been called to it, the jury would doubtless have been required to amend their verdict, so as to add the words wounding, stabbing and cutting, and to make it conform to the requirements of section 4040 of the Code, subject, of course, to the rule laid down in Jones' case, 31 Grat., 836.

I was all the more anxious to find that the verdict could be sustained, for I apprehend that it will be claimed that its effect was to acquit the accused of any offence except an unlawful assault, which, of course, is simply a misdemeanor, and that he could not be again tried either for malicious or for unlawful stabbing and wounding, with intent to maim, disable or kill.

The verdict certainly acquits Curtis of malicious stabbing and wounding, with intent to maim, disfigure or kill; I am not prepared to say that it acquits him of unlawfully doing these acts. A good deal can be said for and against such a proposition.

Very truly yours,

WILLIAM A. ANDERSON.

December 21, 1905.

WILLIAM R. ABBOTT, JR., ESQ.,

Bedford City, Virginia.

DEAR SIR:

Yours of the 20th, with enclosures mentioned, and herewith returned, this instant received.

The Auditor of Public Accounts is the only officer of the State now empowered to collect any claim due the State. Neither he nor any other

officer is authorized to release any claim of the State; and the General Assembly is prohibited from passing any special act for any such purpose.—Const., Sec. 30. Experience has shown that there are few, if any, wiser provisions in the Constitution than that inhibition.

The Auditor, with the approval of the Attorney-General and the sanction of the circuit court of the city of Richmond, is authorized to compromise and settle claims under certain circumstances; but such action must be based solely upon the consideration of the interest of the State.—Va. Code, sec. 702a; but this statute refers only to doubtful or disputed claims.

The act of February 4, 1886 was not saved by the Code of 1887, and was, therefore, repealed by that Code, so that the general law embodied in section 703, as re-enacted in the Code of 1887, governs all such cases.

If the auditor should undertake to release any such claim as you mention, he would have to pay the sum lost to the State out of his own pocket, or his sureties would have to pay it for him.

Regretting that it is absolutely out of my power to serve you or your clients in the way you suggest,

Very sincerely yours,

WILLIAM A. ANDERSON.

January 15, 1906.

J. M. HOOKER, Esq.,

Attorney for the Commonwealth. Stuart, Va.

DEAR SIR:

The question presented in your favor of the 12th., this instant received, is not expressly settled by the statute nor ruled by any decision of the Virginia Supreme Court.

The succession tax levied by section 44a of the Virginia tax law, page 2219, Code 1904, is distinctly imposed in every case except when an estate passes by descent or by will to the grandfather, grandmother, husband, wife, brother, sister, or lineal descendant of the decedent.

In this connection the words "lineal descendant" embrace and are synonymous with children and grandchildren, and so on to the remotest degree.

Bastards are in legal intendment *filius nullius*, and at common law "had no inheritable blood." 1 Ves. and B., 423; Bennett and others v. Toler and others, 15 Gratt., 588-619.

But for the Virginia statute, V. C., section 2552, a bastard would not inherit even from his mother.

The subsequent marriage of his father to his mother, legitimizes the child born out of wedlock, provided the father, before or after marriage recognizes him as his child; but there must be a marriage in order to legitimize such a child, and this is a change of the common law rule, made by statute V. C. section 2553.

The words child, children, etc., their synonyms, descendant or issue, when used in a statute or will, import lawful child, children or descendant, unless the contrary is made to appear from the text, or context, of the statute or the will. 2 Gray, Mass., 535; 8 Miss., 107; 3 Barbour, 466; 2 Paige, 13; 9 Bailey, 351; 5 Ves., 530; 7 Io., 453; 18 Id. 528.

I conclude that the words "lineal descendant" in section 44a import lawful descendant, and that only the lawful issue of the testator in such a case as you mention take a legacy or device free from the five per cent. succession tax imposed by that section.

I take it that no act in which words of descent or inheritance, or words descriptive of children or other kindred of a decedent, or other person, are used, will ever be construed to refer to or include a bastard unless this is expressed in the statute.

Very truly yours,

WILLIAM A. ANDERSON.

April 30, 1906.

B. P. HOLLAND, Esq.,

Mayor, Virginia Beach, Virginia.

DEAR SIR:

Your favor of the 28th has been received and carefully noted.

From repeated examination heretofore made, I have found that article 8 of the Constitution, concerning the organization and government of cities and towns, makes but little provision for the government of towns; and the laws passed by the Legislature since the adoption of the Constitution also very inadequately define the powers and duties of mayors and councils of towns.

In reply, however, to your inquiry as to the veto power of mayors of towns, I would say that I am of opinion that the mayor of a town has no power to veto all town ordinances; such power, if he has it at all, being confined to ordinances granting franchises, selling municipal property, etc.

Section 1021 of the Code of 1904 makes the mayor a member of the town council; section 1033a confers upon him and other members of the council certain powers and authority; and section 1035 provides that he shall preside over the meetings of the council; and these sections give about the sum of his powers and authority under the general law. The Legislature, by the adoption of section 1033c of the Code of 1904, has construed section 123 of the Constitution as applying only to cities; and this leaves section 125 of the Constitution, and sections 1033e and 1033f of the Code of 1904, open for consideration. Under these sections, the mayors of towns may have, inferentially, the power to veto ordinances disposing of franchises, etc., but this is by no means clear. It would seem, however, that he has, in effect, veto power *quo ad* the disposition of franchises, etc., as section 1033f provides that no franchises, etc., shall be disposed of until "after its term shall have been approved by the mayor," or passed over his veto, and under this provision he may withhold his approval and in effect veto the ordinance.

I find from the acts of 1906, page 80, that the charter of your town gives the mayor no other powers than such as are given by the general law.

Very truly yours,

WILLIAM A. ANDERSON.

May 5, 1906.

C. M. WAITE, Esq.,

Commonwealth's Attorney, Culpeper, Virginia.

DEAR SIR:

Your favor of the 1st instant has been received.

Under section 5219 of the statutes at large of the United States, the only way in which the capital of a national bank can be taxed by a State or local authorities is by taxing the shares of such National Banking Association.

You know there has been a great deal of litigation in this and other States about the taxation of national banks, and the right of this State to tax them was fought for thirteen years through to the Supreme Court of the United States.

Under section 5219 of the United States statutes, the taxation levied by the State on national bank shares must not be greater than that levied on other moneyed capital in the hands of the individuals of the State.

In addition to this, that section requires that the shares of a national bank owned by non-residents of a State shall only be taxed in the city or town where the bank is located, and not elsewhere.

In order to comply with these requirements of the Federal statute in regard to the taxation of national banks, it has been found necessary to tax domestic banks in precisely the same way in which the national banks are taxed. If a different rule was adopted for our home banks from that prescribed by the Federal statute in reference to national banks, the capital and shares of national banks would escape taxation entirely, and the State would get no revenue from them.

Accordingly, the State taxes each banking association and trust company, whether it be national or State, in the city or town in which it is located. I mean its shares are assessed there for State taxes.

You will observe that, under our State law, as well as under the Federal law, the tax can only be upon the *shares*, and where the shares are owned by non-residents, they can only be taxed in the city or town where the bank is located.

I take it for granted that shares of banks (whether State or national, because they are placed under our law upon precisely the same footing) owned by residents of Virginia, could be assessed for county and town taxes in the county or town in which the owner of those shares lives, but you will see what confusion that would make if part of the shares of the bank are taxed in the city where the bank is located, and part of them are taxed elsewhere. The danger would be that those owned by parties living outside of the town or city where the bank is located might escape local taxation entirely.

The uniform practice, therefore, is, I think, throughout the State, to tax all the bank shares of every bank, whether State or national, but for State and local purposes, in the town or city where the bank is located.

I do not find that there is any special requirement, either in the State or in the Federal law on the subject, in reference to branch banks, and ~~am~~ inclined to think that the legal situs for taxation of the shares of a bank having branch banks also would be in the county or city in which

the principal bank was located; for, as stated, the tax is not on the bank, nor can the State, or any political sub-division of the State, levy a tax on a bank or the capital of the bank; they can only levy a tax upon the shares, so that the only revenue which any town, except that in which the bank is located, could derive from taxation on the shares of the bank, would be such as could be gotten from a tax on the shares of stockholders living in such towns, if such shares were not assessed and taxed for local purposes elsewhere in the State.

There would be difficulties and complications about the taxation of the scattered shares in that way, which would make any such system undesirable.

At present, all the shares are taxed, and all, under the stringent provisions of our law, pay the tax both to the State and to the communities in which the banks are located and where most of their business is transacted.

Very truly yours,

WILLIAM A. ANDERSON.

May 24, 1906.

HON. J. DAVIS REED,

Mayor, Portsmouth, Virginia.

MY DEAR SIR:

Your letter of the 22nd instant, with enclosures, has been received and noted. In reply thereto, let me say that I see no reason why the business conducted by Mr. Hanger on Sunday cannot be suppressed by the imposition of fines on the persons so violating the law, under section 3799, without regard to the exemption claimed under the guise of a social club.

As to the proceeding for the forfeiture of the charter of this club, I would say that section 1105e, sub-section 51 of the Code of 1904 is not the only procedure for the forfeiture of charters; it is permissive, but not mandatory.

Chapter 145 of the Code of 1904, sections 3022-3028, provides that proceedings by *quo warranto* may be instituted in a circuit or corporation court, by the Attorney-General, the attorney for the commonwealth, or, if they refuse, by any individual. I think it best that the attorney for the commonwealth should move in such local matters, as the Attorney-General cannot be expected to appear in such cases in all of the courts of the State; indeed, it is impossible for him to do so, and at the same time to attend to many other positive and pressing demands on his time.

I am,

Very truly yours,

WILLIAM A. ANDERSON.

June 23, 1906.

FRED HARPER, Esq.,

Lynchburg, Virginia.

MY DEAR SIR:

Your letter of the 21st instant has been received and noted.

In reply, I would say that no opinion or suggestion has been given or made from this office as to the exemption from taxation of the bonds issued by school districts under chapter 255 of the acts of 1906.

The Attorney-General is not authorized by law to give official opinions to others than officers at the seat of government, but, answering your inquiry unofficially and personally, I would say that it seems to me that the bonds issued by district school boards under the act aforesaid are not exempt from taxation, for either State or local purposes.

Under section 183 of the Constitution, only obligations issued by the State since the 14th day of February, 1882, or thereafter, are exempt from taxation, both State and local. Under the last clause of that section, obligations issued by counties, cities and towns may be exempted by the authorities of such localities from local taxation, and it may be that, under this provision, bonds issued by school districts, or sub-divisions of counties, might be so exempted; but I am strongly inclined to the opinion that such bonds cannot be so exempted, unless such exemption is provided for by the Legislature. Section 488 of the Code follows section 183 of the Constitution, and no express authority for such exemption is found there; nor do I find such authority in any other general act of the Legislature.

It seems to me, therefore, that the bonds issued under chapter 255 of the acts of 1906 are subject to both State and local taxation.

You will understand that these views are but an expression of my personal opinion, and are in no sense official, and are intended for your personal consideration only.

Very truly yours,

WILLIAM A. ANDERSON.

June 23, 1906.

J. EUGENE POOL, ESQ.,

Newport News, Virginia.

DEAR SIR:

Your favor of the 21st instant received.

If you will examine sections 162 and 163 of the Virginia Code, you will see that no man who holds any office or post of profit, trust, or emolument of any description whatever, under the government of the United States, or who is in the employment of such government, can hold any office or post whatever of trust, profit or emolument under the government of this State, or under any county, city or town therein.

There are certain exceptions to the above general rule, as to fourth-class postmasters acting as notaries, school trustees or justices of the peace, or foremen, artisans and others employed in any navy yard or naval reservation being eligible to certain offices.

A United States commissioner does not come, however, within any of said exceptions and it is undoubtedly a post under the United States government which disqualifies him from holding any post or office of trust, honor or emolument under the government of this State, or under any county, city or town therein.

The rule as to members of the Legislature is entirely different.

Very truly yours,

WILLIAM A. ANDERSON.

July 2, 1906.

CAPTAIN HENRY C. DAVIS, U. S. A.,
Fort Hunt, Virginia.

MY DEAR SIR:

Your letter of June 25th, addressed to the Attorney-General, has been received and noted.

In reply thereto, I beg leave to say that the boundary line between the State of Virginia and the State of Maryland is the low water mark on the south bank of the Potomac river, as the river meanders from the West Virginia line to Smith's Point.

As I understand your letter, the boat on which you suspect liquor is sold is habitually anchored below the low water mark on the south or Virginia side of the Potomac river, probably opposite the city of Alexandria, or Alexandria county.

I am, therefore, of opinion that the Potomac river beyond low water mark is not Virginia territory, hence this State has no legal right to impose a license for the conduct of any business carried on outside of her territory. From this it necessarily follows that this State can neither require a license to sell, or prohibit the sale of, liquor on a vessel of any kind habitually anchored below low water mark.

Under the Virginia tax law, "no person can sell wine, ardent spirits, or malt liquors, or any mixture thereof, by retail upon any steamboat, canal boat, ship, barge, or other vessel at any wharf or landing, or upon any river, creek, sound or any of the other waters of the Commonwealth, without a license therefor," and the boat to which you refer does not seem to come under this provision.

There are agreements by compact and concurrent legislation between the States of Virginia and Maryland, as to fish and oysters, and the prosecution of certain offenses committed on the Potomac, but there is no provision as to the sale of liquor.

I conclude, therefore, that the State of Maryland has jurisdiction of this case, and the liquor laws of that State must control.

Very truly yours,

ROBERT CATLETT.

Assistant to the Attorney-General.

July 9, 1906.

HON. A. A. GRAY,
Palmyra, Virginia.

DEAR SIR:

Yours of the 30th ultimo has been carefully considered.

The question which you present has been very often passed upon by the Auditor of Public Accounts, both before and since my incumbency in office. He has again and again ruled that the attorney for the commonwealth, under the statutes of the State, cannot be paid a fee out of the State treasury in any felony cases, except where the case has been actually tried in a circuit or corporation court; and that, subject to the exceptions mentioned in the first paragraph of section 3528, they cannot be paid

out of the State treasury in any misdemeanor cases, except in a case which has been prosecuted in any such court to a judgment for the Commonwealth.

As stated, such has repeatedly been his ruling after the most careful consideration, from the time of the passage of the act of 1898 (acts of 1897-'98, page 868) until the beginning of my first term of office. Since then the question has arisen very often, and, after full conference with me, he has adhered to his former ruling; and I am strongly inclined to the view that he could come to no other conclusion.

Even if I entertained a different opinion, as you can very well understand, his ruling would have to stand, as I have no jurisdiction over his official acts. He can call upon me for advice, and will be protected if he will follow my advice, but he is not bound to follow my advice.

His decision in such a matter can only be overruled by the courts, in the manner prescribed by law.

I confess that the provisions of section 3527 are not only confused, but confusing, and, in so far as they refer to Commonwealth attorneys, are absolutely nugatory. It is the plainly expressed mandate of that statute that nothing in it "shall be construed as allowing fees in any cases which are now allowed by law," and you will observe that there is no statute anywhere which allows the Commonwealth attorneys any fee in any cases embraced in section 3527 or under the conditions mentioned in said section.

On my first examination of the law, I was strongly inclined to the conclusion which you have reached, the reasons for which you so forcibly present, but, on going over the matter with the auditor, and more careful consideration of the subject, I was satisfied that the auditor's view was correct.

He cannot allow a fee in any such case, unless it is plainly authorized and provided for by the statute. That is particularly true as to the office of Commonwealth attorney, in view of section 4089, which commands that:

"No fee to an attorney for the Commonwealth shall be payable out of the treasury, unless it is expressly so provided."

The only explanation which occurs to me of the language of section 3527 is that the draftsman of that statute (acts of 1897-'98, page 868) included the words "attorneys for the Commonwealth" through inadvertence in that section. At any rate, if it was the purpose of the General Assembly to authorize the payment of fees to Commonwealth's attorneys in such cases as are mentioned in section 3527, it failed to expressly direct and authorize such payment. Indeed, the language of the act renders it, in my opinion, inoperative as to attorneys for the Commonwealth.

I wish to say here what I have expressed repeatedly in other connections, that there are no officers in the Commonwealth who are more poorly paid, having reference to the responsibilities and importance of their duties, than are the Commonwealth's attorneys of the State. I am satisfied that none of them receive one-half the compensation which they ought to receive for the services which they are required to render; but the auditor and the Attorney-General have to take the law as it is written, and can add nothing to it and take nothing away.

Very truly yours,

WILLIAM A. ANDERSON.

October 5, 1906.

HON. F. P. SARGENT,

*Commissioner-General of Immigration and Naturalization,
Washington, D. C.*

SIR:

Your favor of the 3rd instant, enclosing copy of your letter of the same date to R. W. Duke, Esq., clerk of the corporation court of Charlottesville, this instant received.

By section 16 of the Virginia revenue law, a tax of \$1,000 is required to be paid whenever the seal of a court or notary shall be affixed to any paper, except in the cases exempted by law.

The cases of exemption are, by the terms of the statute, plainly those in which no tax upon the use of the seal of a court or notary is required to be paid by the laws of Virginia in the particular case.

I do not find that the use of a court seal upon a certificate of citizenship issued under the United States naturalization law is exempted from the above tax by any statute of Virginia.

By another provision of said section 16 of the revenue law of Virginia, any such seal is declared to be illegal and of no effect unless the same shall be superimposed upon an adhesive stamp; and the act provides that the sum of \$1.00 shall be paid for each of said stamps.

Any jurisdiction in the matter of the naturalization of aliens possessed by any State court is derived exclusively from, and conferred upon, such court by, the act of Congress upon that subject approved June 29, 1906.

By section 13 of that act, the charges which may be made in any such proceedings are specifically prescribed, and by section 21 of said act of Congress it is made a misdemeanor punishable by imprisonment of not more than two years or a fine of not more than one thousand dollars, or by both such fine and imprisonment, for any clerk, or his authorized deputy or assistant, of any court exercising jurisdiction in naturalization proceedings, to demand, charge, collect or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys specified in said act.

There is thus a palpable (though, doubtless, unintentional) conflict between section 16 of the State revenue law and the act of Congress referred to.

Clause 2 of article 6 of the United States Constitution prescribes that the United States Constitution and the laws made in pursuance thereof "shall be the supreme law of the land, and that the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Wherever, therefore, there is a conflict between a State law and a valid law of Congress, the provisions of the Federal statute are thus made paramount, and must prevail.

The above mentioned act of Congress, approved June 29, 1906, providing a uniform rule for the naturalization of aliens throughout the United States, is plainly a valid exercise of powers conferred upon Congress by the Federal Constitution.

While authority and jurisdiction are, by that act, conferred upon the State courts therein defined, to naturalize aliens as citizens of the United States, the exercise of such jurisdiction by such courts is not compulsory.

If any such State court shall take jurisdiction of any such proceedings under said act of Congress, such court and its officers must conform in all particulars to the requirements of that act, which is the supreme and paramount enactment upon the subject; and failure to do so on the part of any officer of such court will subject such officer to the penalties imposed by the act of Congress.

Very truly yours,

WILLIAM A. ANDERSON,
Attorney General of Virginia.

P. S.—I am sending a copy of this letter to Mr. Duke, the clerk of the corporation court of Charlottesville.

October 25, 1906.

D. G. SMITH, Esq.,

Clerk Corporation and Circuit Courts, Newport News, Va.

DEAR SIR:

Your favor of the 24th instant, enclosing letter of Mr. L. H. Larned, acting commissioner-general of the United States bureau of immigration and naturalization, this instant received.

I think there can be no question but that Mr. Larned is correct in the view he expresses as to the meaning and effect of the act of Congress of June 29, 1906, and that it would be a violation of the terms of that act for the clerk of the State court to collect from the applicant any tax or other charge for the use of the court seal upon a certificate of naturalization.

I enclose a copy of a letter addressed by me to Hon. E. P. Sargent, commissioner-general of immigration and naturalization, on the 5th instant, which gives my opinion upon the question.

If the clerk affixes an adhesive stamp to such certificate and makes the impression of the seal thereupon, he will, of course, have to pay the cost of such stamp out of his own pocket.

The better course for him to pursue (and I think it would be a safe course) would be to put the court seal upon the certificate without using an adhesive stamp, and then he would not be chargeable with the cost of the same.

I herewith return Mr. Larned's letter, and also enclose a copy of the rules and regulations adopted by the United States Department of Commerce and Labor in reference to the enforcement of the naturalization laws.

This letter will be submitted to Col. Marye, who will endorse his approval thereon.

Very truly yours,

WILLIAM A. ANDERSON.

A large number of opinions, either as to matters of no general interest, or upon questions covered by other opinions published in this or in former reports, are not embraced in this report. Besides the work of the office thus exhibited, oral advice has been given by my assistant or myself to the Auditor of Public Accounts and other officers of the State government upon numerous questions which have arisen in the administration of their respective offices or departments, of which no record has been or could well be kept.

By the act approved March 12, 1906, the Attorney-General was authorized to appoint an assistant. For this position I was fortunate in securing the services of Mr. Robert Catlett, a trained lawyer, who has had a valuable experience as attorney for the Commonwealth, and in other employments, and is thus well fitted for the efficient discharge of the duties of this office. I beg leave to make acknowledgment of the valuable assistance which I have received from him, and the important service he has rendered the Commonwealth in the conduct of the business of the office, and the preparation, trial and argument of cases in the courts.

Owing to the increase in the number of departments, bureaux and boards, the greater complexity of the transactions of, and of the laws regulating the officers and bodies in charge of these agencies of the State government, all incident to the growth in population and wealth, and the remarkable increase in activity in every department of business, and educational and industrial and professional endeavor throughout the State, the work devolved upon this office has been very greatly augmented in the last few years, and it would have been simply impossible to have met and discharged the varied duties of the office with any degree of satisfaction as to the results, but for the assistance which has been thus so efficiently provided.

I beg leave to append a statement of the contingent expenditures of the office for the fiscal year ending February 28, 1906, and from that date to October 31, 1906, of the current fiscal year.

All of which is respectfully submitted.

WILLIAM A. ANDERSON.

STATEMENT

*Showing the Current Expenses of the Office of the Attorney-General from
March 1, 1905, to March 1, 1906.*

1905.

March 1. Appropriation to defray current expenses to March 1, 1906, \$200 00
1905.

June 28. Warrant on Auditor to cover items paid for by
William A. Anderson—postage, telegrams, copy of
City Directory, and telephone for 5 months, \$3 per
month, February to June, inclusive.....\$46 86

July 3. Warrant on the Auditor for the Lawyers Co-
Operative Publishing Co., Vols. 1, 2 and 3, Supp.
Rose's notes..... 19 50

Warrant on Auditor for J. P. Bell Co. for Va.
Law Register from May, 1905, to April, 1906, incl. 5 00

Warrant on Auditor for L. D. Powell Co. for Vol.
V., Ency. of Evidence..... 6 00

Warrant on Auditor for Columbia Typewriter Co.
for repairing typewriter, 1 doz. note books, and 1-2
doz. pencils..... 8 75

July 11. Warrant on Auditor for So. Bell Tel. Co. for tele-
phone for 1 month (\$3) and long distance mes-
sage to Williamsburg..... 3 35

July 18. Warrant on Auditor for L. D. Powell Co. for Vol.
VI., Ency. Evidence..... 6 00

Aug. 9. Warrant on Auditor for So. Bel. Tel. Co. for tele-
phone for month of August..... 3 00

1906.

Jan. 5. Warrant on Auditor to cover items paid for
by William A. Anderson, as follows:
Telephone, Sept., Oct., Nov. and Dec., 1905,
and Jan., 1906, (\$3 per month).....\$15 00

Postage from Sept., 1905, to Dec., 1906..... 7 05

Telegrams 96

Letter basket and table..... 3 50

Copies of petition in La Fontaine and Nel-
son on Habeas Corpus, to Clerk U. S. Circuit
Court 3 70

To be used for postage..... 10 00 \$40 21 \$138 67

Jan. 5.	By warrant on Auditor for Everett Waddy Co. for sundries furnished this office....	8 12 15	
	Warrant on Auditor for Lawyers Co-Operative Publishing Co., Vol. 45, U. S. Reps..	5 00	
	Warrant for L. D. Powell Co., Vol. VII., Ency. of Evidence.....	6 00	
Feby. 26.	Warrant on Auditor to cover items paid for by William A. Anderson, as follows:		
	Mrs. R. E. Cella, stenographer (2 weeks), February 12-24, 1906.....	30 00	
	Three telegrams.....	78	
	Telephone mo. Feb'y, 1906, and long distance,	3 75	34 53
Feby. 26.	To be used for postage.....	3 65	\$ 61 33
			<hr/>
			\$200 00

STATEMENT

*Showing the Current Expenses of the Office of the Attorney-General from
March 1, 1906, to November 1, 1906.*

1906.		
March 1.	Appropriation to defray current expenses to March 1, 1907, \$400 00	
1906.		
March 15.	Warrant on Auditor for Rochester Carbon Co. (Baltimore branch) for 100 sheets Red Seal Carbon paper.....	\$ 3 50
March 16.	Warrant on Auditor for postage to mail 1905 Annual Reports to the commonwealth's attorneys	5 00
May 22.	Warrant on Auditor for Charles E. Picor for printing extra 1905 Annual Reports.....	25 96
June 6.	Warrant on Auditor to cover items paid for by William A. Anderson, as follows:	
	Telephone March, 1906.....	\$ 3 00
	Eight telegrams.....	2 54
	Postage	6 00
	Typewriter ribbon.....	75
	Paid C. C. Millner for hauling furniture and 2 large book cases from department of education.....	5 25
	of Education	5 25
	Opening drawer to safe.....	50
	Wm. E. Ross for Gregory's Forms Annotated	5 00
	Subscription to Va. Law Reg. from May, 1906, to April, 1906.....	5 00
	Other sundries.....	1 00
		<hr/> 29 14
July 30.	Warrant on Auditor for West Publishing Co. for books as follows:	
	Wigmore on Evidence, 4 volumes.....	\$ 26 00
	Taylor's Juris. & Proced. of the U. S. Sup. Court, 1 volume.....	6 00
	Words & Phrases Judicially Defined, 8 volumes	48 00
	Virginia & West Virginia Digest, 1st Vol.	6 00
		<hr/> 86 00

Sept. 11.	Warrant on Auditor for Everett Waddey Co. for sundries furnished this office.....	\$ 20 00	
	Warrant on Auditor for Rochester Carbon Co. (Baltimore branch) for 100 sheets Red Seal carbon paper	3 50	
	Warrant on Auditor for Baughman Stationery Co. for sundries furnished this office.....	5 25	
	Warrant on Auditor to cover items paid for by William A. Anderson—postage, telegrams, long distance telephone, etc., and to E. S. Shields for typewriting brief in Commonwealth v. A. C. L. R. Co.....	29 16	
		<hr/>	207 09
1906.			
Nov. 1.	Bal. to credit of contingent fund.....	192 09	
		<hr/>	\$400 00

APPENDIX

COPY OF BILL FILED BY VIRGINIA.

IN THE SUPREME COURT OF THE UNITED STATES.

ORIGINAL No. —.

COMMONWEALTH OF VIRGINIA

v's.

STATE OF WEST VIRGINIA.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Commonwealth of Virginia, by William A. Anderson, her attorney-general, brings this, her bill, against the State of West Virginia, and shows the court that:

I.

On the first day of January, 1861, your oratrix was indebted in about the sum of \$33,000,000 upon obligations and contracts made in connection with the construction of works of internal improvements throughout her then territory. By far the greater part of this indebtedness was shown by her bonds and other evidences of debt, given for the large sums of money which she from time to time had borrowed and used for the above purpose; but a portion of her liabilities, though arising under contracts made before that date, had not then been covered by bonds issued for their payment.

In addition to the above liability to the general public, there was a large indebtedness evidenced by her bonds and other liabilities held by and due to the commissioner of the sinking fund and the literary fund of the State, as created under her laws amounting, the former to \$1,462,993.00, and the latter to \$1,543,669.05, as of the same date.

The official reports and records showing the exact character and amounts of the public debts thus contracted and how the same was created, are referred to and will be produced upon a hearing of the case.

II.

That portion of the territory embraced in what constitutes the present territorial limits of Virginia was prior to that date devoted mainly to agriculture and to some extent to grazing and manufacturing, which afforded its chief sources of revenue, while that portion included in what now constitutes the State of West Virginia had vast potentialities of wealth and revenue in the undeveloped stores of minerals and timber, which had been known many years prior to the date named, and their prospective values, if made accessible to the markets of the country, were understood to be well nigh beyond computation. It was to hasten and facilitate the development of these sources of wealth and revenue by the construction of graded roads, bridges, canals and railways, extending through the State from tidewater towards the Ohio river, that the Commonwealth of Virginia, in the first quarter of the nineteenth century, entered upon a system of public internal improvements, which it was contemplated should include the entire territory of the State, and embraced in its design the construction of public works adapted, not to the needs of any one portion of the State alone, but of the entire State, as a unit of interest. The larger part of these works were constructed east of the Appalachian range, as leading up to the undeveloped territory west thereof, but a very considerable portion of them were, at an expense of several millions of dollars, constructed west of said range within the territory now included in the State of West Virginia; and the completion of some of the main lines of improvement beyond the said range through to the Ohio river, since the first day of January, 1861, has increased to a very great and material extent the values of real estate, including coal and timber, in the said territory now included in West Virginia, thus carrying into effect the original scheme of improvement, which could not have been done had not the lines east of said range been first constructed; and your oratrix believes and avers that the property values within the limits of West Virginia have been enormously enhanced in large measure by reason of these improvements. The money appropriated to the payment of the annually accruing interest on the said debt, prior to January 1, 1861, and to the formation of the sinking fund for the ultimate redemption thereof, was derived from taxes imposed upon the property subject to taxation throughout the entire State. The first of this indebtedness to be contracted was a small amount borrowed by the State in the year 1820 and the debt was thereafter from time to time continued and increased by renewals and new loans until it reached the amount above stated in 1861.

III.

The Commonwealth of Virginia was induced to enter upon the construction of this general system of internal improvement, in a very large measure for the purpose of developing the aforesaid resources of the western portion of the State, now constituting the State of West Virginia, thereby ameliorating the condition of her citizens residing therein; and it was with this view that she took upon herself the burden of the public debt for which her bonds were issued, without which debt such improvements could

not have been undertaken. In corroboration of this view it will appear an inspection of the legislative records of the State, where the vote carrying the appropriations for such public improvements was recorded, that in nearly every instance a majority of those members of the House and Senate of the original State, who then represented the counties now composing West Virginia, voted for such appropriations. Indeed, it appears from those records that a great majority of the acts of the Legislature of Virginia under which said indebtedness was created, would have failed of their passage, had the representatives from the counties embraced in what is now West Virginia opposed their enactment, and that a very large proportion of said indebtedness was actually contracted over the votes of a majority of the representatives from the counties and cities embraced in the limits of the present State of Virginia. This will be found to be true, not only in the Legislature for one single session, but in the Legislatures for many successive years, thus showing it to have been the fixed policy of the people in that portion of the State now constituting West Virginia to participate in, support and carry out this general plan of internal improvements in the State.

IV.

The development of this system of public improvements thus entered upon was, from its character and extent, necessarily progressive, and the same extended with the general growth and increasing needs of the State, and was incomplete, as above stated, in 1861, though a very considerable portion of such improvements had, prior to that time, been constructed as above stated, in the territory now constituting West Virginia, in order to meet the needs of the people of that portion of the State for their local purposes. As early as the year 1816 a board of public works was created by law for the State, the members of which were elected by the voters of the State at large, and this board had in charge the construction and supervision of all the works of public improvement in this State. The annual reports of this board will be referred to for information as to the character, extent, cost and location of the public works and internal improvements constructed in the State prior to January 1, 1861. The amounts expended upon the construction of these works in what is now West Virginia can only be accurately ascertained by the examination of the numerous entries in the records of this board extending through a number of years and showing such expenditures as were made from time to time.

V.

On the 17th of April, 1861, the people of Virginia, in general convention assembled, adopted an ordinance by which it was intended to withdraw Virginia from the Union of the States. From this action a considerable portion of the people of Virginia dissented, and organized a separate government which was known and recognized by the government of the United States as the "Restored State of Virginia," and will be hereafter referred to in this bill as the "Restored State."

VI.

On the 20th day of August, 1861, the restored State of Virginia, in convention assembled, in the city of Wheeling, Virginia, adopted an ordinance to "provide for the formation of a new State out of the portion of the territory of this State"; section 9 of which ordinance was as follows, to-wit:

"9. The new State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia, prior to the first day of January, 1861, to be ascertained by charging to it all the State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government since any part of said debt was contracted, and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during said period. All private rights and interest in lands within the proposed State, derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in the State of Virginia."

VII.

On the 31st day of December, 1862, an act was passed by the 37th Congress of the United States providing that the new State thus formed in pursuance of the ordinances of the Wheeling convention above referred to, should, upon certain conditions, be admitted into the Union by the name of West Virginia, with a constitution which had theretofore been adopted for the new State by the people thereof, such condition being that a change should be made in such proposed constitution in regards to the liberations of slaves therein; and it was provided by this act of Congress that whenever the president of the United States should issue his proclamation stating the fact that such change had been made and ratified, thereupon the act admitting the new State into the Union should take effect sixty days after the date of such proclamation. Such proclamation declaring these conditions to have been complied with was duly made by President Lincoln on April 20, 1863, and West Virginia, in conformity therewith and by the operations of said act of Congress, was admitted into the Union as a State on the 20th day of June, 1863; and thereupon the State of West Virginia became fully organized, and each of its departments of government commenced operations on the date last named.

VIII.

Pending the admission of the State of West Virginia to the Union, the General Assembly of the restored State of Virginia passed, February 3, 1863, the following act:

"That all property, real, personal and mixed, owned by, or appertaining to, this State, and being within the boundaries of the proposed State of West Virginia, when the same becomes one of the United States, shall thereupon pass to and become the property of the State of West Virginia, and without any other assignment, conveyance or transfer or delivery than

is herein contained, and shall include among other things not herein specified all lands, buildings, roads and other internal improvements or parts thereof, situated within said boundaries, and vested in this State, or in the president and directors of the literary fund, or the board of public works thereof, or in any persons for the use of this State, to the extent of the interest and estate of this State therein; and shall also include the interest of his State, or of the said president or directors, or of the said board of public works, in any parent bank or branch doing business within said boundaries and all stocks of any other company or corporation, the principal office or place of business whereof is located within said boundaries, standing in the name of this State, or of the said president or directors, or of the said board of public works, or of any person or persons, for the use of this State.

5. That if the appropriations and transfers of property, stocks and credits provided for by this act take effect, the State of West Virginia shall duly account or the same in the settlement hereafter to be made with this State, provided that no such property, stocks and credits shall have been obtained since the reorganization of the State government.

Your oratrix is informed, believes and so charges, that the property which was by the operation of this act, appropriated and transferred from the State of Virginia to the State of West Virginia, and which was subsequently received and enjoyed by the State of West Virginia, consisted of a number of items, and the value of it amounted, in the aggregate, to several millions of dollars, the exact amount your oratrix is unable at this time more definitely to ascertain and state. That of the bank stocks alone, which were transferred under the operation of this act, the State of West Virginia realized and received into her treasury from the sale thereof about six hundred thousand dollars; and that no part of the property so received by West Virginia had been obtained by Virginia since April, 1861.

IX.

And by a further act of the General Assembly of the restored State of Virginia passed on the next day, February 4, 1863, it was enacted.

"1. That the sum of one hundred and fifty thousand dollars be, and is hereby, appropriated to the State of West Virginia out of moneys not otherwise appropriated, when the same shall have been formed, organized and admitted as one of the States of the United States.

"2. That there shall be, and hereby is, appropriated to the said State of West Virginia, when the same shall become one of the United States, all balances, not otherwise appropriated, that remain in the treasury, and all moneys not otherwise appropriated, that may come into the treasury up to the time when the said State of West Virginia shall become one of the United States; provided, however, that when the said State of West Virginia shall become one of the United States, it shall be the duty of the auditor of this State to make a statement of all the moneys that up to that time have been paid into the treasury from counties located outside of the boundaries of the said State of West Virginia, and also of all moneys that up to the same time have been expended in such counties, and the unexpended surplus of all such moneys shall remain in the treasury and continue to be the property of this State."

And this last named sum of one hundred and fifty thousand dollars, together with the other sums belonging to the State of Virginia, were turned over to and received or collected by the new State of West Virginia after its formation as aforesaid.

X.

The Constitution of the State of West Virginia, which became operative and was in force when she was admitted into the Union, contained the following provisions:

By section 5 of article VIII of said Constitution it was provided:

"5. No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

And by section 7 of article VIII it was provided:

"7. The Legislature may, at any time, direct a sale of the stocks owned by the State, in banks and other corporations, but the proceeds of such sale shall be applied to the liquidation of the public debt, and hereafter the State shall not become a stockholder of any bank."

And by section 8 of article VIII it was provided:

"8. An equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, shall be assumed by this State, and the Legislature shall ascertain the same as soon as may be practicable and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years."

At the time the Constitution containing these provisions was adopted, West Virginia did not owe, and could not have owed, any "public debt" or "previous liability," except for her just, contributive proportion of the public debt of the original State of Virginia, and for the money and property of the original State which had been transferred to and received by her under the acts of the General Assembly of the restored State of Virginia above set forth. By the provisions of section 8 of article VIII above cited, she expressly assumed her equitable proportion of the debt of the original State as it existed prior to the first day of January, 1861. By section 5 of the same article VIII, above set forth, her Constitution forbade the creation of any debt "except to meet casual deficits in the revenue, to redeem a previous liability of the State, etc., and there was not and could not have been any such "previous liability," except her portion of the debt of the original State, and her liability for the money and property of the original State which had been transferred to and received by her under the acts of the General Assembly of the restored State. And section 1 of the same article of her Constitution, above cited, authorized a sale of the stocks owned by the State, in banks and other corporations, the proceeds to be applied to the liquidation of the public debt; and she had no such stocks, except those acquired, as above stated, from the original State. This section of her Constitution also expressly required the proceeds of such sale to be applied to her public debt, which public debt could only have been her proportion of that of the original State of Virginia, and her liability for the money and property of the original State which had been transferred to her.

XI.

After the year 1865 and prior to the year 1872 attempts were made at different times by the public authorities of both the Commonwealth of Virginia and the State of West Virginia, respectively, to ascertain their contributive proportions of the common liability resting upon them for the public debt of Virginia, contracted prior to January 1, 1861; but all such attempts proved ineffectual and vain, and no accounting or settlement of any kind was ever had between the two States in regard to this debt.

XII.

The efforts looking to a settlement by the concurrent action of the two States having proved abortive, and your oratrix being anxious to adjust the portion of the common debt which it was right she should assume and pay, upon terms just and equitable alike to the public creditors and to West Virginia, made several efforts to effect such a settlement.

The first of these was made by the General Assembly which was chosen at the close of the period of "destruction and reconstruction," which, following closely upon the period of disastrous war, had inflicted upon her people injuries and losses the harmful effects of which were then by no means realized.

The purpose of the representatives of the Commonwealth, then just emerging from conditions which had impoverished her people and paralyzed their productive energies, to assume and pay to the utmost every dollar which her most exacting creditor could demand of her, was expressed in the act of her General Assembly, approved March 30, 1871.

By the terms of settlement embodied in this act, your oratrix undertook to give her obligations bearing six per cent. interest for two-thirds of the principal, and for two-thirds of the **past due** interest, and also for two-thirds of the interest on that accrued interest, which accrued interest, to the extent of nearly \$8,000,000, had been funded after the war in new bonds of Virginia, thus capitalizing at six per cent. not only the interest, but interest upon that interest.

It was soon apparent that Virginia had by this measure assumed a heavier burden than she was able to bear, and so other plans for the settlement of the State debt were attempted by the acts of the General Assembly of the Commonwealth approved March 28, 1879, and February 14, 1882, until at length a final and satisfactory settlement of the portion of the debt of the original State which Virginia should assume and pay was definitely concluded by the act of February 20, 1892. Your oratrix will file copies of each of the acts of her General Assembly herein mentioned as exhibits to this bill, and to be read as part hereof.

XIII.

As farther indicating the great burden which your oratrix, notwithstanding the disaster and loss above referred to, has assumed and met on account of the common debt of the undivided State, she shows your honors

that, since January 1, 1861, she has actually paid off, retired and discharged, or assumed and given her new outstanding obligations for the aggregate sum of over seventy-one million dollars, as will more particularly appear from a statement thereof filed as an exhibit herewith and hereinafter referred to as exhibit number 7.

It is proper in this connection to call attention to the fact that, while your oratrix has made this large contribution towards the settlement of the common debt, West Virginia has not paid one dollar thereof; and although in the early years of her history she repeatedly conceded that there was some portion of that debt which should equitably be borne by her, her properly constituted authorities have for a number of years refused to recognize that any liability whatever rested upon her, on that account, and have declined even to enter into an accounting or to treat with your oratrix in reference thereto.

It would seem from the above statement that Virginia has already done as much under all the circumstances as she could be fairly expected to do towards paying off the common public debt of the old State. Such was the view and purpose of the General Assembly in the several acts above recited.

A question may be raised as to whether such was the effect of the language used in the act of March 30, 1871, with respect to the certificates issued thereunder; but the great mass of the creditors entitled to whatever may be due upon the unfunded obligations of the undivided State, have in effect agreed, as will be hereinafter shown, to waive any such question, and to accept the adjudication of this court in this cause against West Virginia in full discharge of all their claims, thus giving that effect to the act of March 30, 1871, which it was the purpose of your oratrix that it should have.

XIV.

By each of the acts for the settlement of her debt above recited, it was provided that the bonds of undivided Virginia, so far as not funded in the new obligations given by your oratrix, should be surrendered to and held by your oratrix, who either by the expressed terms of the settlement provided for by said acts, or as a just and equitable consequence therefrom, received and holds said original bonds, so far as unfunded, in trust for the creditors who deposited the same with her, or her assigns; and certificates to this effect were given by your oratrix to each creditor whose old Virginia bond was so surrendered to her.

Having as an essential part of the contract for the adjustment of the common debt of the original State entered into this fiduciary relation in reference to these bonds, it became her obligation of duty to the creditors who had confided their securities to her keeping, as well as to her own people, whose credit and fair name required that these obligations of the old State should be fairly and honorably adjusted, to do all in her power to bring about a determination of West Virginia's just liability in respect thereto, and if possible the recognition and settlement of the same by that State.

Only after exhausting every means of amicable negotiation, and having her overtures to that end repeatedly refused, and as a last resort, has your oratrix been constrained at length reluctantly to apply to this, the only tribunal which can afford relief, for an adjudication and determination of this question, of such vast importance to your oratrix and to all of her people.

All of the bonds and obligations and other evidences of the indebtedness of the original State of Virginia outstanding and contracted on January 1, 1861, as stated in paragraph I of this bill, except a comparatively insignificant sum, not amounting to one per cent. of the aggregate of those liabilities, have been taken up and are now actually held by your oratrix, and she has the right to call upon West Virginia for a settlement with respect thereto. They are too numerous and involve too great a number of transactions running through many years, for it to be practicable to exhibit them here in detail, but the original bonds and other evidences of indebtedness so paid off or retired and now held by your oratrix, will, when it shall be proper to do so, be exhibited to the master, who shall take the accounts hereinafter prayed for.

XVI.

Of the evidences of indebtedness representing principal and interest of the liabilities of Virginia contracted before her dismemberment, those so paid off or retired by your oratrix and now held by her in her own right, exclusive of the amounts represented by the certificates issued under the funding acts aforesaid, amount in the aggregate, including the interest to be fairly computed thereon on this date, to a very large sum, considerably in excess of \$25,000,000, by far the greater part of it being now, of course, on account of the interest computed thereon, at the rate of six per cent. per annum, the then legal rate in both States.

For all of these obligations taken up and payments made on account of the common debt, your oratrix has in her own right a just claim against West Virginia for contribution to the extent of West Virginia's equitable liability therefor.

XVII.

In addition to the above bonds, there were outstanding on the 1st day of January, 1861, certain obligations of the State of Virginia as guarantor upon some of the securities issued by internal improvement companies, which your oratrix was called upon to provide for and settle. They were not comparatively of a very large amount, however, and the questions involved in connection therewith can be stated and settled in the account hereinafter prayed for to be taken between the two states; and in such accounts your oratrix will also ask to have included all such items of debit against the State of West Virginia on account of the property and moneys of the original State which was received or appropriated by West Virginia which may not have been specifically or accurately stated herein. These items of accounting between the two States are so numerous and varied and extend

throughout a period of so many years' duration that it is impossible from the nature of the case to state all of them in this bill; and the account between the two States can only be taken and settled, and the balance due your oratrix thereon ascertained, under the supervision of a court of equity.

XVIII.

Your oratrix charges that the liability of the State of West Virginia, for a just and equitable proportion of the public debt of Virginia, as of the time when the State of West Virginia was created, rests upon the following among many grounds which might be indicated here:

First. That the area of the territory now known as the State of West Virginia formed about one-third of the territory of the Commonwealth of Virginia when this public debt was created, and its population included about one-third of that of the original State at the time of its dismemberment. And the State of West Virginia did, by the acquisition and appropriation of such territory, with the population thereof, assume therewith liability for a just and equitable proportion of the public debt created prior to the partition of such territory.

Second. The liability of West Virginia for a just proportion of the public debt of the Commonwealth of Virginia, as it existed prior to the creation and erection of the State of West Virginia, forms part of her very political existence, and is an essential constituent of her fundamental law as shown in the said ordinance adopted at Wheeling on the 20th day of August, 1861, in which the method of ascertaining her liability on account of said debt is prescribed. And this liability is embedded in the Constitution under which she was admitted as a State into the Federal Union, and was one of the conditions under which she was created a State and admitted into the Union.

Third. The State of West Virginia has further, by the repeated enactments and joint resolution of her Legislature, recognized her liability for a just proportion of this debt.

Fourth. The State of West Virginia has, since her creation as a State, received from the State of Virginia, real and personal property, amounting in value to many millions of dollars, and held and enjoyed the same, but upon expressed conditions that she should duly account for the same in a settlement thereafter to be had between her and the Commonwealth of Virginia.

Fifth. While the transfer of this property, real and personal, and also of certain moneys of the Commonwealth of Virginia, purport to have been made to the State of West Virginia by the act of "the Restored Government of Virginia," there were in fact represented in said "restored government" and in the Legislature thereof, no other people and no other territory than that which then, as now, constitute the State of West Virginia.

XIX.

The General Assembly of Virginia being anxious to affect a settlement of the portion of the common debt of the undivided State which remained

unadjusted, and if possible to bring this about with the friendly co-operation and concurrence of West Virginia, adopted: "A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by the State of West Virginia, and for the application of whatever may be received from the State of West Virginia to the payment of those found to be entitled to the same," approved March 6, 1894. A copy of this resolution will be hereinafter shown as an exhibit to this bill, to be read as a part thereof.

Under this resolution a commission of seven members was appointed for the purpose of carrying into effect the objects expressed therein.

The efforts made by this commission, acting under the above resolution to bring about a settlement with West Virginia having proved ineffectual, and the overture which the commission, with the active co-operation of the Honorable Charles T. O'Ferral, the then governor of the Commonwealth, made to the authorities of West Virginia for the purpose of bringing about a friendly adjustment having been declined, the General Assembly of Virginia passed the act approved March 6, 1900, entitled, "An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the protection of the Commonwealth of Virginia in the premises," the purpose of which act is sufficiently set forth in its title, and a copy of the act will also be hereinafter shown as one of the exhibits herewith filed.

XX.

The commission acting under said last mentioned act made most earnest efforts to bring about an amicable adjustment of the matters herein set forth with West Virginia, but all of their efforts in that behalf proved ineffectual and unavailing. An application to this honorable court being thus left as the only alternative for Virginia, this suit has been instituted at the request and direction of the said commission, and in strict conformity with the provisions of the said act of March 6, 1900, all of which will be more fully and completely shown by the report of the said commission dated January 6, 1906, made to the General Assembly of Virginia now in session, a copy of which report and the documents accompanying the same, and referred to therein, will be exhibited as a part of this bill.

XXI.

In order that the matters hereinbefore referred to may be more fully shown to the court, your oratrix files herewith certain exhibits (eight in number) which she prays may be read as part of this bill, to-wit:

Exhibit number 2. A copy of the act of the same General Assembly of Virginia, March 30, 1871, entitled an act to provide for the funding and payment of the public debt.

Exhibit number 2. A copy of the act of the same General Assembly of March 28, 1879, entitled an act to provide a plan of settlement of the public debt.

Exhibit number 3. A copy of the act of February 14, 1882, of the same General Assembly, entitled an act to ascertain and declare Virginia's equitable

share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular payment of the interest thereon.

Exhibit number 4. A copy of the said act of the same General Assembly, approved February 20, 1892, entitled an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled, etc.

Exhibit number 5. A copy of the said joint resolution of the said General Assembly of March 6, 1894, providing for the appointment of a commission.

Exhibit number 6. A copy of the said act of March 6, 1900, under which the powers of the said commission were enlarged and the institution of this suit authorized.

Exhibit number 7. Showing amounts paid off since January 1, 1861, or assumed and now carried by Virginia on account of the old debt of the undivided State.

Exhibit number 8. A copy of the report of the said Virginia commission made to the General Assembly of that State, dated January 6, 1906, together with the accompanying papers.

XXII.

Forasmuch, therefore, as your oratrix is remediless save in this form and forum, and to the end that the State of West Virginia may be duly served, through her governor and attorney-general, with a copy of this bill, your oratrix prays that the said State of West Virginia may be made a party defendant to this bill, and required to answer the same, that all proper accounts may be taken to determine and ascertain the balance due from the State of West Virginia to your oratrix, in her own right and as trustee as aforesaid; that the principles upon which such accounting shall be had may be ascertained and declared, and a true and proper settlement made of the matters and things above recited and set forth; that such accounting be had and settlement made under the supervision and direction of this court by such auditor or master as may by the court be selected and empowered to that end, and that proper and full reports of such accounting and settlement may be made to this court; that the State of West Virginia may be required to produce before such auditor or master, so to be appointed, all such official entries, documents, reports and proceedings as may be among her public records or official files and may tend to show the facts and the true and actual state of accounts growing out of the matters and things above recited and set forth, in order to a full and correct settlement and adjustment of the accounts between the two States; that this court will adjudicate and determine the amount due to your oratrix by the State of West Virginia in the premises; and that all such other and further and general relief be granted unto your oratrix in the premises as the nature of her case may require or to equity may seem meet.

And your oratrix will ever pray, etc.

WILLIAM A. ANDERSON,
Attorney-General of Virginia.
HOLMES CONRAD.

COPY OF DEMURRER FILED BY WEST VIRGINIA.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

ORIGINAL NO. —.

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA

The demurrer of the State of West Virginia, defendant above named, by William M. O. Dawson, governor, and Clark W. May, attorney-general of said State of West Virginia, to the bill of complaint of the Commonwealth of Virginia, complaint, by William A. Anderson, attorney-general of said Commonwealth of Virginia.

The defendant, the State of West Virginia, above named, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are set forth and alleged, or in any way or manner, demurs thereto, and for the cause of demurrer shows:

First: The jurisdiction of this court does not extend to the character of demands, alleged in the bill in this case, being in substance simple demands for money, and this court could not enforce a judgment for money against one of the sovereign States of the Union of the United States in any way or manner.

Second: The bill on its face shows that the said Commonwealth of Virginia has no suable interest in the demands for money set out therein which would entitle her to the relief prayed for therein, and that the said demands, if recovered, would be only for the benefit of certain individuals, who are the holders of the alleged evidences of debt mentioned in said bill.

Third: The bill on its face shows that so far as said Commonwealth of Virginia may have any ownership of any of such alleged evidences of debt, the acts of the Legislature of said Commonwealth, claimed by the said attor-

ney-general thereof as authority to institute this cause, do not in fact authorize any suit therefor to be instituted, but only authorities, if any authority at all is given, action on the part of the commission in said bill mentioned and said attorney-general for the benefit and at the expense of the individuals in the bill and exhibits called "certificate holders," which is in effect giving the use of the name of said Commonwealth to such "certificate holders" for the purpose of attempting to collect their alleged private money demands against said State of West Virginia.

Fourth: The said bill does not sufficiently and definitely set out therein the alleged demands for money claimed therein, so that a complete and proper answer can be made thereto.

Wherefore, and for divers other good causes of demurrer in the said bill, this defendant demurs thereto and humbly demands the judgment of this court whether she shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with her costs and charges in the matter most wrongfully sustained.

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