

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1909

RICHMOND
DAVIS BOTTOM, SUPERINTENDENT OF PUBLIC PRINTING
1910

ATTORNEYS GENERAL OF VIRGINIA

FROM 1755 TO 1910.

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.....	1906-1910.

Robert Catlett, Assistant to the Attorney General, 1906-1910.

T. Gray Haddon, Clerk.

REPORT

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.

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

SIR:

In accordance with the requirements of law, I beg leave to submit my report embracing the transactions of this office since October 31, 1908.

As this is the last report that I will make before the expiration of my term of service, I have included transactions of this office down to the first of December, the latest period to which I could make up my report in time for the same to be laid before the General Assembly at the opening of its next session.

The cases in which the Attorney General, or his assistant, appear as counsel for the Commonwealth, which have been disposed of during the past year, or which remain undecided, are mentioned in the succeeding pages of this report under the titles of the several courts in which those suits have been pending.

In the Supreme Court of the United States.

1. VIRGINIA *v.* WEST VIRGINIA.—This is an original suit which was brought by me in 1906 at the instance, and with the hearty concurrence, of the Virginia Debt Commission.

The reasons which rendered its institution exceedingly important, if not necessary for the protection of the rights and interests of the Commonwealth, are fully stated in my reports for the years 1906 and 1907, and 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 wisdom of the action taken has been emphasized by subsequent events.

At the time of its institution there was good reason to believe that if it had not been brought a suit would have been instituted against the Commonwealth in the manner indicated in my reports for 1905 and 1906.

The following is an outline of the procedure so far in the case:

In March, 1906, the bill was filed, and the defendant was given until the October term, 1906, to demur, plead, or answer.

At the October term, 1906, counsel for West Virginia filed a demurrer, and afterwards an amended demurrer to the bill.

Thereupon the cause was fully argued, both in print and orally, upon the demurrer, and on May 27, 1907, the court decided the demurrer in favor of Virginia, its unanimous opinion overruling the demurrer being delivered by the Chief Justice.

The effect of this decision was to hold that the Commonwealth had presented a cause of action by her bill, of which the United States Supreme Court had jurisdiction, and upon which she was entitled to recover if the facts alleged in her bill should be established by proofs, though this decision was "without prejudice."

West Virginia was thereupon given until the October term, 1907, to answer the bill.

Her answer was filed in 1907, and issue was taken upon it.

Thereupon there were various proposals for a decree referring the cause to a master, and directing the accounts which should be taken in order to ascertain the nature and extent of West Virginia's liability.

The cause was again fully argued upon these proposals, by printed briefs and orally, by the counsel for both parties.

On the 4th of May, 1908, the court entered its decree referring the cause to a special master to be thereafter designated, to take the accounts deemed necessary or proper for the proper decision of the cause.

The counsel for West Virginia thereupon applied to the court to make a number of modifications in this decree, only one of which requests (and that in no aspect prejudicial to Virginia) was granted by the court.

Thereupon after nominations by the respective counsel, the court appointed Hon. Charles E. Littlefield, formerly of Maine, but now a member of the bar of the city of New York, as special master, to take the accounts ordered in the decree of reference.

Mr. Littlefield's selection was entirely satisfactory to the representatives of both litigants.

He gave a preliminary hearing on the 29th of June, 1908, and has subsequently given a number of hearings in the city of Richmond, and several in the city of New York.

Expert accountants, employed by the respective parties, began to state the accounts on behalf of the plaintiff and defendant respectively in the early part of 1908, and were employed, each with a number of assistants, almost continuously from that time until September of the present year in stating and restating the accounts directed by the decree of reference, in accordance with the contentions of the respective parties.

The statements and schedules exhibiting these accounts accordingly were finally completed under the direction of the master and filed with him on the 9th of October, 1909.

The case was set down for argument before the master upon the accounts and schedules so made up and filed before him, beginning on the 4th of November, 1909, in the city of New York.

The opening argument for Virginia was made by the undersigned. He was followed by Mr. G. W. McClintic, one of the counsel for West Virginia. He was followed by the Honorable Charles E. Hogg, of counsel for West Virginia. Then Mr. John B. Lightfoot, Jr., argued two of the important questions in the case, on behalf of Virginia. He was followed by the Honorable John C. Spooner, of counsel for West Virginia. Then Major Holmes Conrad spoke on behalf of the plaintiff, or of parties interested in any recovery in the case.

Hon. John G. Carlisle, one of the leading counsel for West Virginia, was to have concluded the argument for West Virginia, but he was attacked with

sudden sickness on the morning of the day upon which he was to begin his argument, and the farther and final hearing before the master has been adjourned on account of that regrettable event until the 28th instant, when it is to proceed and be concluded, either Mr. Carlisle or one of the other able counsel for the defendant making the closing argument for West Virginia, and Mr. Randolph Harrison making the concluding argument in the case before the master on behalf of Virginia.

After those arguments shall have been ended, the master will doubtless require several weeks in order to determine his findings and to complete his report, which will necessarily involve great labor, and a full statement of the facts and considerations upon which his conclusions shall be based.

This report of the master will be filed in the United States Supreme Court, and thereafter, at such time as shall be determined by that court, the case will be set down for argument and heard upon the report and any exceptions thereto, and upon such other matters as it may be necessary for the court to pass upon in order to decide the issues presented in the cause.

It is to be hoped that the report of the special master will be so full, complete, and satisfactory that the court will be enabled, upon that report, and the evidence returned therewith, to finally decide the cause.

Just what the course of procedure will be, however, cannot be certainly anticipated.

We can rest assured that the able and resourceful counsel for West Virginia will make every defense, and interpose every obstacle in the way of a recovery by Virginia, which the ingenuity and learning of such skillful and experienced counsel can suggest.

One, and it may be more than one, of the greatest and most important contests which have, or are to, come off in this memorable litigation, are yet to take place in this court of last resort.

While West Virginia is represented by counsel who are among the foremost lawyers in America, who, with zeal and ability, have made, and will make, every defense against the claims of Virginia which their trained minds can suggest, we have the satisfaction of knowing that the cause which Virginia presents is a just one, and that the consummate ability even of such distinguished counsel cannot change its character.

The progress of this cause towards a final decision at the earliest possible date has been persistently and continuously pressed by the counsel for Virginia at every stage of the litigation, against the efforts of opposing counsel to secure repeated postponements and delays, some of which delays, however, were unavoidable.

In view of the magnitude and complexity of the case, the great mass of accounts and statements, records, statutes, and documentary and other evidence, covering transactions extending over the forty years prior to January 1, 1861, and embracing a number of important transactions since that date, which had to be examined, investigated, and passed upon, and from which the accounts and schedules representing the contentions of the parties respectively in the different branches of the case presented by the seven general accounts directed by the seven paragraphs of the decree, had to be derived, the progress of the case cannot be said to have been, under all the circumstances, unduly retarded.

It has been my earnest desire to see this litigation (second only in importance to the Commonwealth to that involving the validity of her Constitution, and of the suffrage article thereof, so happily decided in her favor during my first term of office), satisfactorily and finally ended before the end of my term of service. And it is a source of sincere regret to me to realize that, notwithstanding my efforts in that direction, this result cannot be now accomplished.

A great deal has been done in the case since my last report was made, and results accomplished, which it would have been impossible to have achieved without the valuable assistance of Mr. Randolph Harrison and Mr. John B. Moon, associate counsel for Virginia, in connection with the preparation, as well as in the argument, of the case.

Major Holmes Conrad, counsel for parties interested in any recovery in the suit, has also rendered valuable services upon the hearings and argument of the case before the special master.

I wish also to make special acknowledgment of the valuable assistance of Mr. John B. Lightfoot, Jr., in connection with the making up of the accounts for Virginia, and in the preparation of the case, and in arguing two of the important issues presented in the case.

The importance of this litigation to Virginia is shown by my last four annual reports, and will be manifest from the following statement:

In the first place, Virginia has paid off or redeemed and taken up several million dollars of principal and a large amount of the interest of the public debt of the undivided State since January 1, 1861, the date fixed for the settlement between the two States.

For the sums so paid she has a just and equitable claim against West Virginia for reimbursement from that State to the extent of West Virginia's *aliquot* liability to contribute to the satisfaction of the common indebtedness which has been thus paid off by Virginia.

In the second place, there is a large amount of the unfunded and unsettled indebtedness of the undivided State for the payment of which to the extent of her equitable liability therefor West Virginia is bound: but as to which Virginia has not been as yet released.

She has a right to look to West Virginia to assume and pay her equitable proportion of this large indebtedness, amounting to some \$12,700,000.00 as of July 1, 1871, in exoneration of Virginia, and in discharge of West Virginia's just obligation to satisfy the same.

The authorized representatives of the common creditors, recognizing that Virginia has already assumed or paid as large a sum on account of the debt of the Commonwealth contracted prior to her dismemberment as she could, under all of the circumstances of the case, reasonably be expected to discharge, have agreed, on behalf of the creditors represented by them, constituting nine-tenths, or more, in amount of those common creditors, to accept such sum as they may receive or be entitled to under any adjudication against West Virginia in this suit, in full discharge and acquittance of any and all claims or demands which they have against the Commonwealth.

The effect of this suit, if there is any decree at all against West Virginia, will be to exonerate and relieve Virginia entirely from any liability on account of that indebtedness.

This is the most interesting phase of the litigation for Virginia, and one which gives the greatest promise of benefit to her.

In the third place, by reason of the terms of the several settlements heretofore made, or attempted to be made, between Virginia and the holders of her obligations, and particularly under the terms of the funding act of March 30, 1871, Virginia sustains a fiduciary relation to the creditors who funded their bonds and deposited them (so far as unfunded) with Virginia, upon the assurance that they would be paid in accordance with such settlement as should be made with West Virginia.

They have looked to Virginia to use her best endeavors to bring about such a settlement. This Virginia persistently endeavored to accomplish by friendly negotiation with West Virginia.

Her overtures in that direction having been repeatedly emphatically rejected by West Virginia, no alternative remained but to invoke the jurisdiction of the Supreme Court of the United States, the final arbiter, under our Federal Constitution, of all controversies between States, to bring about such a settlement, not only for the protection of her own rights and interests, but for the vindication of the rights and interests of the common creditors which had been confided to her custody and keeping.

2. VIRGINIA PASSENGER RATE CASES.—R. R. Prentis, Henry C. Stuart and Joseph E. Willard, individually, and constituting the State Corporation Commission, and R. T. Wilson, clerk of said Commission, appellants,

v.

Atlantic Coast Line Railroad Company, appellee;

Same *v.* Chesapeake and Ohio Railway Company,

Same *v.* Norfolk and Western Railway Company,

Same *v.* Southern Railway Company,

Same *v.* Chesapeake and Western Railway Company, and

Same *v.* Louisville and Nashville Railroad Company.

These six cases, which were argued at the October term, 1908, of the United States Supreme Court by Mr. A. C. Braxton, Senator John W. Daniel and myself on behalf of Virginia, and by Mr. Alfred P. Thom on behalf of the appellee companies, were decided on the 30th of November, 1908. By the decision of the court the decrees of the United States Circuit Court for the Eastern District of Virginia, which were appealed from in the cases, were *reversed with costs*; but at the same time, while reversing those decrees, the court, in its opinion prepared by Mr. Justice Holmes, decided that the United States Circuit Courts had jurisdiction to enjoin the orders and judgments of the State Corporation Commission in a suit in which any order of that Commission fixing rates should be attacked on the ground that it was confiscatory, or otherwise unconstitutional. But the court held in that opinion that such relief should not be accorded by the United States Circuit Courts until after the cases had been first carried by appeal from the judgment and order of the State Corporation Commission to the Supreme Court of Appeals of Virginia, as provided for in the Constitution and statutes of Virginia, if such an appeal was still available for said companies. But if the Supreme Court of Appeals of Virginia should affirm the judgment and order of the State Corporation Commission, or enter any order invading the rights of a transportation company under the Federal Constitution, then a railroad company ag-

grieved by such final decision of the Supreme Court of Appeals of the State, would be entitled to invoke the jurisdiction of the Circuit Court of the United States by injunction against execution of the order and judgment of the Supreme Court of Appeals of the State, which such railroad company should claim deprived it of any right guaranteed to it under the Constitution of the United States.

There were vigorous dissents from the reasoning and conclusions of Mr. Justice Holmes' opinion, by the Chief Justice and by Mr. Justice Harlan, who in their dissenting opinions very forcibly sustained the main contentions of Virginia in the litigation.

There is some satisfaction in knowing that upon one vital point the decision of the court was in favor of the Commonwealth. One of the most earnestly and persistently pressed points urged by the counsel for the railroad companies was that the Virginia State Corporation Commission was from its very construction and constitution an illegal and unconstitutional body, and its acts therefore void. This point the Supreme Court overruled, sustaining the validity of the Commission and of its acts not in contravention of the Constitution.

The cases were remanded by the decree of the Supreme Court of the United States to the United States Circuit Court for the Eastern District of Virginia, and thereafter a satisfactory adjustment was made of the four first named, and by far the most important cases, as hereinafter explained, upon terms upon which those cases could have been adjusted before any litigation in the United States courts was begun, if the railroad companies had then been willing to acquiesce in such terms.

By this adjustment those four railroad companies abandoned their suits in the United States courts and applied to the State Corporation Commission for redress against what they claimed to be the unreasonable rates for passenger transportation prescribed by the order of that Commission, entered on the 27th of April, 1907.

The Corporation Commission, after hearing this application, entered an order authorizing those railroad companies to charge a maximum rate of 2 1-2 cents a mile upon their main lines, with permission to charge higher rates upon a few branch lines where exceptional conditions existed, those railroad companies agreeing to put in mileage books upon favorable terms, charging two cents a mile.

Thus has been finally ended an unpleasant chapter in the railroad history of the State.

While the litigation in the Federal courts was unfortunate (and as it has always seemed to me, uncalled for and unnecessary), the action of these railroad companies, representing the greater part of the railroad mileage of the State, and the action of the State Corporation Commission, has tended to restore, and has restored, those amicable relations which should subsist between the official representatives of the State, and the people of the State represented by them, on the one hand, and those great lines of transportation upon the other, in whose prosperity the people of the Commonwealth have a deep interest, just as those companies also are deeply interested in the prosperity of the people whom they serve.

The effect of this decision of the United States Supreme Court is to recognize in the Circuit Courts of the United States jurisdiction to enjoin

the execution of the decision and judgment of the highest court of a State, for when the Supreme Court of Appeals of Virginia passes upon a judgment and order of the State Corporation Commission brought before it upon appeal, it makes the judgment and order of the Corporation Commission appealed from its own order and judgment if it shall affirm the same: and if it modifies that order and judgment, and enters such judgment, as in the opinion of the appellate court the Corporation Commission should have entered, that judgment and order of the Supreme Court is also, of course, its own judgment. In every case it is the judgment and order of the Supreme Court of the State, the execution of which will be enjoined and restrained by a subordinate court of the United States.

The importance of the questions involved, not only to Virginia, but to the people of all the States of the American Union, was pointed out in my report for 1907.

In view of this decision of the court of last resort in our country, in which it is held for the first time that the subordinate courts of the United States are vested with jurisdiction to enjoin the execution of a judgment of the highest court of a State, it may be necessary and proper for the authorities and representatives of the Commonwealth to consider what measures may be adopted, in the exercise of such powers as still remain in the States, to safeguard the rights of the people of the Commonwealth in the premises, by such amendment of section 156 of the Constitution of the State as may be made by the General Assembly upon the initiative of the State Corporation Commission, and as will not conflict with any provision of the Federal Constitution, or with any adjudication of the United States Supreme Court.

Adequate relief against such a condition of things can be accorded by the Congress of the United States. Congress can, by appropriate amendments of the judiciary act, so fairly define and justly limit the jurisdiction of the subordinate courts of the United States, and of the judges of those courts, as to protect the just powers of the governments, and particularly of the lawfully constituted judicial tribunals of the several States, from being paralyzed, and those tribunals from being humiliated and brought into contempt by the use by the United States Circuit Courts of the summary writ of injunction, or by any other species of collateral attack upon the orders or judgments of the State tribunals entered within the scope of their rightful jurisdiction, touching subjects that unquestionably come within the domain of State adjudication, regulation, and control.

It may be, therefore, that the States will have to look to Congress for complete and effective relief against such abuses of judicial power; but it will nevertheless be worth while for the representatives of Virginia to take counsel and consider well whether such measures cannot be devised as, without depriving any citizens or corporation of any right under the Constitution and laws of the United States, or of Virginia, will guard against unseemly conflicts between the subordinate courts of the United States and the courts of the State, and prevent unwarranted or unwise encroachments upon the rightful jurisdiction of the States over their own domestic affairs.

The following is a more detailed account of the proceedings had, and the final adjustment reached, in those cases:

Before the matters involved in the four principal suits referred to were disposed of, there were one or more informal hearings before the State Corporation Commission and proposals submitted, which were considered and which are discussed in the opinions and correspondence which will be found in their appropriate places among the opinions returned with this report.

Thereupon each of the four principal railroad companies filed its petition before the State Corporation Commission, alleging that the two cent maximum passenger rate then in force upon each of those lines was unreasonable and unjust, and so low as not to yield a fair return for the service rendered, and as to be confiscatory, and asking that the Commission would enter an order prescribing a larger and a fairer maximum passenger rate upon each of those lines of railroad—each company proposing to put in a 1,000 miles mileage book at a charge of two cents a mile.

Each of these companies were fully heard by the Commission, the undersigned appearing for the Commonwealth in those hearings.

After consideration, the Commission entered orders in each case prescribing two and one-half cents a mile as the maximum passenger rate upon the lines of each of those four railroad companies, except that three cents a mile could be charged on certain branch lines of the Southern Railway where exceptional conditions existed.

Thereupon the suits instituted by those companies against the State Corporation Commission in the United States Court, were, at the instance of those companies, respectively, abandoned, and the unpaid costs in each of those suits, as well as the costs of the appeals taken to the United States Supreme Court by the members of the State Corporation Commission acting on behalf of the Commonwealth, were paid up. And thus was all litigation and controversy between those companies and the Commonwealth ended.

There were two railroad companies—the Chesapeake and Western having about 40 miles, and the Louisville and Nashville, operating about 100 miles of railroad in Virginia—which were not parties to the important agreement entered into with the four principal companies by the representatives of Virginia on the 3rd day of August, 1907, under which the two cent rate was put into effect pending the litigation as to its validity, and these two companies operating a small mileage in Virginia, continued to press their claims in the Circuit Court of the United States, and obtained a decree from that court in their favor.

Thereafter proceedings were instituted by the State Corporation Commission against the Louisville and Nashville Railroad Company, which had put into effect a three cent maximum passenger rate, looking to the reduction of that rate, which proceeding is still pending before the State Corporation Commission and undetermined.

No appeal, of course, has been taken as to the Louisville and Nashville case, for the reason that the main matter involved in that suit is pending before the Commission.

No appeal has been taken in the Chesapeake and Western case, nor has there been any proceeding before the State Corporation Commission against that company in the premises, it being recognized not only that it was almost a negligible quantity, but also that the maximum rate charged upon that road was perhaps not excessive, considering the conditions under which it is operated.

Appropriation Made for Defending the Six Suits Mentioned.

An appropriation of \$20,000.00 was made in 1908 to pay the costs and expenses of defending the attacks made upon Virginia in the above suits, including the fees of Mr. A. C. Braxton and Senator John W. Daniel, the special counsel retained for the defendants and the Commonwealth in those cases.

Of that appropriation, I am glad to report that, after paying all fees, costs and expenses incurred in that protracted litigation, the sum of \$6,228.38 remains, according to the books of the Auditor's office, unexpended, and will be covered into the treasury.

Other Cases Before the State Corporation Commission.

There have been a number of hearings before the State Corporation Commission since October, 1908, some of them more or less informal, in which the undersigned represented the Commonwealth.

The more important of these were the passenger rate cases of the Richmond, Fredericksburg and Potomac Railroad Company, the Louisville and Nashville Railroad Company (already mentioned), and the Washington-Southern Railway Company.

All of these hearings have been concluded, at least for the present, and the Commission has under advisement the order which it will enter, or the action which it will take, in each of the three cases mentioned.

Cases in the Circuit Court of the United States for the Eastern District of Virginia.

1. *John E. Brickhouse v. Gallup and others, judges of election.*

This is a case brought to test the validity of the Constitution of the State, and of the suffrage article thereof.

The case, upon the issues as made up by the pleadings, squarely presents the issue of the validity of that Constitution, the alleged invalidity of which was the principal ground relied upon by the counsel for the plaintiff.

Upon the issues thus made up the case was fully argued in February, 1907, before the Circuit Court of the United States for the Eastern District of Virginia, Judge Nathan Goff presiding. Owing to the illness of the learned judge the decision was delayed until the early part of the present year, when it was handed down deciding the case upon those issues in favor of the defendants, and of the positions contended for by the counsel for the Commonwealth. This decision, from which no appeal has been, or, as I understand, is likely to be, taken, disposes of this case, and if applied to the two following cases will in like manner dispose of them.

2. *Edgar Poe Lee v. A. J. Montague, Governor of Virginia, John S. Barbour and other members of the Virginia Constitutional Convention, who voted to adopt the Constitution without submitting it to the vote of the people, and*

3. *Anthony S. Pinner v. Same, and others.*

In view of the decision rendered by Judge Goff, and upon other grounds equally as conclusive, it is manifest that neither of these cases can be main-

tained. The plaintiffs seem disposed to let them sleep. It may be as well perhaps to let them die a natural death.

An appropriation of \$3,911.45 (the unexpended balance of a previous appropriation of \$10,000.00) was made in 1906, to pay the expenses incurred in defraying the suits which involved the validity of the Constitution, or of the suffrage article thereof. Of this sum \$2,911.55 remained unexpended in March, 1908, as shown by the books of the Auditor's office, after paying the costs and expenses of that litigation, and has been covered into the treasury.

CONCLUSION.

As will be seen from the foregoing and subsequent parts of this report, there have been a number of important suits in the State and Federal courts, and there have also been a number of matters before the State Corporation Commission, in which my assistant and myself have represented the Commonwealth.

The most notable, as well as the most important of these, have been the suits attacking the Constitution, and the suffrage article thereof, the six Virginia passenger rate cases, and the suit of *Virginia v. West Virginia*, and the litigation with the Richmond, Fredericksburg and Potomac Railroad Company involving the liability of that road to taxation.

Important as have been the duties devolved upon the Attorney General and his assistant in the trial of litigated cases in court, it is probable that among the most important of the duties which they have had to discharge have been those connected with what may be termed the routine or bureau work of the office, the daily consultations sought by executive officers and boards of the State government, and the advice given to them, in many instances necessarily oral, upon the large number of questions which are constantly arising in connection with the administration of the laws.

In the discharge of these duties, as well as in the argument of a number of cases in the courts, I have been very ably and efficiently aided by my assistant, Mr. Catlett.

I wish to make this acknowledgment to him, and also to Mr. T. Gray Haddon, the clerk in the Attorney General's office, for the diligence, fidelity and efficiency which have characterized his discharge of his duties.

A schedule of the other cases pending in the courts of the Commonwealth in which the Attorney General or his assistant are counsel, and a number of the more important opinions rendered by this office, and some of its most important correspondence, follow.

Respectfully submitted,

WILLIAM A. ANDERSON.

Cases Decided in the Supreme Court of Appeals of Virginia.

1. *Commonwealth of Virginia, ex. rel. etc. v. School Board of Norfolk*. Appeal from the law and chancery court of Norfolk city. Argued by the Attorney General and Messrs. W. W. Old & Son. Reversed.

2. *Stanley v. Commonwealth*. Appeal from the circuit court of Franklin county. Argued by Mr. Catlett. Affirmed.

3. *Burton v. Commonwealth*. Appeal from the hustings court of the city of Richmond. Argued by Mr. Catlett. Reversed.

4. *Commonwealth of Virginia et als. v. Camp Manufacturing Co.* Appeal from the circuit court of Brunswick county. Argued by the Attorney General and E. P. Buford, Esq. Reversed.

5. *Commonwealth of Virginia v. Goodwin.* Appeal from the circuit court of Prince William county. Argued by Mr. Catlett and Ro. A. Hutcheson, Esq. Reversed.

6. *Commonwealth of Virginia v. McCue's Exor's.* Appeal from the corporation court of Charlottesville. Argued by the Attorney General and A. D. Dabney, Esq. Reversed.

7. *Parks v. Commonwealth.* Appeal from the circuit court of Scott county. Argued by Mr. Catlett. Reversed.

8. *Clopton v. Commonwealth.* Appeal from the circuit court of Gloucester county. Argued by Mr. Catlett. Affirmed.

9. *Jennings v. Commonwealth.* Appeal from the circuit court of Louisa county. Argued by Mr. Catlett. Reversed.

10. *Wright v. Commonwealth.* Appeal from the circuit court of Dickenson county. Argued by the Attorney General. Reversed.

11. *Withers v. Commonwealth.* Appeal from the circuit court of Bedford county. Argued by the Attorney General. Reversed.

12. *Sutherland v. Commonwealth.* Appeal from the circuit court of Dickenson county. Argued by the Attorney General. Reversed.

13. *Donithan v. Commonwealth.* Appeal from the circuit court of Pulaski county. Argued by the Attorney General. Reversed.

14. *Pendleton v. Commonwealth.* Appeal from the circuit court of Augusta county. Argued by the Attorney General. Reversed.

15. *Roselle v. Commonwealth.* Appeal from the corporation court of the city of Charlottesville. Argued by the Attorney General. Affirmed.

16. *Commonwealth v. Henry.* Appeal from the circuit court of Frederick county. Argued by the Attorney General and R. M. Ward. Reversed.

17. *Commonwealth v. Shannon.* Appeal from the circuit court of Giles county. Argued by the Attorney General, and by McCormick, Henson & Broun, defendants in error. Reversed.

18. *B. & O. R. R. Co. v. Commonwealth.* Appeal from the State Corporation Commission. Argued by the Attorney General. Reversed.

19. *White v. Commonwealth.* Appeal from the circuit court of Louisa county. Argued by Mr. Catlett. Reversed.

20. *Samuels v. Commonwealth.* Appeal from the corporation court of the city of Danville. Argued by Mr. Catlett. Reversed.

21. *Lily v. Commonwealth.* Appeal from the circuit court of Alexandria county. Argued by Mr. Catlett. Reversed.

22. *Edmonston v. Commonwealth.* Appeal from the circuit court of Alexandria county. Argued by Mr. Catlett. Reversed.

23. *Camp Manufacturing Co. v. Commonwealth, &c.* Appeal from the circuit court of Brunswick county. Argued by the Attorney General and E. P. Buford, Esq. Affirmed.

24. *Harris v. Commonwealth.* Appeal from the circuit court of Fauquier county. Error confessed by the Attorney General, as follows:

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND.

J. D. HARRIS, Plaintiff in Error

v.

COMMONWEALTH OF VIRGINIA, Defendant in error.

Confession of Error by the Commonwealth.

One of the grounds of error assigned by the accused is, that the trial court refused to allow the accused to contradict the evidence of Irvin Maxheimer, a witness for the Commonwealth, before the trial jury, by showing that he had made a wholly different statement when he testified before the grand jury which found the indictment. For the purpose above indicated, the accused offered as a witness W. B. G. Shumate, who was a member of, and the foreman of, the grand jury finding the indictment against the accused.

The evidence of both of these witnesses material to the question now presented, is fully set out in bill of exception number 3, wherein it also appears that the trial court refused to allow the evidence of the said Shumate, contradicting the said Maxheimer, to go to the trial jury, on the ground that so to do was contrary to public policy. The evidence of Maxheimer given on his examination in chief, and on cross-examination, and the evidence of Shumate as to the evidence of Maxheimer before the grand jury, involves a vital point in the defence, and the refusal of the trial court to let the evidence of Shumate go to the jury was plainly prejudicial to the accused. The question thus presented is, was the testimony of Shumate (a member of the grand jury making the indictment) competent evidence for the accused to contradict the evidence of Maxheimer, a witness for the Commonwealth, by showing that his evidence before the grand jury was materially different from that given before the trial jury.

We have carefully considered the evidence of these witnesses as it appears in the record, and we think that the evidence of Shumate *was material* to the defense of the accused, and with due deference to the trial court, we feel constrained to admit that there is prejudicial error in the trial court's refusal to let the evidence of Shumate go to the jury.

In *Little's Case*, 25 Grat. 921, this court, speaking through Judge Moncure, plainly and clearly intimated, to say the least, that a grand juror is a competent witness as to the evidence of a witness before the grand jury; and we believe the "dictum" of this case has been accepted by both bar and bench, and has become the established rule of practice in this State for many years. This case, and the other authorities cited by counsel for the accused, in our opinion, fully sustain the contention that members of a grand jury making an indictment *are competent witnesses* to contradict the testimony of a witness before the grand jury who testifies before the trial jury in the same case.

The conclusion we have reached is, therefore, that the evidence of Shumate should have been given to the trial jury: that it was material to the defense of the accused, and that the ruling of the trial court excluding the same was prejudicial error, for which the judgment against the accused should be reversed, and a new trial granted. For these reasons briefly, and we fear inadequately stated, and to save unnecessary delay, trouble and cost, we deem it our duty to confess error in this case, subject to the approval of the court.

Cases Pending in the Supreme Court of Appeals of Virginia.

1. *Commonwealth v. Gleason, et als.* Appeal from the circuit court of the city of Clifton Forge. Writ of *quo warranto*.
2. *Hardy v. Commonwealth.* Appeal from the circuit court of Nansemond county. On conviction of murder.
3. *Dix v. Commonwealth.* Appeal from the circuit court of Lancaster county. On conviction for violation of local option law.
4. *Myers, Receiver, v. Commonwealth.* Appeal from the hustings court of the city of Richmond. Argued by Mr. Catlett, and submitted.
5. *Commonwealth v. Virginia Bank and Trust Co.* Appeal from the corporation court of the city of Norfolk. Argued by Mr. Catlett, and submitted.
6. *Commonwealth v. R., F. & P. R. R. Co.* Appeal from the circuit court of the city of Richmond.

The last named case involves the question of the liability of the Richmond, Fredericksburg and Potomac Railroad Company to pay the State franchise tax, and in one aspect of the case the question whether that company is not now generally liable to taxation State, county and municipal.

Cases Pending in the 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 in 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, 25, 26, 27 and 28. *Richmond, Fredericksburg and Potomac Railroad Company v. Marye, Auditor*. Six cases. Brought to set aside the assessment of franchise taxes made by the Corporation Commission, on the ground that the company is exempt from all taxation.

These cases were long since fully argued upon the demurrers filed for the Commonwealth, which demurrers were overruled; and thereupon I filed answers for the defendant setting up grounds upon which it was claimed for the State that the company by accepting certain amendments to its charter had lost any exemption from taxation which it ever possessed. The cases were argued upon the facts and proofs. A reargument was asked for by the plaintiff before the court had made its decision.

These cases have been fully argued by Messrs. Braxton, Williams and Eggleston for the plaintiff, and by myself for the Commonwealth, in printed or typewritten briefs, and were submitted to the court for decision in 1908.

They were finally decided by the honorable judge of the Circuit Court of the city of Richmond in January last, in favor of the Richmond, Fredericksburg and Potomac Railroad Co. I have taken an appeal in a test case from that decision, and it is confidently expected that it will be argued in the Supreme Court of Appeals of the State in the early part of the month of January next.

29. *John A. Parker and Bernard P. Green's Administrators v. Morton Marye, Auditor*.

This is a suit to recover over \$172,000.00 claimed to be due the plaintiffs for services rendered by their intestates in the matter of the settlement of the claim of Virginia v. the United States for advances made the latter during the War of 1812.

After a number of unavoidable delays, the evidence in this case was finally completed, and the case was submitted on its merits, in February, 1909, and was decided in the early part of July last by the Honorable R. Carter Scott, judge of the Circuit Court of the city of Richmond, in favor of the Commonwealth.

Notice, however, has been given of the purpose of the plaintiff's to carry the case to the Supreme Court of Appeals of Virginia.

30. *Richmond Traction Company v. Commonwealth.*

31. *Richmond Passenger and Power Company v. Same,* and

32. *Virginia Passenger and Power Company v. Same.*

Suits for correction of alleged erroneous assessments of plaintiff's property. A basis of settlement has been, with the approval of the State Corporation Commission, reached in these cases, and they have been disposed of accordingly.

33. *John Bailey, Jr. v. Commonwealth.*

Suit under section 746 of the Code to recover back 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 case. A demurrer has been filed, upon which it is believed the case will be decided.

34. *Pocahontas Consolidated Collieries Company v. Morton Marye, Auditor.*

This case involves the validity of the tax imposed by section 13 of the Virginia revenue law upon a mortgage upon lands in Virginia, and also upon lands in West Virginia, to secure an ultimate issue of \$20,000,000.00 of bonds issued, or to be issued, by the petitioner. This case has been argued by printed briefs filed by the counsel on both sides, and it is hoped will be submitted and decided in December or January next.

35. *Virginia-Carolina Chemical Company v. Marye, Auditor.*

This case involves questions similar to those presented by No. 34, and it is expected that it will be submitted, heard, and decided along with No. 34.

Opinions and Correspondence.

To the Governor

In Regard to the Mandatory Requirements of the Act to Establish an "Epileptic Colony."

RICHMOND, VA., January 27, 1909.

To His Excellency, CLAUDE A. SWANSON.

Governor of Virginia, Richmond.

MY DEAR SIR:

Your letter of the 25th instant, and your verbal inquiry as to whether the act to amend and re-enact section 1 of the act entitled "An Act to establish an epileptic colony on land of the Western State Hospital, in Amherst county," approved February 20, 1906, imposed such duties upon the General Board of State Hospitals, or upon the Special Board for the Western State Hospital, and was so mandatory as to require those boards or either of them to proceed to its execution forthwith, have been considered.

It is evident from reading section 1, as amended by the act of March 12, 1908, in connection with the original act, that it was the purpose of the General Assembly that the Special Board of Directors of the Western State Hospital should, under the supervision and control of the General Board of Directors of State Hospitals for the insane, as soon as practicable erect all suitable buildings and appurtenances for the establishment of a colony for the reception, care, treatment, training, and employment of three hundred epileptic patients on the Murkland tract of land in Amherst county opposite the city of Lynchburg, described in the act; or if, in the judgment of the said general board, it was wiser to do so, that then the directors of the Western State Hospital were authorized to sell and convey the whole or any part of said Murkland tract of land, and with the proceeds of such sale, "supplemented with other funds appropriated for such colony," to purchase "adjoining, additional or other land in Amherst county for the purposes of said colony."

It was by this act, clearly made the duty of the General Board of State Hospitals, first to decide whether it was practicable and desirable to establish the proposed institution for the epileptic insane upon the Murkland tract, or upon land adjoining or added to the Murkland tract; and then if, in the judgment of the general board it was deemed impracticable or inexpedient to establish said institution either upon the Murkland tract, or upon land adjacent thereto to be acquired for that purpose, it was thereupon plainly made the duty of the directors of the Western State Hospital, with the approval of the General Board of Directors of State Hospitals, to sell the Murkland tract and to acquire other land in Amherst county and proceed to establish said institution thereon, provided it was practicable to obtain a tract of land in Amherst county suitable for the purpose of said colony.

No time was expressly prescribed by the terms of the statute within which these matters should be acted upon by the general board, but, as is implied from every such direction to public officers in a statute, it was incumbent upon the members of that board to discharge these duties as soon as practicable.

I learn from a copy of the minutes of the meeting of the General Board of Directors of State Hospitals, held on the 8th of December last, that that board has decided that it is impracticable and unadvisable to establish this institution either upon the Murkland tract, or upon lands adjacent to the Murkland tract which can be acquired for that purpose, for reasons stated in the resolutions, and which seem to be good and sufficient as to the ineligibility and undesirableness either of the Murkland tract, or of the Murkland tract and any adjacent or additional lands thereto which can be acquired as a site for such an institution.

It further appears from the minutes of that meeting that said general board had made some examination and inspection of other land in the county of Amherst; that a committee appointed by the general board to make "an inspection of available lands in the said county adapted to the needs of such colony," had made reports to the general board, and that the general board from its own examination and inspection of lands in Amherst county, and from the reports of said committee, say, "We do not feel that we ourselves have seen, or that there has been mentioned in said reports, any tract of land in said county suitable for the purposes of the said colony."

The general board thereupon, by a majority vote, adopted the following preamble and resolution:

"And whereas, We believe that it would, under the circumstances as they now appear to us, be unwise, and not to the best interests of the State or of the epileptics for whom it desires to make provision, to establish the said colony either upon the Murkland property or on any other location in the said county of Amherst now known to us,

Therefore, Be it resolved, That we, though in all deference to the character of the act authorizing and directing the establishment of the said colony, as well as to the source from which it emanates, defer all further action regarding the establishment of said colony until the next meeting of the General Assembly of Virginia."

It does not appear from the minutes of said meeting, what was the nature of the reports of the committee appointed by the general board, or how thorough or exhaustive their examination of lands in Amherst county was, or how many proposed sites were examined by said committee.

It is fairly inferable from the recitals in the minutes of the meeting that the examination made by the members of the general board themselves, probably, embraced a very small part of Amherst county.

It would require strong proofs to show that in a county so large as Amherst, all of it lying in a region of great healthfulness and accessibility to other parts of the State and country by the two or three lines of railway which for many miles pass through it or along its borders, there cannot be found an available and suitable site for such an institution.

The general board was undoubtedly given a broad discretion in the matter of deciding whether it was practicable and wise to establish the institution

on the Murkland tract, and in the matter of sanctioning the selection and purchase of some other tract in the county of Amherst, if the Murkland tract should be rejected; and the Special Board for the Western State Hospital was also given a broad discretion in the selection and purchase of such other tract.

But it seems to me that it was required that this discretion should be exercised, and exercised so as to carry out the manifest purpose of these acts; and that whatever was necessary to be done to enable these boards intelligently and properly to exercise this discretion, should be done.

There is nothing in the facts recited in the minutes of the meeting of the general board submitted to you, to show that these boards have caused such information to be obtained, or had before them such information as would enable them to intelligently and satisfactorily exercise the discretion devolved upon them.

It was manifestly the purpose of the General Assembly, as may be gathered from the language of the amendatory and the original acts read together, that this "Epileptic Colony" should be established either on the Murkland tract or on other land in the county of Amherst, if a suitable site could be secured.

The language of the amendatory act is as follows:

"Sec. 1. Be it enacted by the General Assembly of Virginia, That the special board of directors of the Western State Hospital, under the supervision and control of the general board of directors of the State hospitals for the insane, be, and they are hereby, authorized and directed to erect on the tract of land in Amherst county, opposite the city of Lynchburg, devised to the said Western State Hospital by the will of Sidney R. Murkland, deceased, out of consideration for the kindly and humane treatment of his son at said hospital, all suitable buildings and appurtenances for the establishment of a colony for the reception, care, treatment, training, and employment of three hundred epileptic patients; provided, however, that if in the judgment of the said general board of directors of the State hospitals, it appear proper the said special board of directors of the Western State Hospital may sell and convey the whole or any part of the said Murkland tract of land and with the proceeds of such sale, supplemented with other funds appropriated for said colony, so far as may be necessary, may purchase adjoining, additional or other land in Amherst county for the purposes of said colony."

By this language, in the event that the general board shall reject the Murkland tract, it is provided that the special board "*may*," with the sanction of the general board, sell the Murkland tract, and purchase adjoining, additional or other land in Amherst county.

It will be observed that the word "*may*" and not "*shall*" is used here in prescribing the duty of the special board.

"*May*," in such connection often means "*shall*." It was doubtless used here as indicating that a discretion was vested in the special board as to the selection and purchase of a site; but I do not think that the alternative provision of the section quoted should be construed so as to defeat the main purpose of the act, which was that a colony for epileptics should be established, either on the Murkland tract or on other land in Amherst county.

It seems to me from an examination of the statute, that it was so mandatory as to require the general board, and the special board also, to proceed

to its execution as soon as practicable, and that so far as appears from the record and facts submitted to you and by you to me, the requirements of the act were not complied with by the action of the general board on the 8th of December, 1908, wherein it determined to "defer all further action regarding the establishment of said colony until the next meeting of the General Assembly of Virginia."

The next session of the General Assembly does not begin until the second Wednesday in January, 1910; so that the general board of State hospitals, by the resolution referred to, postponed all action in regard to the establishment of an "Epileptic Colony" in Amherst county, for quite thirteen months.

Very truly yours,

WILLIAM A. ANDERSON.

In Regard to Litigation in the United States Court in Reference to Passenger Rates.

RICHMOND, VA., March 4, 1909.

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

DEAR GOVERNOR:

Enclosed please find copy of an answer which I have filed in the Louisville and Nashville case against the State Corporation Commission, now pending in the U. S. Circuit Court here, and a copy of a brief which I have filed in that case, and in the case of the Chesapeake Western Railway Company.

Colonel Catlett has filed an answer to somewhat the same effect in the Chesapeake Western case.

These companies have refused to abandon the litigation in the U. S. Court, and apply to the State Corporation Commission for the relief to which they claim to be entitled.

Of course, the officials representing the Commonwealth cannot lie down and allow these companies to take the decrees which they wish to take, deciding that the Virginia State Corporation Commission has attempted to confiscate their property, and to wrongfully deprive them of their rights.

If Judge Pritchard allows the answers to be filed, a good deal of important work will have to be done in order to defend these cases, and it will be absolutely necessary to have the assistance of some reliable, trained, expert railroad man, entirely familiar in all their details with the operation of railroads, and with their systems of accounting. Such assistance will be essential in order to enable counsel for Virginia to analyze and digest the accounts filed by the railroad companies, to show any errors which exist in said accounts, and the fallacious or unjust basis upon which any items or charges may be made.

That errors do exist in those accounts, I am satisfied, but it is absolutely necessary to have them dissected, analyzed, and traced back in some instances to the original charges in order to show the errors in these charges.

It will be impossible for the defense to be made on the part of the State, with any sort of efficiency, without such assistance.

This does not mean the employment of additional counsel, but it does mean securing the services of some fearless, upright, trained, experienced and competent railroad man to assist the counsel for Virginia in this litigation.

I think that Colonel Catlett and I can, with such assistance, make Virginia's defense. We may, and doubtless will, need the assistance of special counsel to aid us in taking the testimony in these cases, as that may require much time which neither of us could, without neglecting other duties constantly coming up, devote to that sort of work.

You will see from reading the answer and the brief, the importance of the questions involved. I am sure you will agree with me that it will not do for the representatives of Virginia to fail to resist to the last extremity the, as I consider it, unjust and uncalled for war that is being made upon her by these two railroad companies. It would be better to have an adverse decision against us at the last, after such resistance, than by inaction, or inefficient action, to allow this reproach to be placed upon Virginia without an effort on our part to prevent it.

It is true that the lines of road owned by the two companies which now persist in prosecuting this litigation are comparatively not very important, either in their extent, or in their relations to the people of the Commonwealth, but the principle involved is the same as if they constituted among the most important railways in the State.

The act approved February 8, 1908, acts of 1908, chapter 35, pp. 38-9, places the appropriation thereby made under the control of the Governor and the Attorney General for the purpose of defending these suits. That fund has been already considerably reduced in the payment of the costs and expenses of the litigation in the Supreme Court of the United States in these and in the four other cases, but a balance remains which I hope would more than suffice to employ the expert assistance outlined above, though it will probably be inadequate to pay the further expenses and costs incurred in litigating these two suits, and the fees of such special counsel as it may be wise to retain to aid in making our defense.

I now write to bespeak your active co-operation and assistance along the lines which I have indicated, or such other line of defense as you or the members of the State Corporation Commission may approve.

If Judge Pritchard shall deny the defendants the right to answer, it is my purpose to appeal these suits.

I remain,

Most sincerely yours,

WILLIAM A. ANDERSON.

In Reference to Act Requiring the Purchase of Land for an "Epileptic Colony."

RICHMOND, VA., March 8, 1909.

To His Excellency, CLAUDE A. SWANSON,

Governor of Virginia, Richmond.

DEAR SIR:

Yours of the 1st instant, enclosing copy of letter of Mr. W. H. Landes, the chairman of the Special Committee of the General Board of Directors of State Hospitals, with accompanying documents, was duly received.

A reply was delayed in order that I might get certain information I desired to have before responding to your inquiry.

This information was received on Friday evening last, but owing to my absence on Saturday my response to your inquiry was delayed until to-day.

However, I wired both Mr. Landes and Mr. Bauserman on Saturday briefly what my conclusions would be.

The question submitted by Mr. Landes' letter, which you referred to me, involved two inquiries:

First: Whether the act approved February 20, 1906, entitled "An Act to establish an epileptic colony on land of the Western State Hospital, in Amherst county," acts of 1906, p. 36, and the act approved March 12, 1908, amending the first section of the former act, acts of 1908, p. 295, are constitutional and valid enactments; and

Secondly: What is the character of the title which the Western State Hospital acquired to the property left to that hospital by Mr. Murkland's will, and what are the rights and obligations of the Commonwealth in respect thereto?

After a careful consideration of the two acts of the General Assembly referred to, and of the views forcibly expressed by Mr. Landes in his letter to you, and accompanying documents, and also after considering views submitted to me, in response to a letter from me, by Senator Aubrey E. Strode (who I believe was the patron of the bills enacted into the two statutes recited above), and certain statements which were also kindly submitted to me by Mr. R. D. Yancey, a member of the Board of Directors of State Hospitals, and a member, I believe, of the special committee of said board of which Mr. Landes is the chairman, in response to a letter from me to Mr. Yancey, I have come to the following conclusions:

I.

That whatever objections, founded upon equitable considerations, may be urged to the two statutes referred to, I do not think that either of those acts is unconstitutional. It is true that by the will of Mr. Murkland, which will be hereinafter more fully referred to, the residuum of his estate, after paying the testator's debts, and certain small legacies, was given to the trustees of the Western State Hospital for a certain specific purpose mentioned in said will, and that the establishment of an "Epileptic Colony" was not embraced in the purpose so mentioned in the testator's will. But it appears that in a suit instituted by the Western State Hospital for the purpose of having Mr. Murkland's will executed, and his estate settled up, and obtaining for the hospital the benefit of the legacy bequeathed to it, all of the personal and real estate of the testator was sold, and the trustees of the Western State Hospital bought in the Murkland farm situated in Amherst county, opposite the city of Lynchburg, and in order to secure title to it and to furnish money to pay off the unpaid debts of the testator, paid about \$3,000.00 or more in cash, and received a credit for some \$14,000.00 upon the purchase money so payable for said farm, and thus obtained title to the same. The sum of \$3,000.00 or more so paid, was paid out of a fund appropriated and paid to the Western State Hospital out of the treasury of the Commonwealth. To that extent the Commonwealth, through the Western State Hospital, acquired an absolute interest in this Murkland farm.

It is true that the Western State Hospital is, under the laws of this State, a corporation; but it is a corporation sole, wholly owned and controlled by

the State, and as was said by the Supreme Court of Appeals of Virginia in *Eastern State Hospital v. Graves*, 105 Va., p. 153, "was created and exists for purely governmental purposes—is a public corporation governed and controlled by the State, and acts exclusively as an agency of the State for the protection of society and for the promotion of the best interests of the unfortunate people of the Commonwealth of insane and disordered minds."

So that, while it is a corporation, it is a corporation in a limited and qualified sense, is made a corporation for purely public and governmental purposes, and is in fact and in law a governmental agency of the State, and subject to control by the Commonwealth through the acts of its General Assembly.

I am not, therefore, prepared, as a question of law, to assent to the proposition that it was not competent for the General Assembly, under the Constitution of the State, by its act of February 20, 1906, to authorize the "Epileptic Colony" provided for in that act, to be established upon the Murkland farm so acquired by the Western State Hospital, or as was done by the amendatory act of March 12, 1908, to authorize the directors of the Western State Hospital to "sell and convey the whole or any part of the said Murkland tract of land and with the proceeds of such sale, supplemented with other funds appropriated for said colony, so far as may be necessary" to "purchase adjoining, additional or other land in Amherst county for the purposes of said colony."

Whatever question may be raised as to the expediency or propriety of the investment of the proceeds of the sale of the Murkland tract in the purchase of a site for an "Epileptic Colony," was a question for the decision of the General Assembly, and as to which the discretion of that body is not limited by any inhibition of the Constitution of the State.

II.

As to the second question indicated above, namely:

"What is the character of the title which the Western State Hospital acquired to the property left to that hospital by Mr. Murkland's will, and what are the rights and obligations of the Commonwealth in respect thereto?"

The following is the text of the will of Sidney R. Murkland, deceased, as shown by the copy furnished to me:

"Amherst County,

State of Virginia.

I, Sidney R. Murkland, being of disposing mind, declare this my last will & testament. After payment my Funeral expenses, & debts, I bequeath to my colored man, Wyatt Wade, One hundred Dollars. To Mrs. E. C. King now 186 Manhattan Ave. New York City, One Hundred Dollars. To 'Trustees State Hospital, Staunton, Va.,' where my son, Sidney Price Murkland now is cared for, the entire balance my property, real & Personal the increase from which, to be used by said Trustees for purchase Extra comforts patients said Hospital, for all time.

Witness my hand & Seal this 14th day March, 1904.

SIDNEY R. MURKLAND. (Seal.)"

It is manifest from the language of this will, read in the light of decisions of the highest court of the State, that the testator devised and bequeathed the entire residuum of his estate, real and personal, to the Western State Hospital at Staunton, Virginia, upon the trust that the increase thereof, or income therefrom, should be used by the trustees or directors of said hospital for the purpose of providing extra comforts for the patients in said hospital for all time.

The State, through its said agency, the directors of the Western State Hospital, having accepted said devise and bequest, must be conclusively presumed to have accepted it upon the express trust upon which the gift was made by the testator.

As a matter of duty and of conscience, it is just as incumbent upon the Commonwealth, and upon any representatives of the Commonwealth, that they should sacredly observe, and faithfully comply with, such a trust, as it would be upon an individual, or an ordinary corporation, accepting a like donation.

That, however, again is a matter which addresses itself to the judgment and conscience of the General Assembly.

It can hardly be plausibly contended that the establishment of an "Epileptic Colony" in Amherst county, or anywhere else, would satisfy the plain language of Mr. Murkland's will, or fulfill the manifest object of his bounty, which was not that the money bequeathed by him should be used for establishing any other institution for all or for a portion of the unfortunate class of people who were inmates of the Western State Hospital, but that it should be used in providing "extra comforts" for the inmates of the Western State Hospital at Staunton.

But it would be a gratuitous assumption to conclude from the two acts of Assembly referred to, that it is the purpose of the General Assembly to permanently divert the fund appropriated by the will of Mr. Murkland, to any other object than the beneficent one indicated by the testator himself.

The entire residuum of the estate of said testator turned out to be about \$14,000.00. That fund was invested, along with about \$3,000.00 of money derived directly from the State, in the Murkland farm.

The General Assembly had the right, in the exercise of its power of control over the directors of the Western State Hospital, to require them or authorize them to sell the Murkland farm. It had the power to require them to invest the whole fund in the purchase of a site for an "Epileptic Colony."

Upon such investment being made an obligation would be devolved upon the Commonwealth, and upon the General Assembly acting for and representing the Commonwealth, to make good the terms of the bequest of Mr. Murkland, and to see to it that the trust upon which that bequest was accepted, should be faithfully complied with.

But this again is a matter which addresses itself to the conscience and the discretion of the General Assembly.

I can only give you as my conclusion upon the second branch of your inquiry, that the Western State Hospital takes the legacy bequeathed to it by Mr. Murkland's will, charged with the trust plainly expressed in that will.

I do not think the title of the Western State Hospital to the tract of land in Amherst county, which I understand has been purchased for the "Epileptic Colony," will be impaired or affected by the fact that all or a portion of the

fund derived by that hospital from the estate of Mr. Murkland under his will, has been, pursuant to the provisions of said act of March 12, 1908, invested in its purchase.

I learn from Mr. Landes' letter that he did not know until recently that the Murkland legacy to the Western State Hospital was upon any special trust whatever.

If Mr. Landes, a member of the special board of the Western State Hospital, was not aware of this fact, it is to be presumed that the members of the General Assembly did not know it when they passed the acts referred to. Indeed, from reading those acts one would infer that they could not have known the terms of Mr. Murkland's will.

Doubtless, as soon as the nature of the trust upon which this testator gave the residuum of his estate to the Western State Hospital is made known to the General Assembly, it will by appropriate legislation provide that that trust shall be carried out according to the letter and the spirit of the testator's will.

Respectfully submitted,

WILLIAM A. ANDERSON.

As to Liability of Foreign Consuls to Taxation Upon Their Incomes, Salaries, Etc., in Virginia.

RICHMOND, VA., March 25. 1908.

To His Excellency, CLAUDE A. SWANSON,

Governor of Virginia, Richmond.

DEAR SIR:

Your favor of the 12th instant, requesting that I should reply to the inquiry made by the Honorable Robert Bacon, Department of State, Washington, D. C., was duly received, and I reply as soon as I could give the subject requisite attention.

Secretary Bacon's inquiry is as to whether the incomes of foreign consuls, both that derived from their official salaries, and that derived from other sources—especially from sources outside of the United States—is exempt from State taxation under the revenue laws of Virginia.

This question has not been considered or decided by the courts of the Commonwealth, and its answer must be determined either by the treaties of the United States, or by Federal, public, or international law. The general rule is that while consuls are not representatives of their sovereigns or of the countries from which they have been accredited, and do not enjoy the rights accorded by the law of nations to ambassadors and public ministers, they are, nevertheless, entitled to certain rights of comity, and to certain privileges, and immunities from local and political obligations, which cannot be claimed by private individuals—rights and privileges which are incident to their office, and which result from their character as the duly appointed and recognized officers of a foreign State.

Halleck Int. L., Chap X, Sec. 8.

Among these immunities is exemption from personal taxation.

Opinions of Atty. General of the U. S., Vol. 7, p. 22:

Taylor Int. Pub. L., Sec. 328;

Halleck Int. L., Chap. X, Sec. 11.

These immunities would, I think, embrace any income derived by a consul from his salary, or from sources outside of the United States.

The above propositions are subject to the following qualifications:

1. That if the consul engages in business in Virginia, such business, the property or capital used in such business, and the income derived by him from such business, would be subject to taxation just as that of any other citizen of the Commonwealth.

2. That if the consul is not a citizen or subject of the country from which he is accredited, but is a citizen and resident of Virginia, he would not be entitled to any immunity from taxation, except upon such income as is derived from the salary or the emoluments of his office as consul.

I beg leave to refer to Hall's Int. L., Sec. 335; Phillimore's Int. L., Secs. 248-275; Opinions of Atty. General of the U. S., Vol. 8, p. 169; Attorney General v. Kent, 1 H. & C., 1231; also Horne on Diplomacy, section 1 and section 13.

It is barely possible that the statement of the law of Virginia here given may be modified in some particular by some of the treaties between the United States and other powers. I have not access here to a number of those treaties.

My information as to the provisions of those treaties upon this subject is confined to a few of them. So far as the information thus obtained extends, those treaties do not vary the rights of consuls, as herein defined by me, in any particular.

Respectfully submitted,

WILLIAM A. ANDERSON.

As to Acknowledgments of Deeds by "Vice Consuls in Charge."

RICHMOND, VA., July 9, 1909.

To His Excellency, CLAUDE A. SWANSON.

Governor of Virginia, Richmond.

DEAR SIR:

Nothing, of course, can be done, so far as Virginia is concerned, in the matter referred to in the letter of Mr. E. G. Babbitt, "Vice Consul General in Charge" for Japan, except by the legislature.

When the General Assembly meets it can, of course, if it sees fit to do so, amend the statute in regard to the acknowledgment of deeds and other papers, so as to to authorize such acknowledgments to be taken and certified by a vice consul or vice consul in charge.

A reply to your inquiry has been delayed because neither you nor I can do anything in the matter at present.

I return the correspondence which you sent me.

Very truly yours,

WILLIAM A. ANDERSON.

As to Writ for a Special Election to Fill a Vacancy in the House of Representatives of the United States Congress from a Virginia District.

RICHMOND, VA., November 8, 1909.

Honorable CLAUDE A. SWANSON,

Governor of Virginia, Richmond.

MY DEAR SIR:

Yours of the 5th instant, addressed to the Attorney General, making inquiry about a writ of election to fill the vacancy in the House of Representatives from the Fourth District of Virginia, has been received.

In the absence of the Attorney General, I beg leave to say that I have considered the question submitted and have reached the conclusion that you, as Governor, have authority to issue a writ directing a special election to fill such vacancy, at any time that you may deem such action advisable.

Section 26 of the Revised Statutes of the United States provides:

"The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively."

Section 53 of the Code of Virginia provides:

"Writs of election to fill vacancies in the representation of this State in the House of Representatives of the United States shall be issued by the Governor."

And section 115 of the Code of Virginia provides:

"Whenever a special election is ordered by the Governor, speaker of the house, or president of the senate, it shall be his duty to issue a writ of election, designating the office to be filled at such election and the time such election is to be held, and transmit the same to the sheriff of the county and the sergeant of the corporation in which such election is to be held, to be by such sheriff or sergeant published by posting a copy thereof at each voting place in his county or corporation at least ten days before such election."

I find upon an examination of the records in the office of the Secretary of the Commonwealth that the precedent has been established by Governor A. J. Montague, who on August 13, 1902, issued a writ of election to fill a vacancy in the House of Representatives from the Sixth Congressional District caused by the death of the Honorable P. J. Otey.

It seems to me, therefore, that under the statutes above quoted, and the precedent thus established, the opinion hereinabove expressed as to your authority in the premises is correct. I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

In reference to the litigation in the United States Courts between six railroad companies and the State Corporation Commission, in the passenger rate cases.

RICHMOND, VA., December 17, 1908.

Hon. WILLIAM A. ANDERSON,
Attorney General of Virginia,
Richmond, Virginia.

DEAR SIR:

I herewith enclose a copy of the suggestion submitted to me by the Hon. Alfred P. Thom, referring to the passenger rate cases in the Circuit Court of the United States, and referred to in our conference of yesterday.

I would be very glad to have you confer with the other counsel for the State as soon as you can, so that we may make a fitting reply to the counsel representing the railroad companies.

Very truly yours,

ROBERT R. PRENTIS,
Chairman.

It appearing to the court, that the defendants in this cause, the members of the State Corporation Commission of Virginia, have refrained from answering the bill on the merits, because of the wish, on their part, merely to secure an early decision of the question of jurisdiction of this court and on other questions of law arising on the record, and that their failure to make such answer on the merits is not intended as an admission on their part that in their opinion the passenger rates fixed in the order of the Commission, of April 27, 1907, are in fact unreasonable or in any way improper, and it further appearing to the court, that the question of whether or not the rates in controversy in this cause are unreasonable or confiscatory is no longer, in the opinion of the Commission, in any way material, for the reason that the Commission is at the present time engaged in an investigation as to what passenger rates are now, under present conditions, just and reasonable.

RICHMOND, VA., December 21, 1908.

Hon. ROBERT R. PRENTIS,
Chairman State Corporation Commission,
Richmond, Virginia.

DEAR SIR:

The copy of the memorandum submitted by Hon. Alfred P. Thom, embodying the suggestion made by him as to the terms of a final decree to be entered by the Circuit Court of the United States for the Eastern District of Virginia, together with your letter of the 17th instant communicating the same, has been carefully considered by Senator Daniel and myself, so soon as he could come to Richmond and confer with me on the subject. Of this you and your colleagues were advised in the conference which Senator Daniel and I had with you after his arrival here on the afternoon of the 18th instant.

The views presented by yourself and your colleagues during that conference, and the memorandum tentatively suggested by you by way of response to Mr. Thom's proposal, have also been considered.

I beg leave now to submit the following statement of my views upon the subject.

In order to determine intelligently what action should be taken by yourself and your colleagues, in the premises, it is necessary in the first place to have a clear understanding of the intendment and effect of the recent decision of the Supreme Court of the United States in these cases.

Just what that court decided is to be learned from its final decree in each case, and from the opinion upon which that decree is founded.

That decree, a copy of which I received on the 19th instant, is:

"That the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings as indicated in the opinion of this court."

"November 30, 1908."

The opinion of the court is thus referred to in its final order as indicating for what purpose and with what effect each case has been thus remanded.

When we examine the opinion, we find that this is indicated mainly by the language of the last paragraph, though that must be read in the light of the statements, and reasoning of the court as expressed in the preceding portions of the opinion. In other words, the opinion must be taken as a whole.

The last paragraph of the opinion of the court is as follows:

"There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia Statute of April 15, 1903, enacted to carry into effect the provision of the Constitution, requires, by sec. 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. Pollard's Code of Va., 714. It may be that when an appeal is taken to the Supreme Court of Appeals this section will be held to apply and the appeal be declared too late. We express no opinion upon the matter, which is for the State tribunals to decide, but simply notice a possibility. If the present bills should be dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the Commission affirmed, the bills may be dismissed without prejudice and filed again.

"Decrees reversed."

From this it is manifest that, whatever happens, the final decree of the circuit court in each case is reversed with costs.

In any event, that decree is obliterated. The bills are to be dismissed without prejudice, if it is practicable for the complainants to carry their

cases in the regular and orderly mode of procedure provided by the Constitution and laws of Virginia, and approved by the U. S. Supreme Court, by appeal from the action of the Commission to the Supreme Court of Appeals of the Commonwealth.

If the complainants cannot obtain an appeal to the highest court of the State from the action of the Corporation Commission, then the companies "will be entitled to decrees."

The first question presented is whether there can be appeals by these complainants from the action of the Commission, to attack which their suits were instituted.

In the first place it is a notable circumstance that both by the language of sub-section (d) of section 156 of the Constitution, and of clause 34 of section 1313-a of the Code, which are the enactments which prescribe the terms and conditions on which such appeal may be taken, the appeal is allowed, not from any *order*, but only from some "*action*" of the Commission prescribing rates, charges or classification of traffic," etc.

Now here the action of the Commission which was sought to be impeached in these suits was inchoate, incomplete, and ineffective. Its completion was intercepted and held up by the injunction orders of Judge Pritchard, and it has never been completed. The order of the Commission is still up in the air so far as these six companies are concerned, and will be inchoate until it shall have been published for four consecutive weeks in some newspaper of general circulation published in the city of Richmond, as imperatively required by sub-section (b) of section 156 of the Constitution, as an indispensable condition precedent to any such order of the Commission's becoming in any sense operative or effective.

So soon as the decree reversing the order of the U. S. Circuit Judge by which the injunction was awarded, shall be certified down to said circuit court by the mandate of the U. S. Supreme Court, the suspended order of the Commission can be completed by the publication required by the Constitution to be made, pursuant to a supplemental order to be then entered by the Commission, *nunc pro tunc*.

The action and order of the Commission in the premises would thus be completed.

The continuity of the proceeding would be preserved, and an ample opportunity would be open to these railroad companies to take their appeals to the State Supreme Court.

In this way it would be entirely practicable for any of the complainants which should desire to do so, to promptly perfect its appeal to the Supreme Court of Appeals of Virginia, from the action of the Commission of which they complain.

It might be urged that conditions have changed since the order of April 27, 1907, was entered by the Commission.

This cannot be denied; but it is a circumstance which would be just as inherent in these cases if an appeal could still be now taken to the Supreme Court of Appeals of Virginia directly from the order of April 27, 1907, or if these cases should be litigated in the United States Court to a final decision upon their merits, as the parties have stipulated shall be done.

It is true here, as it must generally be true, that the conditions existing at the time a particular rate may be prescribed, will not as a rule be the

same, one or two years after its adoption; but that affords no ground for attacking the rate, if it was valid and reasonable when prescribed, though it may furnish a good reason for applying to the body which prescribed the rate, to change it to conform to the requirements of the changed conditions.

That is to say, the case would go to the Virginia Court of Appeals upon precisely the same evidence upon which it would go if an appeal could now be taken from the incipient order of April 27, 1907.

The case which would be heard by the appellate court would be precisely the same which would have been heard if an appeal had been taken, say, in 1907, which the U. S. Supreme Court hold is the course of procedure which the complainants should have pursued.

It is clearly the meaning of that decision that the appellees shall, if it is practicable to do so, first have recourse to the Supreme Court of Appeals of Virginia before invoking the jurisdiction of the U. S. Circuit Court; and it is manifest that it is practicable for them to have these cases reviewed in the Virginia Court of Appeals in the manner I have suggested.

Let us now consider what will be the status of these cases and the rights of the parties in respect to them, upon the hypothesis that it is not practicable for the complainants to have appeals to the Supreme Court of Appeals of Virginia.

In that contingency it is evident from the final decree and the opinion of the U. S. Supreme Court, that the decrees appealed from have been reversed; but the bills are not dismissed. These cases would thereupon stand just as they stood after the complainants' bills were filed and process executed thereon, without any appearance for the defendants except the limited appearance entered solely for the purpose of contesting the jurisdiction of the court.

Upon the issues involving that jurisdiction the decision of the U. S. Supreme Court must be taken in this contingency to have sustained that jurisdiction, and that is all; for only the question of jurisdiction was decided by that court.

So the complainants would stand upon their bills with the demurrer and pleas to the jurisdiction overruled or rejected.

Will it or can it be contended that the defendants would, under such circumstances, be precluded by anything which has been done or said by the U. S. Supreme Court from now putting in a general appearance, and asking and being allowed to contest the cases upon their merits, and to file their answers in each case for this purpose?

Will a court of equity close its doors to defendants under such circumstances, and decline to permit them to show that upon the merits, there is no equity in the complainants' bills, a thing the defendants have never had an opportunity to do?

It is true that the Supreme Court in its opinion says, that in the contingency we are now considering, "the companies will be entitled to decrees."

Can it be reasonably or plausibly contended that that means that they will be thereupon entitled to the very decrees which have been reversed; or fairly construed, must it not be taken to mean that they will be entitled to such decrees as they shall show themselves to be entitled to in equity and good conscience?

Upon this aspect of the subject, that is upon the opinion and decree of the court, I conclude that one of these two courses may be pursued, namely:

(1) Complete the action of the Commission begun on the 27th of April, 1907, and let the companies deeming themselves aggrieved by it, appeal to the Supreme Court of Appeals of Virginia, or else

(2) If that door shall be considered to be closed, then let the defendants, by their counsel, enter a general appearance in these six suits in the U. S. Circuit Court and ask to be permitted to defend them upon their merits, and to that end to file their answers or such other pleadings as they may be advised.

But there is another and a very material aspect in which these cases now present themselves, and one which demands the most serious consideration.

It is that which arises by reason of the contract entered into on the 2d day of August, 1907, between the complainants in the suits of the Atlantic Coast Line R. R. Co., the Chesapeake & Ohio Railway Co., the Norfolk & Western Railway Co., and the Southern Railway Company, and the defendants, which will be found printed with a communication from the Governor to the General Assembly of 1908, as Senate Document No. 5.

That contract contains some very important stipulations, among other things that the companies parties thereto will put into effect and keep and maintain in force, unless changed by the Commission, the rates prescribed by said order of the Commission of April 27, 1907, from a date not later than October 1, 1907, "unless and until, upon a final hearing of the merits (after the decision by the Supreme Court of the question of jurisdiction or other preliminary questions), as herein provided for, such rates be held to be unreasonable, illegal, or invalid." (See paragraph 4 of said contract.)

Paragraph 2 specifies how the defendants shall be given an opportunity to be so heard upon the merits.

Paragraph 2 of that agreement is as follows:

"2. That if the defendants in said cases, with a view to expediting their final hearing in, or decision by, the Supreme Court of the United States should, prior to an appeal to the United States Supreme Court, decline to, or refrain from, defending them on their merits in the lower court, then, and in the event of a decision of the Supreme Court adverse to the said defendants' contention, or any of them, said defendants shall not be prejudiced by their failure to defend on the merits in the lower court, but (either in some new suit or suits or other proceedings instituted in the Circuit Court of the United States, or in the same suits upon a rehearing, or otherwise, in the same court) they shall—unless such Supreme Court decision determine the invalidity of the Commission itself—have an opportunity to assert anew and to establish the reasonableness and validity of said rates and the rights of the State to make and enforce them, without prejudice on the merits, by reason of anything which may have occurred, in said causes first above named, and, so far as the merits are concerned, just as if such causes now pending had never been in existence, but the complainants shall be entitled to, and the defendants shall be bound by, the determination of all questions decided by the Supreme Court in said causes first above named, except those affecting the merits."

It is here distinctly stipulated that in the event that the decision of the Supreme Court shall be adverse to the defendants upon any of their contentions (except only in the contingency that that court shall decide that the Commission is itself an invalid tribunal), then the defendants shall not be prejudiced by anything that has occurred, but shall thereafter have the fairest and fullest opportunity to defend these four suits on the merits. And the contract states specifically in what manner this right shall be accorded to the defendants, namely, "either in some new suit or suits, or other proceedings instituted in the Circuit Court of the United States, or in the same suits upon a rehearing or otherwise in the same court."

There can be, and there will be, no contention that the precise conditions upon which these stipulations as to a hearing upon the merits were to become operative, now exist exactly as they are defined in the contract, *if these four railway companies have within the meaning of the decision of the U. S. Supreme Court lost their opportunity to appeal to the Supreme Court of Virginia.*

If this be the effect of that decision, I am unable to deduce any other meaning from the language of the contract, except that the parties stipulate that said rates shall, unless changed by the Commission, be maintained until there shall be a hearing and final adjudication upon the merits adversely to the validity of said rates, and that such hearing shall be in said Circuit Court of the United States, "either in some new suit or suits or other proceedings instituted therein, or in the same suits upon a rehearing *or otherwise in the same court.*"

I feel sure that it is the purpose and desire of all parties to that memorable compact, to carry out its stipulations in good faith according to their letter and spirit.

Of course, neither counsel nor parties could anticipate the precise decision which has been rendered by the U. S. Supreme Court, one which requires these companies, if it is practicable to do so, to appeal first to the Supreme Court of the State before invoking the ultimate jurisdiction of the U. S. Circuit Court, and if such a remedy is open to them, and if the Supreme Court of Appeals of Virginia decides adversely to the jurisdiction of said circuit court as here attempted to be exercised.

In my view, as already indicated, it is still entirely practicable for any of the defendants in any of these six suits to have recourse to the highest court of the State along the line of procedure which I have above outlined, and if that course is pursued, the case would be relieved from any difficulty whatever upon the question of procedure.

But if that course shall not, or for any reason cannot, be adopted, then what is to be done?

The only thing to be done, as I understand the decree and opinion of the Supreme Court, is for the defendants to ask leave to enter a general appearance, and to be given an opportunity to be heard in each case upon the merits, and to this end to file their answers, and to meet testimony with counter testimony and proofs with counter proofs.

It is clear to my mind that the defendants have the right, in the event that the complainants' bills are not dismissed, to now file their answers, and to be heard upon the merits, independently of any stipulation with the complainants.

But if there is any question as to this, there cannot be any doubt that they would have this right as to the four companies, parties to the contract of August 3, 1907, by the express terms of that contract.

It is expressly stipulated in that contract that the hearing upon the merits therein provided for, must be in the said U. S. Circuit Court, "either in some new suit or suits or other proceedings instituted therein or in the same suits upon a rehearing or otherwise.

I have been unable to conceive any manner in which, under the rules of pleading, the defendants could obtain a rehearing; nor is that necessary when we have the simple and usual mode for making defense in such cases, by answer, plainly open to them.

If this, for any reason, cannot be availed of, then it will be *for the complainants by* some new suit or suits or other proceedings instituted by them in the U. S. Circuit Court to give the defendants the opportunity to have a hearing on the merits, which they have stipulated shall be accorded to the defendants.

That will be a problem for the complainants to solve, in the event that the defendants are denied the right to answer, and to defend on the merits.

The foregoing are my views of the rights of the defendants in these cases, under the decision and decree of the Supreme Court, and under the contract with the four principal companies litigant.

Now as to Mr. Thom's suggestion.

Upon the maturest reflection and consideration which I have been able to give to the subject, I am constrained to advise most earnestly against according to, or acquiescing in, any such proposal as he suggests.

As I understand his proposal it is, that the Commission shall allow a final decree to be entered by Judge Pritchard in each of these cases, deciding that the order of the Commission of the 27th of April, 1907, was confiscatory and otherwise improper, said decree to contain a declaration that the Commission do not consider the question of the validity, confiscatoriness, or unreasonableness of that order any longer material.

If these were suits which merely affected the rights and interests, and propriety of conduct of the defendants as individuals, I do not think they ought to agree to let a decree go reflecting upon that conduct. Against such a decree, if not sustained by the truth, they should interpose every legal defense which could be made against it.

Here the members of the Commission represent great public interests. They are in fact the official representatives of the rights, the interests, and the dignity of the Commonwealth. I do not think they could, without compromising the Commonwealth, lie down and let a decree reflecting upon a solemn act of one of her most exalted tribunals be entered. They should resist it to the last extremity.

The question whether such an act was a wrongful act can never cease to be a material question.

If the Commonwealth shall be given a fair opportunity to be heard in these cases upon their merits, and shall avail herself fully and effectively of it, I am convinced (as Mr. Braxton, lately my very efficient colleague, was satisfied) that we can show that the order complained of was not confiscatory, invalid, unreasonable, or otherwise improper.

As the general attorney for the State, as well as *ex-officio* of counsel for the members of the Commission, I shall deem it my duty to make every defense which can be lawfully made to any decree or adjudication which shall pronounce said order confiscatory, or otherwise improper, or unreasonable, and to resist the same to the utmost.

To act differently would be to acquiesce in, if not to consent to, a course which would subject Virginia to humiliation and in my candid judgment to grievous wrong.

I do not think there is any course open to the members of your Commission for the termination of this unfortunate litigation if it is ended by a decree which shall decide these cases upon the merits, except along one or the other of the lines which I have indicated.

If it is to be ended without farther controversy, then the complainants have the matter entirely within their control.

They can, if they wish to avoid all farther acrimonious litigation, accomplish this by dismissing their suits (if their bills are not dismissed under the decree of the Supreme Court), and applying to the State Corporation Commission to give them relief against the rates prescribed by the order of April 27, 1907.

If they shall in such a proceeding show that those rates are under present conditions and those likely to exist in future, unjust, not fairly compensatory for the service rendered, or otherwise unreasonable, I feel sure they will receive from the Commission such relief as they may be entitled to.

No one can be more sincerely anxious than I am to see these vexatious suits ended, and all controversy between the railroad companies and the Commonwealth adjusted on just and honorable terms, but I am unwilling by action or inaction to sanction a termination of that litigation upon any terms which would be unjust or prejudicial to Virginia.

As a matter of fair dealing, and by the express terms of the contract with the four leading companies, the defendants are entitled to a hearing upon the merits, before any decree disposing of these suits upon the merits shall be entered, and upon this we must insist.

After a full interchange of views with Senator Daniel, I am justified in saying that he concurs generally in the conclusions here expressed. I regret that there has been no opportunity to submit this communication to him, that I might have the benefit of his farther suggestions in strengthening the points I have made, and of his concurrence in this opinion in detail, as well as in the general results reached.

Very truly and respectfully,

WILLIAM A. ANDERSON.

To the Superintendent of Public Instruction.

As to the Compensation of County Treasurers for Receiving and Disbursing School Taxes and Money.

RICHMOND, VA., February 1, 1909.

Hon. J. D. EGGLESTON, JR.,
Superintendent of Public Instruction,
Richmond, Virginia.

DEAR SIR:

Your favor of the 30th ultimo, enclosing letter of Mr. David Walker, school trustee of Campbell county, of the 29th ultimo to you, this instant received.

(1) It seems to me that section 1449 of the Code, as amended by the act of March 14, 1908, acts of 1908, p. 553 (compilation of Virginia School Laws, section 88, page 25), governs the question of the compensation to be allowed the treasurer of Campbell county for receiving and disbursing the \$5,000.00 turned over to him by the treasurer of Lynchburg on account of the value of the school buildings in that portion of Brookville District of Campbell county which has been recently annexed to that city.

(2) I am strongly inclined to the view also that the same section (1449) of the Code governs the question of the compensation to be paid to the treasurer of Campbell county for receiving and disbursing the school taxes (one-half thereof) collected by the treasurer of Lynchburg for the year 1908, and paid over to the treasurer of Campbell county.

I know of no other statute which prescribes the compensation which a county treasurer shall be entitled to for receiving and disbursing funds other than those arising from taxes and levies collected by him, and the money last referred to does not arise from taxes or levies collected by the treasurer of Campbell county. All that he has to do, is to receive and disburse this money in accordance with the direction of the board controlling the fund.

The fund derived from those taxes so paid over to the treasurer of Campbell county by the treasurer of Lynchburg, who collected those taxes, has already, I presume, been charged with commissions by the treasurer of Lynchburg for collecting and paying over the same.

(3) I know of no law or decision of the courts in Virginia which would justify a county treasurer in receiving and appropriating to his own use, one dollar of profit on account of the deposit or other use of public funds. Any money earned in that way clearly belongs to the public fund which earned it, and cannot be appropriated to the personal use of the treasurer.

If money has been earned by reason of the deposit of either of the funds referred to, it should be added to the fund, and not retained by the treasurer.

It would be a palpable breach of trust for any ordinary trustee to undertake to appropriate money earned by the trust fund in his custody, to his own use, and it is at least equally a violation of duty for a county treasurer to attempt to make money for himself in the same way, for he is in the highest sense a trustee for the public.

He and the sureties upon his official bond would be liable to make good such a misappropriation of money.

Of course, what I say is based upon the facts communicated to you by Mr. Walker, and by you to me.

I would be loath to believe that the treasurer of Campbell county would attempt to make money in that way.

I herewith return Mr. Walker's letter to you.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Jurisdiction of School Trustee Electoral Boards in Appeals from District School Boards.

RICHMOND, VA., March 5, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction,

Richmond, Virginia.

MY DEAR SIR:

As well as I can understand the inquiry submitted in your favor of the 6th instant, just received, I would say that the second sub-section of section 45 of the *School Law* gives to the school trustee electoral board of a county jurisdiction to hear an appeal from any action of a district board of school trustees of such county in the matter of either the employment or of the dismissal of a public school teacher employed by such district board of school trustees.

Section 55 of the regulations adopted by the State Board of Education gives to the division superintendent jurisdiction to hear all appeals or complaints concerning the action of any persons connected with the school systems within the bounds, *unless the matters in question may be properly referred to other authorities*: "Provided that teachers or officers belonging to the system shall have the right of appeal from the decisions of the division superintendent to the Superintendent of Public Instruction."

Now, while this language is very broad, I do not think it should be construed to confer upon the division superintendent jurisdiction to hear a question in regard to the employment or dismissal of a school teacher, because to give it that construction would make it repugnant to the provisions of the second sub-section of section 45 of the *School Law* above referred to.

Section 55 of the *Regulations*, as will be seen, does not give the division superintendent appellate jurisdiction of any matter which may be properly referred to other authorities, and by the second sub-section of section 45 of the *School Law*, an appeal from any action of a district board of school trustees in the matter of either the employment or dismissal of a teacher must go to the school trustee electoral board.

Appeals to the school trustee electoral board are governed by the provisions of section 27 of the *School Law*—section 1487 of the Code—and such appeals can only be taken by five interested heads of families resident of the district who feel themselves aggrieved by the action of the district school board.

Upon such consideration as I have been able to give to the provisions of sub-section 2 of section 45 of the *School Law*, and to the provisions of *Regulation No. 55*, it appears to me that it was never designed that an ap-

peal should be taken to the Superintendent of Public Instruction upon the question of the propriety of either the employment or of the dismissal of a school teacher by the district board of school trustees.

If the division superintendent cannot settle and adjust such complaints and controversies satisfactorily when they arise, then it seems to me that the only remedy is by appeal, under sub-section 2 of section 45, section 27, and section 23 of the *School Laws*, to the school trustee electoral board of the county, whose decision will be final.

These statutes were evidently intended to be "statutes of repose," and to rest with the local authorities jurisdiction for the final decision of the innumerable questions of this kind which must arise in the different counties and cities of the State, instead of burdening the Department of Education with their consideration and decision.

Very truly yours,

WILLIAM A. ANDERSON.

As to Appeals by Teachers to Division Superintendents of Schools and to the Superintendent of Public Instruction.

RICHMOND, VA., March 19, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction,

Richmond, Virginia.

MY DEAR SIR:

I have again considered the question as to the right of a teacher who has been suspended by the board of district school trustees of her district, to appeal to the division superintendent, and from his decision to the Superintendent of Public Instruction, submitted to me in your favor of the 10th instant, and have followed out the history of the legislation upon that subject.

The general policy of our law seems to be to leave the control and administration of the schools in the matter of the selection of teachers, and other matters of local interest, with the local school authorities. And yet the language of section 55 of the regulations would seem to be broad enough to bear an interpretation which would give to a teacher suspended by the district board, a right of appeal, first to the division superintendent, and if she considered herself aggrieved by his decision, then to the Superintendent of Public Instruction.

On the other hand, it is clear that under sections 27 and 23 and 45 of the school laws, any five heads of families of such district could take an appeal from such action of the district board of school trustees to the school trustee electoral board of the county.

The question is, whether the appellate jurisdiction of the electoral board is exclusive in such case.

On further reflection, and after considering the legislation upon this subject, from the first enactment of the school law down to the present time, I am, notwithstanding the views expressed in my letter of March 6th, not prepared to say that the appellate jurisdiction of the school trustee electoral board in such case is exclusive.

Section 55 of the school regulations, unless it is in conflict with some statute enacted by the General Assembly, is the law upon this subject.

That section is the same as the eighth subdivision of section 1439 of the school law as found in the Code of 1887, and was expressed in the same language in the original school law prepared by Dr. Ruffner, and enacted by the legislature of 1869-'70, found on pages 407-8 of the acts of 1869-'70. Down to the adoption of the present Constitution, it was undoubtedly the law of the State, and gave to a teacher who was aggrieved by the action of the district board of school trustees in suspending or dismissing her, an appeal to the division superintendent, and then to the Superintendent of Public Instruction.

It has been re-enacted by the State Board of Education as one of the regulations of the public school system.

I am not willing to go to the extent of saying that this regulation is in such conflict with sections 27 and 23 and the second paragraph of section 45 of the school law as to deny to the teacher any right of appeal.

It may be unfortunate that her right of final appeal was not given to the school trustee electoral board.

The law as embodied in the eighth subdivision of section 1439 of the old school law, was merely re-enacted by the State Board of Education as section 55 of the school regulations.

On further consideration, I think you would be justified in taking appellate jurisdiction of the case to which you refer, under the language of that regulation.

Very truly yours,

WILLIAM A. ANDERSON.

As to Power of the Board of Supervisors of a County to Supplement the Salary of the Division Superintendent of Schools When That Salary Has Already Been Added to by the County School Board.

RICHMOND, VA., April 14, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction,

Richmond, Virginia.

DEAR SIR:

Your favor of the 12th, enclosing Senator Strode's letter to you of the 10th instant, has been received, in which you submit the question:

Whether, under section 1438 of the Code, as amended by the act approved March 14, 1908, acts of 1908, p. 535, it would be lawful for the board of supervisors of a county to supplement the salary of a division superintendent of schools in a case where the county school board of such county has already made an addition to such salary under the provisions of said act.

The language of the statute in question is as follows:

"The board of supervisors of any county, or the council of any city may out of any surplus of any funds in the treasury of such county or city, or the county or city school board may out of the local school fund supplement the salary of the superintendent of schools for the division in which said county or city may be located." * * *

To state the concrete case: The county school board of Amherst county has, as I understand, already supplemented the salary of the division superintendent for that county, so as to make the total salary hereafter \$900.00

per annum, and it is proposed that the board of supervisors of that county shall still farther supplement this salary for the purpose of enabling the school authorities to secure the services of a competent and efficient man who will devote his time and attention to the discharge of the duties of his office, and to the school work of the county to the exclusion of the demands of any other avocation or profession.

Members of the board of supervisors of that county are under the impression that, under the language of the statute above quoted, it is not competent for both the school board and the board of supervisors of the county to supplement such salary.

In order to construe the provision of the statute in question it is necessary to determine what is the meaning and effect of the word "or" as therein used.

It is true that the word "or" in an instrument or in a statute may be, and usually is, distinctly a disjunctive participle; but this is not the case where to so construe it would tend to defeat the plain intent of the instrument or of the law.

"To further the intent of the parties, however, it has often been construed as *conjunctive*."

Cyclopedic Law Dictionary, 655. Citing 30 Ohio St., 407; 36 Wisconsin, 466; 3 Gill (Md.), 192; 1 Yeates (Pa.), 316; 14 Daly (N. Y.), 361.

"The word 'or' is frequently construed to mean 'and,' and *vice versa* in order to carry out the evident intent of the parties."

Dumont v. U. S., 8 Otto, 142; *People v. Van Rensselaar*, 8 Barb. (N. Y.), 189, 200; *Hope v. Clifden*, 6 Ves., 499, 508; *Witherspoon v. Jernigan*, 76 S. W. (Tex.), 445, 447. See also *Richmond v. Woodward*, 32 Vt., 833.

"It is not uncommon to construe 'or' to mean 'and' when necessary to carry into effect the intention of the parties."

Litchfield v. Cudworth, 32 Mass. (15 Pick.), 23, 27.

"In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as meaning 'or.'"

U. S. v. Fisk, 70 U. S., 444, 447; 18 L. Ed., 243, 244.

A large number of other cases could be cited to the same effect.

In order to determine the meaning and effect of the word "or" as used in the above statute, it becomes necessary, therefore, to ascertain what was the intent and purpose of the legislature in the enactment of the statute in which this word occurs.

Section 1438 as now amended, is a part of the same act approved March 14, 1908, by which section 1433 of the Code is also amended. The act amending these sections is thus one act, and must be all taken, read, and construed closely together. The first clause of section 1433 as amended by that act, provides for the increase of the salaries of division superintendents of schools wherever this shall be practicable, to a *minimum* of \$900.00 per annum, except in cases where the State Board of Education shall be satisfied that the educational interests of the division can be effectively taken care of by a superintendent at a smaller salary, under exceptional conditions indicated in the act.

It is evident from an examination of the whole act, and from a comparison of its provisions with those of the former statutes on the subject, that

it was the purpose of the General Assembly that there should be such an increase in the salaries of division superintendents of schools as would enable the school authorities to secure trained, capable, and efficient men for those positions.

In the light of this dominant intent and purpose of the act it is manifest that the word "or" as used in section 1438 was not intended to restrict or diminish the salaries of division superintendents of schools, but to provide a manner in which such salaries might be increased.

I am satisfied, therefore, taking the legislation on the subject as a whole, that a liberal construction should be given to this provision of the law in furtherance of the plain intent of the statute, and that it is competent for the board of supervisors of a county to supplement the salary of the division superintendent thereof, in a case where such salary has already been supplemented by the school board of such county.

A different construction would tend to absolutely defeat the manifest purpose of the General Assembly in the enactment of this law. For instance, if the construction suggested by members of the board of supervisors of Amherst county should be a correct one, the county school board of a county would be powerless to supplement the salary of a division superintendent in a case, for example, where the board of supervisors had supplemented the salary so as to raise it to \$600.00; and of course the reverse of this proposition would also be true. All that would be necessary for the board of supervisors of any county to do, in order to defeat the object of the law, would be to supplement the salary of the division superintendent of such county to the extent, say, of \$100.00, \$50.00, or \$10.00, or any other nominal sum, and thereupon, if the literal construction of the act above suggested should prevail, the other body equally authorized to make such addition to the salary would be estopped from exercising that power and duty.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Filling of Vacancies in the Office of District School Trustees and the Terms of the Incumbents Thereof.

RICHMOND, VA., April 21, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction.

Richmond, Virginia.

MY DEAR SIR:

The correspondence between Crandal Mackey, Esq., attorney for the Commonwealth for Alexandria county, and James E. Clements, Esq., superintendent of schools for that county, and yourself, (Mr. Mackey's first letter to you being dated March 10th, his second, April 15th, and Mr. Clements' communication to you being dated April 17, 1909), and your request that I would advise you as to the meaning and effect of the statutes of Virginia upon the subject referred to in that correspondence, were received at the hands of Secretary R. C. Stearnes Monday afternoon.

As I understand the facts to which your inquiry refers, they are as follows:

On the 30th of September, 1907, Mr. Ralph Baldwin was duly appointed by the school trustee electoral board of Alexandria county a school trustee for Arlington District for the unexpired term of Mr. A. P. Douglas, whose resignation of his office of district school trustee was tendered and accepted upon that day. Mr. Douglas had been elected on July 1, 1905, for the term expiring May 1, 1908. By the terms of section 1454 of the Code, as amended by the act of March 15, 1906, acts of 1906, p. 438, his term of office had been "extended to the first day of September succeeding the term for which" he was appointed; so that Mr. Douglas' term had been extended until the first day of September, 1908, and not until the first day of May, 1908, as Mr. Clements states. Mr. Baldwin, therefore, was elected for the unexpired term of Mr. Douglas ending September 1, 1908.

By section 1454 of the Code, as amended by the act approved March 15, 1906, and as it now stands, it is provided that:

"The school trustee electoral board shall appoint one school trustee for the several school districts in their respective counties, not more than thirty days before September first, nineteen hundred and six, whose term of office shall be three years from said September first, nineteen hundred and six, and thirty days before September first of each succeeding year thereafter, one school trustee for each district, whose term of office shall begin on the first day of September of that year and continue for three years."

Mr. Baldwin's successor should therefore have been appointed on some day between the first day of August and the first day of September, 1908. But his successor not having been appointed during that period of 30 days, as expressly required by the above statute, Mr. Baldwin was authorized to continue to discharge the duties of the office after his term of service expired, and until his successor should qualify, by the provisions of section 33 of the Constitution which declares that:

"All officers, elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified."

Mr. Throop lays down the law to be that:

"Where an official term is extended by statute, and a new election is held for the extended period only, the person so elected holds over, with like effect as the incumbent of a full term."

Throop on Public Officers, section 331.

People v. Crissey, 91 N. Y., p. 616.

"The same rule holds, where a person is appointed to fill a vacancy in an office, and for the unexpired term only."

Idem; and *People v. McIver*, 68 N. C., p. 467.

So that here, after the first of September, 1908, Mr. Ralph Baldwin continued to hold the office under the provisions of section 33 of the Constitution of the State, until his successor should have been elected, and qualified.

It appears from Mr. Clements statement that:

"On the 27th day of February, 1909, the said *School Electoral Trustee Board*, appointed Mr. E. B. Van-Every a school trustee of Arlington District to succeed Mr. Ralph Baldwin, who filled out the unexpired term of Mr. A. P. Douglas, resigned; the term of Mr. Douglas having expired May 1, 1908." (Should be September 1, 1908.) "Mr. E. B. Van-Every qualified on the 23rd day of March, 1909.

"Mr. Ralph Baldwin did not send in any resignation."

The question is whether there was a vacancy in the said office of school trustee which said school trustee electoral board was authorized to fill at that time. In other words, whether Mr. Van-Every is the lawfully elected school trustee for that district, or whether Mr. Baldwin continues to hold the office of school trustee for that district.

The question has not been distinctly passed upon or settled by any adjudication in this State, and can perhaps only be definitely decided by the courts; though very broad powers in the matter of determining the true intent and meaning of the school laws and regulations, are vested in the Superintendent of Public Instruction by the second clause of Regulation No. 1, adopted by the State Board of Education, which regulation has the force of law.

If the view that Mr. Baldwin, after the first day of September, 1908, was merely a *locum tenens*, and that there was a vacancy in said office, is the correct view, then the election of Mr. Van-Every as Mr. Baldwin's successor on the 27th of February, 1909, was a valid election.

If, on the other hand, the correct view of the situation be that, under the terms of section 1454 of the Code, which required that Mr. Baldwin's successor should be elected not more than 30 days before the first day of September, 1908, and under the provisions of section 33 of the Constitution, which authorizes Mr. Baldwin to continue to discharge the duties of his office after his term expired, and until his successor should qualify, there was no vacancy in the office on the 27th day of February, 1909, then the election of Mr. Van-Every was illegal; for the school trustee electoral board was by the emphatic and reiterated mandate of section 1454 of the Code required to elect for the regular term, only during the period of 30 days before the first day of September, 1908.

Under the language of the Virginia statute and of the decisions of the courts, I am constrained to the conclusion that there was no vacancy in the office of school trustee then held by Mr. Baldwin as the holding over incumbent of the office, on the 27th day of February, 1909, to be filled by election by the school trustee electoral board, and that Mr. Baldwin was, and is, entitled to hold that office, unless he shall resign the same, remove from the district, be removed from the office in the manner prescribed by law, or shall die, until his successor shall have been elected at the time, and in the manner, authorized by law.

By the positive language of section 1454 of the Code, the board is not authorized to fill vacancies occurring within a regular term of the school trustee, at any time other than 30 days before the first of September in the year in which such term shall expire. That is to say, said board was not empowered to appoint a trustee to fill a vacancy in the office held by Mr.

Baldwin on the 27th of February, 1909, and there being no vacancy in that office at that time, its appointment of Mr. Van-Every was illegal.

It is well settled that:

"Vacancy in an office means that the office is empty—that is, without an incumbent who has a right to exercise its functions and take its fees or emoluments."

State v. Ware, 10 Pac., 885, 888;

Smith v. McConnell, 44 S. C., 491;

Ex Parte Meredith, 33 Gratt., 119, 121-122.

"An office cannot be said to be vacant while any person is authorized to act. In case of the failure by a town to elect officers at the annual town meeting, there is no vacancy because the officers of the preceding year hold the offices until others are chosen or appointed in their places and have qualified."

People v. Van Horne, (N. Y.) 18 Wend., 515, 518.

Not only was there no vacancy in this office at that time, but Mr. Baldwin, the holding over trustee, is, I think, entitled to hold the office until his successor shall have been elected in the manner, and at the time, prescribed by law.

The requirement of section 1454 that the school trustee electoral board shall elect school trustees not more than 30 days before the first of September in each year, except in cases when said board shall elect such trustee to fill a vacancy, is, perhaps, unusual, but it is nevertheless plainly expressed in that statute, and until changed by the General Assembly must control.

If the General Assembly had designed that said electoral board should elect a trustee at any other time than during the month of August in a case where there had been a failure to elect during that month, it would only have been necessary to have said so in the law; and this could have been readily done by providing that such appointment should be made within 30 days before the first day of September in each year, or as soon thereafter as practicable, or by the use of other apt words to like affect. But this, the General Assembly has failed to do.

The whole trouble has been occasioned here by the failure of the school trustee electoral board of Alexandria county to comply with section 1454 of the Code, which plainly required that board to elect this trustee in the month of August, 1908.

I beg leave to refer to the following Virginia cases which have some bearing upon the above question, and the findings of which are in entire harmony with the views here expressed:

Commonwealth v. Drewry, 15 Gratt., 1; *Ex Parte Lawhorne*, 18 Gratt., 85; and *Ex Parte Meredith*, 33 Gratt., 119.

Respectfully submitted,

WILLIAM A. ANDERSON.

As to the Authority to the Boards of Supervisors of Counties to Supplement the Salary of the Division Superintendent of Schools.

RICHMOND, VA., April 27, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction,

Richmond, Virginia.

DEAR SIR:

Yours of the 26th instant, enclosing the letter of Mr. Fletcher C. Campbell to you of the 23rd, this instant received, and I have considered the question submitted by Mr. Campbell to you.

As I understand the proposition suggested by the board of supervisors of Amherst county, it is as follows:

1. That section 1438 of the Code, as amended by the act of March 14, 1908, acts of 1908, p. 535, authorizes the board of supervisors of any county to supplement the salary of the division superintendent of schools thereof only "out of any surplus of any funds in the treasury of such county."

2. That by the same section it is provided that the salary of such division superintendent shall not be increased or diminished by such board of supervisors during his term of office.

3. That such "surplus" not only fluctuates from year to year, but that there might not be any surplus in some of the years of the term of office of such division superintendent.

4. That in this manner it might turn out that the salary of such division superintendent would be diminished during his term of office, which is prohibited by the act referred to; and thus that the act is "contradictory" in terms, and as is stated in Mr. Campbell's letter, "unconstitutional."

I am unable to find anything in the point that this act is contradictory, but if it was that would not render the act invalid. It could be carried out until the contingency happened upon which the so-called contradictory provision came into operation; but there does not appear to me to be anything contradictory in the provisions of this section. It simply, and in the broadest terms, authorizes the board of supervisors to supplement the salary of the division superintendent "out of any surplus of any funds in the treasury of such county." Of course, if there are no surplus of funds in the treasury of the county, the supplemental provision cannot take effect until there should be such surplus.

If there is anything in the point, then a very large number of the appropriations which are now made, and which for half a century and more have been made by the General Assembly of Virginia "payable out of any moneys in the treasury not otherwise appropriated," would be void or illegal, because there might not be any funds in the treasury "not otherwise appropriated"; and yet many thousand appropriations have been made which are in these terms, and their validity has never been, and could never be, questioned. If at any particular time there should not be funds in the treasury "not otherwise appropriated," the payment of the appropriation would have to be deferred until there were such funds in the treasury. And the same rule would, I think, apply to the appropriation authorized to be made by the boards of supervisors in the statute referred to.

Nor do I find anything unconstitutional in the language of this act. It does not authorize the board of supervisors to diminish the salary of a division superintendent when such salary has been once supplemented by such board, nor would such salary be diminished by the failure of funds at a particular time to pay the same, but such payment would have to be postponed until there should be funds in the treasury of the county applicable to its payment. This is true not only as to the salary of division superintendents of schools payable out of the county funds, but it is also true as to any other charge upon the county treasury—that its payment could only be made when there were funds in the treasury which could be used for that purpose; and the failure of funds to meet such a charge would no more render the particular charge upon the treasury of the county illegal in the one case than in the other.

As an answer to the whole of the objections suggested in the above proposition, I would say that the legislature doubtless contemplated that the board of supervisors having once supplemented the salary of the division superintendent, would see to it that there was a sufficient surplus in the treasury to meet the same, by making adequate levies for this purpose.

It is proper, however, that I should say that under the law, the Commonwealth's attorney of each county is the legal adviser of the board of supervisors of such county, and that the board of supervisors of Amherst county should consult and take the advice of that officer.

Very truly yours,

WILLIAM A. ANDERSON.

As to Absence of Any Law Authorizing a Commission on Tuition Paid by Patrons of Schools.

RICHMOND, VA., April 27, 1909.

Hon. J. D. EGGLESTON, JR.,
*Superintendent of Public Instruction,
 Richmond, Virginia.*

DEAR SIR:

Yours of the 26th, enclosing the letter of Mr. David L. Pulliam, superintendent of schools for Manchester, Virginia, this instant received.

The question mentioned by Mr. Pulliam, and which you submit to me, is:

"Is the treasurer of the city of Manchester entitled to commissions on money paid as tuition by parents or guardians residing outside of the city of Manchester?"

County and city treasurers are entitled to only such compensation as is allowed them by law.

I am unable to find any provision in the statutes of the State which can be construed to distinctly apply to the case stated in the above inquiry, or to prescribe the compensation to be allowed a city treasurer in any such case.

It seems to be a case not provided for in our laws.

Very truly yours,

WILLIAM A. ANDERSON.

As to What Constitutes a Quorum of a County School Board.

RICHMOND, VA., June 10, 1909.

Hon. J. D. EGGLESTON, JR.,
Superintendent of Public Instruction,
Richmond, Virginia.

DEAR SIR:

The enclosed letter of date the 8th instant, from Mr. J. J. Pond, clerk of the district school board, Lawrenceville, Virginia, is respectfully referred to you for your ruling upon the question submitted.

I beg leave to submit the following comments or suggestions thereon:

The school law, section 1441 of the Code, provides that:

"The division superintendent of schools, together with the district school trustees in each county, including those in towns constituting separate school districts, for certain purposes hereinafter specified, shall constitute a body corporate, under the style of 'the county school board of county,' etc.

Section 1442 makes the division superintendent of school *ex-officio* the president of such school board, and I would take it the presiding officer at its meetings.

Although section 1461 prescribes what number of trustees shall constitute a quorum of a district school board, the school law is silent as to what shall constitute a quorum of a county school board.

Unless otherwise prescribed by law a quorum in a legislative or other body, cannot be less than a majority of the members of such body.

As the General Assembly has failed to prescribe any other rule, a majority of the members of a school board must be present at a meeting of such board, in order to make a quorum, or a body that can transact any business, except to adjourn to a future time.

As the law, I think, clearly makes the division superintendent a member and part of the county school board of his county, I am of opinion that where there is an equal number of school trustees in a county, one-half of that number, together with the division superintendent, would constitute a legal quorum for the transaction of business.

Very truly yours,

WILLIAM A. ANDERSON.

Note.—The authorities referred to are *Ex Parte Willcocks*, 7 Cow., 402; *Decker v. School District No. 1*, 101 Mo. App., 115; 74 S. W., 391; *Zeiler v. Central R. R. Co.*, 84 Md., 304; 34 L. R. A., 469.

As to the Jurisdiction of Trustee Electoral Boards in Appeals From Action of District School Boards in the Matter of Location of School Houses.

RICHMOND, VA., August 19, 1909.

Hon. J. D. EGGLESTON, JR.,
Superintendent of Public Instruction,
Richmond, Virginia.

MY DEAR SIR:

I have before me your letter of the 10th instant, addressed to the Attorney General, enclosing letter of F. T. West, division superintendent of Louisa county, of the 7th instant, and asking for an opinion on the questions submitted to you by Mr. West.

I regret that this letter was not forwarded to the Attorney General, so that he might have replied by the 12th instant, as requested by Mr. West, and although it may now be too late for practical purposes in this case, I take the liberty of giving you my views on the questions raised, for such consideration as you may see fit to give them.

I think the *principle* involved in these inquiries, are considered and in effect passed on in the opinion of the Attorney General given you on the 2d day of October, 1908, found on page 27 of the report of the Attorney General for 1908, defining the powers of trustee electoral boards, acting as boards of appeal in the matter of the location of school houses, and I think the same reasoning applies to questions of building school houses.

Replying to Mr. West's inquiries, I will say, first: That it does not appear that the district school board *took any action* at all in the matter presented to it, and so he states in this letter, so there is no act of the district board to appeal from. Appeal can only lie from some positive act of the district board, as to some act required by law to be done, and which it takes steps to do, or declines to do. I know of no law that requires district boards to accept donations for school buildings or to borrow money for such purposes, *except in the discretion of the board*. If the district board of the Mineral District is of opinion that there is no need of an \$8,000 building at that place, I know of no power vested by law in any board to compel it to take such action as the refusal to do, is the ground of complaint now made. I therefore conclude that the electoral board sitting as a board of appeal, can neither accept the money offered nor provide the sum of money asked for nor compel the district board to do either or both.

In reply to his second inquiry, I will say that I am of opinion in the case presented, that the trustee electoral board cannot take any affirmative action in the premises. There are cases, however, in which this board may take affirmative action; that is, it may finally decide questions at issue, and direct the district board to act in accordance with its determination. This in my opinion is not such a case.

Very truly yours,

ROBERT CATLETT,
Assistant to the Attorney General.

RICHMOND, VA., *August 25, 1909.*

J. D. EGGLESTON, JR., ESQ.,

Superintendent of Public Instruction.

Richmond, Virginia.

MY DEAR SIR:

Yours of the 20th instant, addressed to the Attorney General, and enclosing letter of C. M. Rives, has been received.

In reply thereto, I would say, that a school trustee cannot legally hold his office as such trustee, and during his term act as a United States census enumerator. It seems to me that such employment by or under the Federal government will *ipso facto* vacate the office of school trustee, under sections 163-4-5, of the Code of 1904.

I herewith return Mr. Rives' letter.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

As to Title to a Lot of Land Purchased for School Purposes.

RICHMOND, VA., *September 2, 1909.*

J. D. EGGLESTON, JR., ESQ.,

Superintendent of Public Instruction.

Richmond, Virginia.

MY DEAR SIR:

I have examined the abstract of title to two acres of land in Alexandria county, purchased, or proposed to be purchased, by the school board of Arlington District, in the said county, from Edward A. Wilson. The title seems to be good, as vested in E. A. Wilson, but the abstract does not show any conveyance to the school board, which is very necessary before a loan is made from the literary fund. I would also call your attention to the fact that there is no evidence whatever that the land has been or will be acquired by the school board in the manner required by law, viz.: with approval of the circuit court of the county. I take this occasion to repeat what I have said to you before, that *this should be done* in all cases where land is *now* bought for school purposes; and I know of no better way to oblige a compliance with the law, than by declining to make a loan until the title is gotten in the manner that the law requires. I would say further, that I have not, nor do I now advise that this rule be applied to those cases where lands have been heretofore acquired by the school boards without the approval of the court.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

*As to the Levy of a Tax for the Payment of the Annual Interest on Bonds
Issued by a School District for School Purposes.*

RICHMOND, VA., September 14, 1909.

J. D. EGGLESTON, JR., ESQ.,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR SIR:

Yours of the 9th instant, addressed to the Attorney General, has been received.

I have noted the letter of Mr. Eastman enclosed therein, and the special act approved March 29, 1902, authorizing the district school board of Poquoson District, of York county, to issue bonds for the building of a school house in the said district, and beg leave to say, that there is no difficulty about the law of the case, but the facts are too briefly stated for us to advise intelligently as to the best practical course to pursue. I take it that the law requires the board of supervisors to levy a *district* tax for the purpose of paying the annual interest on the bonds, and to provide funds for the payment of the principal when the same shall become due. It would seem from the terms of the act, that the levy for the redemption of the bonds might be laid from year to year as the bonds were running to maturity, or it might be laid all at once in one year; but I think the former method (from year to year) the better course. The plan best to be adopted depends upon the amount of the bonds and the time of their maturity, and as these are not given we can say nothing more definite. The school board of this district and the superintendent of schools should notify the board of supervisors what amount of additional district tax will be needed to meet the interest on the bonds, and to provide for the payment of the principal as it matures, *at the time* that estimates are given the board of supervisors for the ordinary levy for district school purposes, and under the law this is supposed to be done nearly a year in advance of the levy, but in fact is often done at the time the levy is made for the current year. As the levy has already been made for the year 1909, and doubtless the tax books completed and returned by the commissioner of the revenue, it is too late now to lay a levy for this purpose for the current year; but it should be done in time for the year 1910, and for such amount as the district board shall estimate will be needed for the payment of interest and such principal as has become due and payable.

Very truly yours,

ROBERT CATLETT,
Assistant to the Attorney General.

*As to the Right of the District School Board of One District to Own School
Property in Another District.*

RICHMOND, VA., September 15, 1909

J. D. EGGLESTON, JR., ESQ.,
*Superintendent of Public Instruction,
Richmond, Virginia.*

MY DEAR SIR:

Yours of the 14th instant, addressed to the Attorney General, enclosing

letter of Mr. Roland E. Cook, division superintendent of schools for Roanoke county, has been received and carefully noted.

In reply to your request for advice as to how the same should be answered, I would say that I have examined the school laws with much care, but find nothing therein which authorizes a district school board to acquire and hold property located in another school district; nor do I find any express inhibition so to do. The law is therefore silent on the subject; but under the general rule that district school boards can only do that which the law or some regulation of the board of education having the force of law, authorizes, I am inclined to the opinion that a school district cannot legally acquire and hold property situated in some other district, either separately or jointly with such other district. If such joint holding of school property is desirable, express authority must be given therefor by legislative act, or it may be, by regulation of the State board, if deemed not inconsistent with the general law, for the regulation of the public schools. I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

As to When the Clerk of the School Board of a Town Should be a Citizen of the State.

RICHMOND, VA., September 15, 1909.

J. D. EGGLESTON, JR., ESQ.,

Superintendent of Public Instruction.

Richmond, Virginia.

MY DEAR SIR:

Yours of the 14th instant, addressed to the Attorney General, enclosing letters of Mr. James Allen and Mr. M. D. Hall, superintendents of schools for Fairfax county, has been received.

In reply to your inquiry—what answer you should make to these letters—I would say that under section 1526 of the Code, as amended by chapter 153 of the Acts of 1908, page 191, if a town constitutes a separate school district the school board of the town can elect *some other person* other than one of its members, clerk of the board by the express terms of the said act; or the said board can elect one of its members clerk. If in its discretion the said board should elect some one, other than one of its members clerk, such person in my opinion need not be a *citizen* and qualified voter of this State; but I would say that he must be a *resident* of the State and district (town) in which he would serve.

If, however, the school board of the town constituting a separate school district should elect one of its members clerk of the board, he must be a *citizen* of the State and town, as no one but a citizen and qualified voter can hold the office of school trustee.

There seems to be some conflict between the letters of Messrs. Allen and Hall, as to the facts in the case presented—Mr. Allen apparently refers to the eligibility of a clerk of a town school board, and Mr. Hall to a school trustee. Mr. Hall's letter is fully answered by saying that only a citizen

and qualified voter of the State can be legally elected to the office of school trustee. I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

As to the Prohibition Against Any Member of a School Board Being Interested in Any Contract With Such Board.

RICHMOND, VA., September 29, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction.

Richmond, Virginia.

DEAR SIR:

Yours of the 27th instant, requesting me to advise you what answer to make to the letter of Mr. W. Marvin Minter, of Mathews, Virginia, of date September 23, 1909, addressed to you, in which Mr. Minter desires to know whether he, as a member of the county school board of his county, can lawfully enter into, and carry out, a contract to do the printing required by said school board, this instant received.

In reply, I beg leave to say that any such contract is expressly prohibited and penalized by the second subdivision of sections 1472 of the Code, section 61, page 57, of Compilation of the School Laws.

That subdivision declares that:

"Second. It shall not be lawful for any member of a school board * * * to be concerned in any contract with a public school board, or a committee of such school board, for any work or labor ordered to be done, or for goods, wares, or merchandise or supplies of any kind ordered by a school board or a committee of such school board, except as provided in the first subdivision of this section."

The last sentence of this subdivision makes any such contract void, and provides that the amount thereof if paid, with interest, may be recovered by the county or district within two years after payment, by action or motion in the circuit court having jurisdiction over said county or district.

The first subdivision of section 1472 contains no exception or proviso which would apply to a contract of the kind mentioned by Mr. Minter.

I return Mr. Minter's letter.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Inequality and Insufficiency in the Assessment of Property for Taxation and the Remedy Therefor.

RICHMOND, VA., October 1, 1909.

Hon. J. D. EGGLESTON, JR., ESQ.,

Superintendent of Public Instruction.

Richmond, Virginia.

MY DEAR SIR:

The question, the facts, and the views presented by Mr. W. T. Hodges,

superintendent of schools for Alexandria county, in his letter to you of the 28th ultimo, submitted to me in your letter of the 29th ultimo, this instant received, are matters rather for the consideration of the General Assembly, than of your office or mine.

Our very imperfect and inefficient statutes in reference to the assessment of both real and personal property can only be improved by radical but statesmanlike amendments.

The compensation prescribed by section 446 of the Code for assessors of lands is grossly inadequate, but that is by no means the principal defect in the law.

The crying evil in our Virginia State government is the unequal, inadequate, and more or less capricious assessment of real and personal property.

The system, or rather the absence of any system, for valuing such property for taxation adopted in Virginia, because of its gross inequalities, works flagrant wrong and injustice not only to individuals and communities, but to the Commonwealth itself, and to her people as a whole.

The condition described by Mr. Hodges as to Alexandria county is but one out of hundreds of illustrations that might be found in Virginia of the gross wrong that is being done to the people in this regard.

My service for eight years in the two branches of the General Assembly upon important committees, and particularly upon the Finance Committee of the House, and my experience in my present office, as well as my observation as a citizen and a taxpayer, satisfy me that if the real and personal property of Virginia was assessed at its full and fair value (which is the only just and reliable standard of assessment which can be adopted), that State taxes could be reduced to 15 cents in the hundred dollars, city taxes from 25 to 50 per cent. below their present rate, and county taxes upon an average at least 66 per cent. below their present rate, and yet still get a larger State and local revenue than is realized from present taxation.

Remedies along two lines have been proposed for the present intolerable condition of things.

One is following the example of West Virginia by radical legislation firmly and patriotically executed to bring about a full and fair assessment of the property of the State. That has been found to be an exceedingly difficult thing to carry out, but it has been accomplished in large measure in West Virginia to the great advantage of the people of that State, the State tax upon property having been reduced from 40 cents in the hundred dollars to 13 cents in the hundred dollars, and local taxes also largely reduced, and yet the aggregate public revenues largely increased.

The other remedy is that provided for in the Constitution of the State by which the State is to be given the monopoly of all taxation of railroads and other public service companies, corporations generally, licenses, and all indirect taxation, and the counties and municipalities given the monopoly of all taxes upon tangible real and personal property.

This latter remedy has been considered the most practicable.

It is the one which has been successfully adopted in Pennsylvania, New Jersey, and in other States.

This letter is not intended, of course, to present this question from a legal, but rather from a politico economic standpoint, and is in no sense an official opinion, but is intended merely by way of suggestion upon a question

of great moment not only to the school interests of the State, but to all the interests of the Commonwealth.

I return Mr. Hodges' letter.

Very truly yours,

WILLIAM A. ANDERSON.

As to Appeal From the Action of a City School Board in Certain Cases.

RICHMOND, VA., October 18, 1909.

Hon. J. D. EGGLESTON, JR.,
*Superintendent of Public Instruction,
Richmond, Virginia.*

DEAR SIR:

Your favor of the 13th, enclosing letters of Mr. Rudd and Mr. Hoke of the 11th and 12th instant, has been received.

As I stated to Mr. Stearnes when he saw me in regard to the matter referred to in Mr. Rudd's letter, I know of, and can find, no law which authorizes an appeal from the action of a city school board in such a matter by any patron of a school, or by any person, except teachers or officers employed in the public school system of such city, and as to them an appeal is only allowed as provided by Regulation 55 of the State Board of Education.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Terms of District School Trustees.

RICHMOND, VA., October 28, 1909.

Hon. J. D. EGGLESTON, JR.,
*Superintendent of Public Instruction,
Richmond, Virginia.*

DEAR SIR:

In reply to your favor of the 25th instant, enclosing Superintendent Willis A. Jenkins' letter to you, I would say that under section 1528 of the Code (159 of your Compilation of the School Laws), the school trustees of a city are elected for a term of three years, but their terms are required to be so adjusted that one-third of the trustees for each district will go out of office every year.

I do not find any provision in respect to the school trustees in cities, such as is contained in section 1454 of the Code (22 of your compilation), in respect to school trustees in counties, which section (1454) provides that the terms of school trustees in counties shall begin on the first day of September after their appointment.

I return Mr. Jenkins' letter to you.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Right of Teacher Who Becomes Insane After Being Placed on the Teachers' Pension Roll, or Her Committee, to a Pension.

RICHMOND, VA., October 28, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction,

Richmond, Virginia.

DEAR SIR:

Your favor of the 27th, enclosing Superintendent Kremer J. Hoke's letter to you of the 25th instant, submitting the question whether a retired school teacher now on the school pension list, but who since being placed upon that pension list has been adjudicated to be a lunatic and is now confined in the Western State Hospital at Staunton where she is largely supported at State expense, though her family supply her with clothing and other necessary supplies other than board and lodging, is eligible to a pension under the school pension law, I would answer as follows:

If any pension can be paid to her now, it must, of course, be paid to her committee, but I am strongly inclined to the view that her committee, duly appointed, would be entitled to receive it.

The rule of law is that, unless otherwise prescribed by statute, the committee of an insane person is entitled to receive for such insane person any money or other thing of value which the insane person would be entitled to collect or receive if not under such disability.

There is nothing in the school pension law which prohibits the payment of a pension to a person who is receiving aid from the State.

There is such a provision in the law providing for pensions to soldiers who served Virginia during the war between the States. That act denies the benefit of the pension provided for by it, to any person "who is in receipt of aid or a pension from any other State or from the United States."

There is no such law in our school pension law.

I herewith return Mr. Hoke's letter to you.

Very truly yours,

WILLIAM A. ANDERSON.

As to Appeals From Any Action of a City School Board.

RICHMOND, VA., October 28, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction,

Richmond, Virginia.

DEAR SIR:

Yours of the 27th in reference to the matters mentioned in your correspondence with Superintendent Hoke and Mr. Worthy F. Rudd, of Manchester, this instant received.

After careful examination of the law and the school regulations, I do not find that an appeal is certainly given from the action of a city school board in the adoption of regulations for the government of the schools of a city, to the division superintendent of schools of such city, or that indeed an

appeal is, by the statute or by the school regulations, given from a city school board in such a case, to any official or tribunal whatever.

Under section 132 of the Constitution, the State Board of Education is given authority "to make all needful rules and regulations for the management and conduct of the schools, which, when published and distributed, shall have the force and effect of law, subject to the authority of the General Assembly to revise, amend, or repeal the same."

This language of the Constitution clothes the State Board of Education with very broad legislative powers, and powers which that board can exercise in respect to any subject coming within its jurisdiction, provided that their regulations shall not be in conflict with the Constitution of the State, or with any law enacted by the General Assembly.

Under this grant of power I think it would be competent for the State Board of Education to adopt a regulation supplemental to Regulation No. 55, so as to provide a remedy for any wrong or injustice which may be done to any pupil in the schools of a city by a regulation or by the action of a city school board.

At present I know of no adequate remedy for any such injustice or wrong.

I herewith return the letters of Mr. Hoke, Dr. Dunn and Mr. Rudd.

Very truly yours,

WILLIAM A. ANDERSON.

*As to the Propriety of a Covenant in a Deed for a School House Lot, That
Intoxicating Liquors Should Never be Sold Thereon.*

RICHMOND, VA., October 28, 1909.

Hon. J. D. EGGLESTON, JR.,

Superintendent of Public Instruction,

Richmond, Virginia.

DEAR SIR:

Yours of the 27th, enclosing letter to you from Mr. C. A. Rodgers, dated the 23rd instant, just received.

Under the law the school authorities should insist upon a perfect title to all land upon which school buildings are to be erected.

While it is incredible that the State would ever allow ardent spirits to be sold upon a lot purchased for the erection of school buildings, there is no law which authorizes the school authorities to accept a condition of the kind mentioned by Mr. Rodgers; and yet I think school authorities could safely permit a covenant to be embodied in a deed that ardent spirits should not be sold upon a lot of land conveyed for such purposes.

I do not think they ought to agree to accept a deed with a covenant of forfeiture such as is suggested by Mr. Rodgers.

I herewith return Mr. Rodgers' letter to you.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Status of Children of the Mongolian Race Under the School Laws of Virginia.

RICHMOND, VA., November 25, 1908.

Hon. J. D. EGGLESTON, JR.,
Superintendent of Public Instruction,
Richmond, Virginia.

DEAR SIR:

Your favor of the 18th, enclosing letter of Col. K. Kemper, superintendent of schools for the city of Alexandria, has been received, and the question submitted has been carefully considered.

The statutes of Virginia, both those relating to the public school system, and those relating to the interests of the people of the Commonwealth generally, make no separate classification of persons of Mongolian or Chinese descent. Until there shall be some statute expressly defining the status of children of the Mongolian race, it will be difficult to answer Col. Kemper's inquiry.

The only racial classification of the population is as between whites and colored persons or negroes.

By section 49 of the Code it is enacted also that a person having one-fourth or more of Indian blood shall be deemed an Indian.

Section 140 of the Constitution, and section 1492 of the Code, prohibit the co-education of white and colored children, but the statutes have never declared that Mongolian or Chinese children shall be deemed to be colored, though by section 49 of the Code, it is declared that a person having one-fourth or more of negro blood shall be deemed colored.

I suppose there can be no question but that people of the Chinese or Mongolian race are in fact colored people, and yet they are not included in any definition of colored people given by the laws of Virginia.

There is no statute which *expressly* requires them to be excluded either from white schools, or from colored schools.

The city and district boards of school trustees are given by the law very broad powers in the matter of the regulation and government of the public schools, and those boards are empowered by the third paragraph of section 1493 of the Code to determine what school the pupils within their district shall respectively attend in any case where the public interests require such action by such board.

In a case which came up, I think, from Lunenburg county, several years ago involving the question of the right of certain children in that county who it was alleged were of African descent (although there was no proof whatever that they had one-fourth or more of negro blood) to attend a particular white school, which school the proof showed would probably be broken up if the children referred to were admitted as pupils therein, the State Board of Education decided that the district school board had a right to determine which school those children should attend, and that under the circumstances of that case, they should attend the school to which they were assigned by the local authorities if they attended school at all. And so in the case of the Chinese child, if the local school authorities should be satisfied that the admission of such a child into a particular school would lead to the breaking up of that school because of racial antagonism between the chil-

dren attending such school and such Chinese child, I am inclined to think that the local board would be justified in directing such child to be excluded from such school, provided they were satisfied, and it could be shown, that the admission of the child into the school would be so exceedingly injurious to the educational interests involved as to justify such action on the part of the district board.

If the provisions in our Constitution and laws prohibiting the co-education of white and colored children should be held, as it may probably fairly be held by the courts, to apply to children of the Mongolian race, as well as to children of the negro race, then it would be not only permissible, but it would be the duty of the local boards to prohibit the admission of Chinese children into any white school.

I assume that the Chinese child referred to by Col. Kemper is a child of Chinese parents living in Virginia, and who was born in the United States, and is therefore a citizen of the United States, and entitled, under the 14th amendment, to the rights therein guaranteed to citizens of the United States. If such child is not a native of the United States, the power of the State, and the authorities of the State to deal with its status would be perhaps less circumscribed.

I return Col. Kemper's letter.

Very truly yours,

WILLIAM A. ANDERSON.

To the Auditor of Public Accounts.

As to the Amount of State Tax on the Recordation of a Mortgage.

RICHMOND, VA., January 23, 1909.

Hon. MORTON MARYE,

Auditor of Public Accounts,

Richmond, Virginia.

MY DEAR SIR:

Your inquiry of this date, accompanied by letter of Messrs. Coke & Pickrell, of date on the 19th instant, has been received, and your request for my opinion thereon noted.

The case presented by the letter of Messrs. Coke & Pickrell is fully covered by an opinion given you on July 18, 1907, as to the tax that should be collected by the clerk for recordation of deeds of trust and mortgages for the security of bonds, and since giving that opinion I have had no reason to change my views on the subject.

I am now of opinion that the clerk of the chancery court collected of the Virginia-Carolina Chemical Company the correct tax imposed by section 13 of the revenue laws for the recordation of the deed of trust to the Central Trust Company of New York, dated November 2, 1908.

My opinion is, therefore, that you have no authority, as auditor, to allow the whole or any part of the claim asserted in the said communication for \$11,788.50, which is claimed as overpayment of the tax collected for the recordation of the said deed of trust.

Very truly yours,

WILLIAM A. ANDERSON.

The letter to the Auditor of Public Accounts of July 18, 1907, follows:

Opinion given the Auditor of Public Accounts, referred to in the preceding letter and not heretofore published.

LEXINGTON, VA., *July 18, 1907.*

COL. MORTON MARYE,

Auditor of Public Accounts,

Richmond, Virginia.

MY DEAR COLONEL:

The enclosed letters from Mr. S. M. Graham, county clerk of Tazewell county, and from Messrs. Henry & Graham, attorneys for the Pocahontas Consolidated Collieries Co., and my reply to same, present an important question upon which it is proper that you should pass in the first instance, and this correspondence is therefore referred to you with the request that you will, at your earliest convenience, rule upon it and advise Mr. S. M. Graham as to your ruling.

The amount of tax to be paid upon the recordation of the mortgage described in these letters must be determined, of course, by the language of section 13 of the revenue law, which is as follows: * * * "and on deeds of trust or mortgages the tax shall be assessed and paid upon the amounts of bonds or other obligations secured thereby."

This language, as it seems to me, is not qualified by anything that goes before it or comes after it in section 13 or in the revenue law.

There is no such qualification of it as there is in regard to the tax on deeds of trust or mortgages upon the works and property of a railroad or other internal improvement company lying partly in this and partly in another State, as to which the statute provides that the tax shall be upon such proportion of the consideration as the number of miles of the line of such company in this State compares to the whole number of miles conveyed by such deed. In the absence of any such qualification it seems to me that the tax upon the recordation of this mortgage must be determined by the amount of bonds secured thereby.

It may be, and it is doubtless true, that this would work a hardship upon the grantor company in this case, but unfortunately for that company, the law makes no exception and no provision by which there can be any abatement of the tax upon the recordation of such a mortgage.

The tax in every case upon the recordation of a mortgage, except that upon the property of a railroad or other internal improvement company lying partly in this State and partly in another State, is in all cases determined by the amount of the bonds or other obligation secured thereby, and this, according to the repeated rulings of your office if I remember rightly, and of my predecessors as well as of myself, is fixed by the maximum amount of bonds secured by such mortgage.

For instance, if an individual citizen who owned a tract of 1,000 acres of land, 900 acres of which was located in McDowell county, West Virginia, and 100 acres in Tazewell county, Virginia, should desire to place on record in Tazewell county a mortgage upon said tract of 1,000 acres to secure \$100,000, the tax upon such recordation would be determined by the aggregate amount of the mortgage, that is \$100,000, and would not be affected by the circumstance that one-tenth of the land only was situated in Virginia.

Of course we have nothing to do with the question as to whether the statute is reasonable or unreasonable. It may be that the legislature, if its attention had been called to a case of this kind, would have provided for some equitable abatement of the tax upon the recordation of such mortgage, but no such abatement is authorized by the statute, and until and unless it shall be amended by the General Assembly, it is clearly settled to my mind that neither the clerk of Tazewell county nor the Auditor of Public Accounts would be authorized to accept any smaller sum than that prescribed by the law.

Yours very truly,

WILLIAM A. ANDERSON.

As to the Tax on the Recordation of Contracts for the Conditional Sale of Personal Property.

RICHMOND, VA., February 13, 1909.

C. LEE MOORE, ESQ.,

Acting Auditor of Public Accounts,

Richmond, Virginia.

DEAR SIR:

I have examined the original "Equipment Agreement, Series 'A,' between Blair & Co., Carolina, Clinchfield and Ohio Railway and Bankers Trust Company, Trustee," dated December 1, 1908, submitted to me by your favor of the 10th instant.

The agreement evidences a conditional sale by Blair & Co. to said railroad corporation of a large number of freight, passenger, and mail cars and locomotives therein described, reserving the title until the obligations given for the purchase money thereof shall have been paid, upon the conditions expressed in the contract.

The question you submit is, What is the tax upon the recordation of this instrument?

This tax is imposed by section 13 of the revenue law, which is as follows:

"13. On every deed not exempt by law admitted to record, and on every contract relating to real estate or personal property, whether it be a deed or not, which is admitted to record, the tax shall be fifty cents; where the consideration of the deed or value of the property conveyed, exceeds three hundred dollars, and does not exceed one thousand dollars, the tax shall be one dollar; and where the same exceeds one thousand dollars, an additional tax of ten cents on every hundred dollars, or fraction of one hundred dollars, of such consideration, or the value of the property in excess of one thousand dollars; but any deed, will, or contract may be recorded in the same office, when the record containing such deed, will, or contract, has been destroyed by fire or otherwise, free of the State tax: provided, that but one tax shall be collected on any deed or contract; but the tax on each deed of release shall be only fifty cents, and on deeds of trust or mortgages the tax shall be assessed and paid upon the amounts of bonds or other obligations secured thereby: and provided further, that on deeds of trust or mortgages upon the works and property of a railroad

or other internal improvement company, lying partly in this State and partly in another State, the tax shall be upon such proportion of the consideration as the number of miles of the line of such company in this State bears to the whole number of miles of the line of such company conveyed by such deed: provided, that upon any deed of partition among joint tenants, tenants in common, or co-parceners, the tax shall be fifty cents."

The contract you submit is a contract under seal "relating to personal property," and upon its being admitted to record is charged with a specific tax of fifty cents.

Where the consideration of the deed or value of the property conveyed exceeds \$300.00, a *graduated* tax is imposed upon the recordation of the instrument as set forth in the foregoing section.

The answer to your inquiry, therefore, turns upon the question whether the contract under consideration is a deed within the meaning of the statute.

The language of the above section, by which a *graduated* tax is imposed, is not as clear and explicit as would be desirable.

In order to justify the imposition of a tax, the language of the statute under which it is exacted should be reasonably clear and explicit, and if it is fairly susceptible of a construction which would exonerate the person or subject to be charged, from the payment of such tax, then such construction should be given to the enactment.

In Cooley on Taxation, 2d edition, page 267, the law on this subject is laid down as follows:

"It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown."

It will be observed that the *graduated* tax is only imposed "where the consideration of the deed or value of the property conveyed exceeds three hundred dollars."

I think there is great force in the view heretofore expressed by me to the Auditor of Public Accounts, that the deed here mentioned, upon the recordation of which a *graduated* tax is imposed, is a deed of *conveyance*. It seems to me that the language here used was designed to require that the amount of the *graduated* tax should be apportioned to, and determined by, the consideration of the deed, or if that was less than the value of the property conveyed, then that it should be apportioned to, and determined by, the value of the property conveyed. In either case it was a deed of conveyance, upon the recordation of which the *graduated* tax was to be collected.

This has been the construction of the law in this regard which has been adopted by your office, under the advice of this office, for years.

The construction here given is strengthened, if it is not rendered necessary, by the change in the law by the amendment to section 13, made by the act approved April 16, 1903, to which I have called the attention of the Auditor of Public Accounts in the opinion I gave him on the 30th of September, 1908, in regard to the tax upon the recordation of a lease of land.

It may be of interest in this connection to call attention to the provisions of section 2463 of the Code of 1904, in reference to the docketing of contracts of conditional sale of personal property. A memorandum or contract evidencing such sale of personal property may, under that statute, be docketed without paying any tax whatever, and I see no reason why an instrument of the kind which you have submitted to me could not be docketed under that statute; but the question which you submit is as to the tax upon the recordation, and not as to the docketing, of this contract.

For the foregoing reasons, and those more fully expressed in the opinion just referred to, I am constrained to conclude that the above mentioned contract is liable only to the minimum tax upon its recordation.

Very truly yours,

WILLIAM A. ANDERSON.

As to Liability of the Land Acquired by the City of Lynchburg for its Reservoir and Water Supply to Taxation.

RICHMOND, VA., March 8, 1909.

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

MY DEAR SIR:

The question submitted to you by O. L. Evans, Esq., Commonwealth's attorney for Amherst county, in his letter of the 23rd ultimo, and which was referred to me several days since, has been carefully considered.

As I understand that question, it is whether there is error against the Commonwealth in the decision of the Circuit Court of Amherst county rendered at the February term thereof, 1909, upon the motion made in the name of the Commonwealth and of the county of Amherst against the city of Lynchburg for the correction of the alleged erroneous assessment of the land in Amherst county acquired and held by the city of Lynchburg for the purpose of a reservoir, a watershed for said reservoir, and for the purpose of water works to supply the city of Lynchburg with water for its purposes.

By section 183 of the Constitution "property lawfully owned and held by counties, cities, towns, or school districts, used wholly and exclusively for county, city, town, or public school purposes," is absolutely exempted from all State and local taxation.

By the amendment of section 7 of the charter of the city of Lynchburg, made by the act approved April 24, 1903, Acts of 1902-3-4, p. 254, that city is given power:

"Sec. 7. To establish or enlarge the water works or gas works with-
in or without said city; to contract with the owners of land for the
use or purchase thereof, or to have the same condemned for the loca-

tion or enlargement of said works, or the pipes and fixtures thereof, and to acquire by purchase or condemn such quantity of the water-shed lands adjacent to the intake or source of supply, as in the judgment of the said council may be necessary to insure a sufficient supply of water for said city, and to protect the same from pollution; to prevent the throwing of filth or offensive matter in James river within six miles of the city limits, and to protect said water supply, works, pipes, reservoirs, and fixtures, whether within or without the city, against injury and pollution, by appropriate ordinances and penalties, to be enforced, as are the other ordinances of said city."

As I understand by Mr. Evans' letter to you, the city of Lynchburg has acquired the lands in Amherst county in question so as to give it control of the intake and source of supply of water for the use of said city, and the water-shed thereof.

It would seem from this, that the land referred to is property lawfully owned and held by the city of Lynchburg for the lawful purposes of said city.

This being the case, I think that the decision referred to was right, so far as any interest of the Commonwealth may be involved, and that the Commonwealth has no interest in the litigation which would justify you in authorizing an appeal to be taken from the said decision of the Circuit Court of Amherst county.

The opinion I here give you is based upon the information that the lands referred to are held by the city of Lynchburg for the purpose of constructing a reservoir or intake, and for the purpose of owning and controlling the water-shed around said reservoir for the purpose of the construction and laying of water pipes and water works in order to supply said city with water.

If the city of Lynchburg owns and holds in the county of Amherst any land or property not used for those purposes, or for other purposes authorized by its charter, such property would, I think, be liable to State taxation.

Very truly yours,

WILLIAM A. ANDERSON.

As to Meaning and Effect of the "Byrd Law" in Various Particulars.

RICHMOND, VA., April 22, 1909.

Col. MORTON MARYE,

Auditor of Public Accounts,

Richmond, Virginia.

MY DEAR SIR:

I have considered the question raised by the order of the Corporation Court of the city of Newport News, entered on the 22d day of March, 1909, whereby the Hoster-Columbus Associated Breweries Company, of Columbus, Ohio, was relieved of the license tax of \$150.00, assessed upon it by the commissioner of the revenue of the said city, on April 24, 1908. The facts of the case, as presented by the order of the court, are very meager and can only be gathered from the order of the court; but I take it therefrom that the Hoster-Columbus Company had taken out a license in the city of Norfolk for the sale of malt liquors by wholesale (presumably for the same years),

when it was assessed with the tax of \$150.00 for maintaining a distributing or storage warehouse in the city of Newport News.

Section 2 of the Byrd law provides: "No person, firm or corporation shall make, distill, manufacture or *sell* ardent spirits except subject to the provisions of this act."

Section 4 of the same act provides: "A wholesale license shall confer the privileges of *selling* in quantities of not less than five gallons, except wholesale dealers in malt liquors may sell not less than one dozen bottles or jugs of malt liquors."

Section 11 of the same act provides "that if any wholesale dealer shall desire the privilege of *selling* malt liquors only, the specific amount to be paid by him for the privilege shall be \$150.00."

Section 15 of the same act provides: "For the privilege of manufacturing malt liquors there shall be paid \$150.00, and * * * the manufacturer shall have the privilege of *selling* the products of his brewing in quantities of two dozen pints or more at any place within the State of Virginia, except," &c. And this section further provided: "Every person, firm or corporation maintaining in this State a distributing or storage warehouse for malt liquors, who has not paid a license tax as a manufacturer of malt liquors, shall pay for such privilege the sum of \$150.00."

See also sections 533 and 535 of the Code of 1904.

These provisions of the law cover, I think, all that relates to the question considered.

You will note that the said act, in express terms, confers the privilege of SELLING, under both the license to wholesale dealers and manufacturers, but is silent as to the privileges under a license to maintain a distributing or storage warehouse—indeed, does not provide for *selling at all* under such license. It seems to me that the words "distributing or storage" *do not confer the privilege of selling*, and this view is strengthened by the use of the disjunctive "or" in the provision of the act now considered. What privileges the law-makers intended to confer under such license, I cannot say; but it seems clear to me that they did not give the *right to sell thereunder*. The sale of ardent spirits without a license is absolutely prohibited anywhere and everywhere in this State, and a license to sell carries only such privileges as to manner and place of sale as the law specifically provides.

If I am correct in this view of the law, the person, firm or corporation maintaining a "distributing or storage warehouse" can only deliver or ship therefrom malt liquors which have been theretofore legally sold. In no event can orders for the sale of such liquors be received or the actual sale thereof made at such distributing or storage warehouse. The order of exoneration says that this company was assessed by the commissioner of the revenue of the city of Newport News, on April 24, 1908, with a license tax of \$150.00 "*for the privilege of selling* from its distributing or storage warehouse in the city of Newport News malt liquors by wholesale." If this is a true statement of the facts, it seems to me that the assessment was properly made and should not have been released. A wholesale license issued

in the city of Norfolk did not give the right to sell *thereunder* in the city of Newport News; and if *sales were made* from the storage house in Newport News, I am of opinion that it could only be done legally, under a *wholesale license* issued in the city of Newport News.

A license tax is not a property tax, and may be arbitrarily imposed by the State; and if the legislature has imposed this privilege or license tax on all who "maintain a distributing or storage warehouse," without extending the privilege of *selling liquors*, it was a legitimate exercise of legislative power, the validity of which cannot be successfully assailed. I conclude, therefore, that any person, firm or corporation maintaining a distributing or storage warehouse in this State, whether resident or non-resident, must pay the tax of \$150.00 imposed by section 15 of the Byrd law, and that such license *does not give the right to sell malt liquors thereat or therefrom*, by wholesale, or in any other way. Only *delivery* or "*distribution*" of such liquors, under a sale *previously made elsewhere*, and under a wholesale or manufacturer's license, can be made from such *licensed* "distributing and storage warehouse."

I do not think that the cases cited by Mr. Berkeley, and which are relied upon by the brewing company to sustain its contention that the law imposing this tax is invalid, are at all conclusive of the case. I think that you are fully warranted in directing proceedings to be had under section 573 of the Code, and if the court refuses to reverse its order of March 22, 1909, on the rehearing, I advise that you take an appeal to the Supreme Court from its final order.

It may be proper to say that it is not at all clear to me that a *manufacturer of malt liquors* can maintain a "distributing or storage warehouse" *without* the payment of the license tax required therefor. *at any other place* than the place of the manufacturers license, *notwithstanding the implication* derived from the words "who has not paid a license tax as a manufacturer of malt liquors," found in section 15 of the said act. It seems to me that there is no discrimination in the law against non-resident manufacturers of, or dealers in, malt liquors, and that the provisions of the law, above quoted, apply to residents as well as to non-residents, and are a valid exercise of legislative authority.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

*As to Liability of a Deed to the United States to Pay the Tax Imposed on the
Recordation of Deeds by Section 13 of the Revenue Laws.*

RICHMOND, VA., June 22, 1909.

Hon MORTON MARYE,

Auditor of Public Accounts,

Richmond, Virginia.

DEAR SIR:

The question submitted in the letter of the Honorable Thomas L. Moore, United States attorney for the Western District of Virginia, to you by his letter dated the 21st instant, and which has been referred by you to me, has been heretofore considered and passed upon by me in an opinion which I gave

to Governor Swanson on July 12, 1907, a printed copy of which I herewith enclose.

For reasons, some of which are therein indicated, I am inclined to the opinion that it is competent for the State to levy the tax or charge imposed upon the recordation of deeds by section 13 of the revenue law, upon a deed to the United States, conveying real estate within the limits of Virginia.

Such a charge cannot be fairly regarded as a tax "upon the instruments of the Federal government," or "upon the means employed by Congress to carry into execution the powers conferred in the Federal Constitution."

Fairly considered, it may be regarded as a charge made by the State for the use of its registry office, and made alike against all persons who avail themselves of the benefit of the registration laws of the Commonwealth for the purpose of protecting their titles, and a charge from which the United States government is not exempted by any language of the statute imposing the charge.

It may be that the General Assembly would, as a matter of comity, have exempted the United States government from such a charge had its attention been called to the matter, but this has not been done in the act imposing the charge, or in any other statute of the Commonwealth known to me.

If there is any act of Congress which expressly or by implication, operates to exempt the United States from such a charge, I do not know of it; and it is gravely to be questioned whether it would be competent for Congress to impose upon the States the duty of providing, without charge, for the registration of conveyances to the United States government upon terms different from those charged to other persons availing themselves of the benefit of the registry laws of the State.

Since the opinion, a copy of which I herewith enclose, was prepared by me, I find that the very question here presented, was considered and passed upon by United States Attorney General Garland, and in a well considered opinion given by him on the 21st of October, 1887, he holds upon this very question arising under this very statute:

"That there being no provision in the State law exempting the registration of deeds to the United States from the tax, the government is properly chargeable therewith, and that it should be paid"; and that "The tax referred to is not, strictly speaking, a tax upon either the instrumentalities, agencies, or property of the United States."

See "Opinions of Attorney General, Vol. XVIII," p. 491.

Very truly yours,

WILLIAM A. ANDERSON.

NOTE.—It is a somewhat significant circumstance that in the act authorizing the United States government to acquire lands adjacent to Fortres Monroe, approved March 12, 1908, Acts of 1908, p. 314, the legislature seemed to have considered it necessary to provide that:

"2. No tax shall be charged or collected for the recordation of any deed or deeds made pursuant to this act * * *"

In the above case, there being no provision in the Virginia statute exempting the United States from a tax on the recordation of a deed to that

government, if the clerk admits the deed to record without prepayment of the tax "he thereby assumes the liability for it, just as if it had actually been paid to him," as was decided in *Lucas v. Chafflin & Co.*, 76 Va., p. 281.

Very truly yours,

WILLIAM A. ANDERSON.

RICHMOND, VA., *September 7, 1909.*

Hon. MORTON MARYE.

Auditor of Public Accounts,

Richmond, Virginia.

DEAR SIR:

In your letter of the 1st instant, received to-day on my return here, you ask me to advise you whether a suit in chancery can be brought to subject land to the payment of a fine.

In *Marye, Auditor, v. Diggs, et als.*, decided December 6, 1900, the Supreme Court of Appeals of Virginia held that the Commonwealth could not, as the law then stood, resort to a chancery suit for the purpose of subjecting lands to sale for the satisfaction of a lien for taxes due thereon, or to any other remedy for the collection of said taxes, except such remedy as was prescribed by law.

It seems to me that if that proposition be true, as it must be taken to be true, in respect to a suit for the collection of taxes, it is *a fortiori* true as to a proceeding for the collection of a fine, and that only such proceedings as are authorized by law can be resorted to for the collection of a fine.

Now chapter 31 of the Code prescribes the remedies by which fines may be recovered, namely, (1) execution of *feri facias*, and (2) *capias pro fine*.

And by section 744, chapter 31, and sections 687-700, chapter 30, of the Code, not only the personal estate, but also the real estate of a defendant against whom a judgment for a fine has been rendered, may be subjected to sale under the execution of *feri facias* issued thereon.

I find no statute which authorizes a chancery suit to be brought for the recovery of a fine, and in accordance with the principle enunciated in *Marye, Auditor, v. Diggs*, would say that a chancery suit would not lie in the name of the Commonwealth for the recovery of a fine.

Still farther applying the rule of the court in *Marye, Auditor, v. Diggs*, to the matter of the collection of fines, I would say that where a chancery suit has already been brought by another person for the enforcement of a lien or liens upon the land of a defendant against whom the Commonwealth has recovered a judgment for a fine, the Commonwealth could come into that suit by petition, or by proof of her judgment for a fine, and recover the fine in that suit.

While such is the effect of the decision of *Marye, Auditor, v. Diggs*, it is manifest from the opinion of the Supreme Court of Appeals in that case, that the Commonwealth cannot institute any suit or proceeding for the collection of a fine, except such as are provided by law; and there is no statute which authorizes a chancery suit to be instituted for this purpose in the name of the Commonwealth.

Very truly yours,

WILLIAM A. ANDERSON.

To the State Board of Charities and Corrections.

As to the Absence of Any Law Authorizing the Commitment of Idiots to the Hospitals for the Insane.

RICHMOND, VA., May 6, 1909.

JOSEPH T. MASTIN, Esq.,
Secretary State Board of Charities,
Richmond, Virginia.

DEAR SIR:

Your favor of the 4th instant has been received, and in reply thereto I beg leave to say that the laws of the Commonwealth do not provide or authorize the commitment of idiots to the hospitals for the insane, or their confinement in jail.

If their families and relatives are unable to provide for, and take care of, them, the counties and cities in which they reside should take care of them in their almshouses.

Very truly yours,

WILLIAM A. ANDERSON.

No Law Which Authorizes the Board of Supervisors of a County to Farm Out the Paupers of the County.

RICHMOND, VA., August 9, 1909.

Doctor J. T. MASTIN,
Secretary State Board of Charities and Corrections,
Richmond, Virginia.

DEAR SIR:

In your favor of the 30th ultimo you inform me that:

"Bland county does not own an almshouse or place of general reception for the poor, but paupers are let out for four years to the lowest bidder, the accepted bidder being then appointed superintendent of poor"; that "As a matter of fact, this superintendent receives \$150.00 a year salary, and takes care of the paupers at his own home at a cost of \$2.57 per capita."

You inquire whether this proceeding is legal.

I know of no general law, and have found no special statute, which authorizes the proceeding mentioned.

It is not sanctioned by, but is plainly in conflict with, the provisions of section 881 of the Code, which requires that:

"Every person to be provided for by the overseers (of the poor) shall be sent to, and kept at, the place of general reception of the poor, to be supported; and all persons kept at such place who are able to work shall be made to do so."

This section farther provides that:

"In any county having no place of general reception for its poor, persons requiring assistance may be provided for by the overseer of the district in which the pauper resides, by, and with the consent of, the supervisor of such district, and the superintendent of the poor; and in any county the overseer of any district by and with the written consent of the supervisor of such district, may provide assistance for any person, or the family of any person, who is unable to support himself or family at his place of residence, when it would be injudicious that such person or family should be moved to the place of general reception."

This statute plainly requires that the paupers provided for by the county shall be sent to, and kept at, the almshouse or poor farm of the county, or else if the county has no almshouse or poor farm, or other general receptacle for the poor, that then they shall be provided for by the overseer of the poor for the district in which they reside, with the consent of the supervisor thereof, and of the superintendent of the poor.

I know of no law which authorizes the board of supervisors of a county to farm out the poor of the county to the superintendent of the poor, or to any other person.

Very truly yours,

WILLIAM A. ANDERSON.

RICHMOND, VA., *September 7, 1909.*

Rev'd J. T. MASTIN,

Secretary State Board of Charities,

Richmond, Virginia.

MY DEAR SIR:

Your letter of the 26th of August last, came duly to hand, but I have delayed answer thereto so as to give the matters presented mature consideration. I have now given the subject my best consideration, and have reached the conclusion without reservation, that the arrangements made by the boards of supervisors of the counties cited, but not named by you, are in violation of both the spirit and letter of the law.

There is no authority whatever of law, for boards of supervisors to pay the superintendent of the poor, any fixed sums per month or by the year, for the support of paupers committed to his care; or to give him in addition to such allowance or board (as we may call it) any part of the grain or other crops raised on the poor farm. I do not mean to say that it may not be lawful for the supervisors to make some arrangement with the superintendent of the poor, whereby he may furnish team and labor for working the farm, and get therefor some part of the crops raised, or even to pay him something for his personal labor on the farm, when it would be necessary to pay others to do such work.

The arrangements as stated by you, are so patently contrary to law, no argument is needed to sustain the proposition, as to the impolicy and I may add the impropriety thereof.

I conclude, therefore, by saying that in my opinion the boards of super-

visors of the counties where such action as you mention has been taken, have acted without authority, and in direct violation of the law, as found in chapter 38 of the Code of 1904.

The legislature has provided no remedy for such proceedings, other than calling the attention of the boards to their dereliction, nor has any State officer been given corrective or even supervisory authority in the premises.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

To the Commissioner of Insurance.

As to Where Powers of Attorney Executed by Surety Companies to Their Agents Must be Recorded.

RICHMOND, VA., May 8, 1909.

J. N. BREXAMAN, ESQ.,

Deputy Commissioner of Insurance,

Richmond, Virginia.

MY DEAR SIR:

Yours of the 5th instant has been received.

In response to your request for an opinion as to whether or not the clerks of courts have the right to require surety companies to have powers of attorney recorded at the time bonds are executed, and to require said companies to pay the fees for such recordation, I beg leave to say that I have considered section 26 of chapter 8 of the act concerning corporations, as amended by the act approved March 12, 1908, Acts of 1908, p. 354, and I am of opinion that under the provisions of this section it is not necessary that the powers of attorney given by surety companies to their agents or attorneys in fact, should be recorded in the several courts where bonds may be executed thereunder.

It seems to me that as all powers of attorney, both general and special, are required to be recorded in the office of the Commissioner of Insurance, and copies thereof made by the commissioner, made evidence in all courts in the State, their recordation in the several courts, even for preservation, is unnecessary.

It seems to me, therefore, that the clerks of courts have no right to require the companies to have such powers of attorney recorded in such courts, nor to charge fees for such recordation.

Very truly yours,

WILLIAM A. ANDERSON.

As to What Constitutes a "Fraternal Beneficial Association" Under the Insurance Law of the State.

RICHMOND, VA., June 29, 1909.

J. N. BREXAMAN, ESQ.,

Deputy Commissioner of Insurance,

Richmond, Virginia.

DEAR SIR:

The question submitted in your favor of the 1st instant has received my

careful consideration, and I reply to your inquiry as soon as I could give the matter further attention.

Alleged fraternal beneficiary associations of the character indicated by you should be required to come up strictly to the requirements of the law as defined in section 1 of chapter V of the act of the General Assembly of Virginia "Concerning the Bureau of Insurance," approved March 9, 1906.

I am inclined to think that the construction placed upon that law by you is justified by the language used, namely, that each of these associations shall have a "representative form of government and a lodge system, with ritualistic form of work for the meeting of its lodges, chapter, councils, or other designated subordinate bodies."

It seems to me that this language requires that the government of any such association shall be representative in form, and that it shall be controlled by officers chosen by the members of the association, and not by self-appointed officers, constituting a self-perpetuating body for the government of the association.

Very truly yours,

WILLIAM A. ANDERSON.

As to What Fire Companies Are Entitled to the Benefit of the Fireman's Relief Fund.

RICHMOND, VA., September 4, 1909.

Col. JOSEPH BUTTON.

Commissioner of Insurance.

Richmond, Virginia.

MY DEAR SIR:

Replying to your inquiry of yesterday, as to the proper construction of the act to create a fireman's relief fund, etc., I would say, that I am of opinion that section 6 of the act requires firemen's relief associations to be duly chartered and organized, before participating in the fund paid by the insurance companies under the provisions of the said act.

Section 9 requires the clerks of the city courts to make to the Commissioner of Insurance, a certificate stating certain facts, on or before the 31st day of October in each year, and further provides that if such certificate is not filed with the commissioner on or before that date, the town, city or county so failing to file such certificate shall be deemed to have waived and relinquished its rights for *such year* to the fund.

I conclude, therefore, that unless a fire company was duly chartered and organized prior to the 31st day of October, 1908, and the required certificate of the clerk filed with the Commissioner of Insurance on or before that date, there could be no participation in the fund which should have been in, within ninety days from the 31st of December, 1908. And so it will be as to the fund that should be paid in within ninety days from December 31st of this year, etc.

As the act uses the word "year" only, we must take it that a calendar year is meant.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

As to the Taxation of Insurance Companies.

RICHMOND, VA., November 24, 1908.

Col. JOSEPH BUTTON,
Commissioner of Insurance,
Richmond, Virginia.

DEAR SIR:

Replying to your inquiry of this instant, I beg leave to say that the real and personal property of insurance companies is taxable under the laws of Virginia in the same manner, and to the same extent precisely, that the property of corporations generally is so liable to taxation. See section 23 of the revenue law.

In addition to the property tax, there is a specific State license tax upon such companies, upon the payment of which they are authorized to do business in this State.

In addition to this, it is proper to say that insurance companies are made subject to the provisions of the general laws of the State in regard thereto, and particularly to the provisions of chapter 112 of the Acts of 1906, establishing the Bureau of Insurance, and the acts amendatory thereof, which statutes, with the exception of chapter 234 and chapter 236 of the Acts of 1908, have been embodied in the compilation of insurance laws prepared by your department.

Subject to these special provisions relating to insurance companies, such corporations are subject to the general corporation laws of the State.

The Commonwealth has adopted no special code of laws in relation to insurance companies, though there are a number of statutes in regard thereto.

Very truly yours,

WILLIAM A. ANDERSON.

Miscellaneous.*As to the Dissolution of Corporations.*

RICHMOND, VA., November 19, 1908.

Hon. WILLIAM F. RHEA,
Member of the State Corporation Commission,
Richmond, Virginia.

MY DEAR SIR:

Your favor of the 13th, enclosing letter of Messrs. Vicars & Peery, to you of date November 7th, has been duly received, and the question submitted considered.

Any corporation, whether organized under the act concerning corporations, which became a law on the 21st day of May, 1903, and the acts amendatory thereof, or under any charter heretofore granted by any court, or by the General Assembly, may be dissolved as is expressly provided in section 30 of chapter V of said act concerning corporations (as said section was amended by the act approved March 20, 1906) in the manner prescribed in that section; and the affairs of such corporation may be wound up, and its property

disposed of, and its debts and liabilities paid, or provided for, subject to the provisions of sections 31, 32, 33 and 34 of that chapter, and where the franchises and property of the corporation are sold under a deed of trust, or under a decree of court, they may be sold in accordance with the provisions of section 36 of chapter V of said act.

As I understand the inquiry of Messrs. Vicars & Peery, the corporation to which it refers is a railroad company.

I do not find any provision in the act concerning corporations which excepts railroad corporations from the operation of the enactments in regard to the dissolution of corporations generally, above referred to.

I return the letter of Messrs. Vicars & Peery, with the memorandum thereon by R. T. Wilson, clerk, and remain,

Very truly yours,

WILLIAM A. ANDERSON.

As to the Compensation of Inspectors Employed to Ascertain the Existence of the San Jose Scale in Any County. No Provision Made for the Discovery and Prevention of "Peach Yellows" and Other Pests to Which Fruit Trees Are Liable.

RICHMOND, VA., November 22, 1908.

J. L. PHILLIPS, ESQ.,

State Entomologist.

Blacksburg, Virginia.

DEAR SIR:

Referring to the question submitted in your favor of the 13th instant, I beg leave to confirm the opinion which I gave to the Commissioner of Agriculture on the 5th day of July, 1902, a copy of which you enclose (and which is herewith returned), and which will also be found on pp. 84-88 of my report for 1902, published in the annual reports of public officers of the Commonwealth for 1902.

The act of the General Assembly of Virginia approved March 28, 1902, Acts of 1901-2, p. 378, has been in effect amended by sections 9 and 10 of the act approved May 9, 1903, Acts of 1902-3-4, chapter 207, p. 310.

Section 10 of the last mentioned act makes it the duty of the board of supervisors of any county, or the city council of any city, in which a local inspector has been appointed, to fix the compensation of such local inspector, whose pay, however, shall not in any case be less than \$1.50 for each day's work, and to provide for the payment of the same as other claims against the county or city are paid, provided the sum does not exceed \$250.00 in any one year, and authorizes the board of supervisors of any county, or the council of any city, to appropriate such sum in excess of \$250.00 in any one year as such board or council may deem proper, as I construe this statute for the purpose of carrying out the purposes of the act.

You will observe, however, that section 9 of the act of May 9, 1903, relates entirely to the appointment of a local inspector, and to investigations of the locality for the purpose of ascertaining whether the San Jose scale is present in such territory.

Nothing is said either in section 9 or 10 in reference to peach yellows, or

other diseases or pests to which fruit trees are liable. The provisions seem to relate entirely to the extermination of, or protection against, the San Jose scale.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Powers of the State Board of Medical Examiners in Reference to a Certificate of Examination Issued by the Medical Board of Another State.

RICHMOND, VA., December 4, 1908.

Messrs. HARRISON & LONG,

Lynchburg, Virginia.

GENTLEMEN:

Your favor of the 3rd, this instant received, in which you, at the request of Dr. Rawley W. Martin, president of the State Board of Medical Examiners, submit the following question:

"Is the Virginia State Board *compelled* by law to accept, in lieu of examination of an applicant, a certificate from the examining board of another State, showing that the applicant has passed a satisfactory examination as to his proficiency, etc.?"

It is provided by section 1747 of the Code of 1904 that:

"The said board shall have, in their discretion, authority to accept in lieu of examination of an applicant a diploma or other satisfactory evidence of the graduation of an applicant in some medical college chartered by the State or Territory in which the same is situated, and a certificate from the examining board of any other State or Territory of the United States or the District of Columbia, showing that said applicant has passed a satisfactory examination as to his proficiency, and obtained license from said board to practice medicine and surgery in said State, Territory, or District."

This provision is evidently merely permissible, and empowers the State Board of Medical Examiners, in their discretion, to accept a diploma or other satisfactory evidence of the graduation of an applicant in a medical college chartered by some State or Territory, together with a certificate of the examining board of any other State or Territory of the United States or the District of Columbia as to his proficiency, and obtained a license from such board. There is nothing in the law, so far as I have been able to discover, which makes it obligatory upon the State Board of Medical Examiners to accept a diploma from any medical college outside of Virginia, and the examination of any examining board outside of Virginia, in lieu of a certificate from the State Board of Medical Examiners of this State, though it may, in its discretion, for reasons satisfactory to the Virginia Board of Medical Examiners, accept such evidence of the proficiency and qualifications of an applicant, if it deems it to be proper to do so.

Very truly yours,

WILLIAM A. ANDERSON.

The Statute Provides That the Justice Who Issues a Warrant of Lunacy May Sit on the Commission of Lunacy, and Does Not Provide That Any Other Justice May Sit in His Place.

RICHMOND, VA., December 17, 1908.

GEO. V. CAMERON, ESQ., J. P.,
Louisa, Virginia.

MY DEAR SIR:

Yours of the 16th instant just received. Replying thereto, I beg leave to say, that section 1669 of the Code (Acts 1902-3-4, p. 121), *seems* to contemplate that the justice who issues a warrant of lunacy, shall sit on the commission trying the case. There is no provision in this act for *any other justice* sitting, as is provided in the case of other warrants or proceedings.

The act of 1906; p. 313, amending section 1671 of the Code, allows a fee of \$1 "to the justice of the peace for his services," in such cases; and there is no provision for any division of this fee between the justice who issues the warrant, and a justice who may act on the commission. The failure to so provide, but strengthens the view that the law contemplates that only one (the same) justice shall act in such cases.

The conclusion is, therefore, that there is no provision of law allowing the justice who issues a warrant of lunacy a fee of 50c. therefor.

I am,

Very truly yours,

WILLIAM A. ANDERSON.

As to Absence of Any Necessity or Occasion for Filing the List of Voters Required by Section 38 of the Constitution at Least Five Months Before the Second Tuesday in June in Any Year in Which no Election is Held in That Month.

RICHMOND, VA., January 11, 1909.

J. O. BRADLEY, ESQ.,
Treasurer of Washington County,
Abingdon, Virginia.

DEAR SIR:

Your favor of the 9th this instant received.

The language used by the legislature in the first section of chapter 130, page 163, of the Acts of 1908, which taken literally requires the treasurer of each county and city to file with the clerk of the circuit court of his county or the corporation court of his city the list therein mentioned, "at least five months before the second Tuesday in June and each regular election in November," imposes an absolutely useless duty upon the treasurers and an unnecessary charge upon such treasurers in every year in which there is no general election to be held in the month of June, and I cannot suppose that it was the purpose of the General Assembly that it should have that effect.

I have no doubt but that the legislature intended the requirement to conform to the provisions of section 38 of the Constitution in that regard. That section of the Constitution requires that list to be filed by the treasurer "at least five months before each regular election."

As there is no regular election in June this year, such list can serve no possible good, or meet any known requirement. Indeed, it would be an utterly useless thing, so far as I can see.

No good can come to the public from the preparation and publication of such a list; and no harm can come to the public from the failure of the treasurer to prepare and file it, but such omission would save the localities from a very considerable cost.

This is a matter, however, of no general interest to the State whatever. The county treasurer in such matter acts as a local officer, and it is not, therefore, one as to which the Attorney General is called upon to advise him. I think it would be proper, therefore, for you to take the advice of the Commonwealth's attorney of your county upon such a question, and follow that.

I will say, that I am unable to discover any injury which would be done to the public, or to any individual from the failure of the treasurer to prepare and file such a list in a year in which there is no election in June, at least five months before such election. As stated, no such list is provided for by the Constitution, or necessary for securing the right of any citizen to vote.

Under the Constitution, the only authentic list of voters is the one provided by section 38 to be filed at least five months before a regular election, and, of course, a list filed five months before the second Tuesday in June next would not be a list filed five months before a regular election to be held at that time, because no such election is to be held in June anywhere in your county, as I understand from you.

Very truly yours,

WILLIAM A. ANDERSON.

*Convicts Sentenced for a Felony for a Punishment of More Than Five Years
Cannot be Sentenced to Work on the Public Roads Under the Existing
Laws.*

RICHMOND, VA., January 15, 1909.

Major E. F. MORGAN,

*Superintendent Virginia Penitentiary,
Richmond, Virginia.*

DEAR SIR:

Yours of the 14th received to-day.

Section 4046-a of the Code, as amended by chapter 28, page 35, of the Acts of 1908, the statute which defines what convicts may be sentenced to work upon the public roads, makes it lawful for the court in which a convict is tried and convicted "for a term not to exceed five years," to sentence him "to hard labor on the public roads for a period of time equal to the term of confinement in the penitentiary so fixed."

By section 3905 of the Code, with the provisions of which you are familiar, a convict is required to be sentenced for five years in addition to the time to which he would otherwise be sentenced, upon a second conviction of a felony, and if the conviction be a third conviction of a felony, he is, by section 3906, required to be sentenced to confinement in the penitentiary for life.

It seems to me that, reasonably construed, the meaning and effect of these statutes are to take convicts who are convicted and sentenced to the penitentiary for a greater term than five years upon whatever account, or for

whatever offence they may be so convicted, out of the class who may be sentenced to work upon the public roads; and that convicts who are convicted and sentenced to the penitentiary for an aggregate term in excess of five years or for life, upon a second or upon a third conviction of a felony as the case may be, cannot be lawfully sentenced to work upon the public roads, and that such convicts may be kept and worked under the contract with the lessees of the shops at the penitentiary.

Very truly yours,

WILLIAM A. ANDERSON.

That the Act Extending State Aid to Public Roads Was Not Intended to Apply to a Toll Road. Maintained and Kept in Repair by the Tolls Thereon.

RICHMOND, VA., January 28, 1909.

P. ST. J. WILSON, ESQ.,

Highway Commissioner.

Richmond, Virginia.

MY DEAR SIR:

Yours of the 27th instant has been received, and carefully noted.

In response to your inquiries I beg leave to say:

1st. That in my opinion, that portion of the Northwestern Turnpike situate in the county of Frederick, which was transferred to that county, by the act of February 26, 1884, and which I assume has been operated and maintained by the said county as a toll road under the provisions of that act, IS NOT such a public road as is contemplated by the act of February 25, 1908, and therefore is not entitled to the State money aid extended by that act.

It seems to me that the manifest purpose of the act of February 26, 1884, was to provide for the maintenance of this road by the tolls directed to be charged and collected for its use; and there is no evidence submitted, certainly to me, that the tolls have not been sufficient to maintain the road, or that the same has ever been a cost to the county at large. The case here presented, is an exceptional one, and I can hardly think that it was considered, or was even known to the legislature, when the act extending State aid to public roads was passed; hence I am inclined to think that the "public roads" mentioned in the act last named, are such roads as are opened, maintained and improved by the counties out of and with public funds.

The question is, however, not free from serious doubt; and it seems to me, and I take the liberty of suggesting, that in order that the county of Frederick may receive the full benefit of the amount of money aid apportioned to it, that if this quota is not entirely consumed by its application to *other roads* in the said county, about which there is no question, the remainder may be applied with propriety, to the improvement of this road: provided, the tolls received therefrom have been and are now insufficient for its proper improvement.

In reply to your second inquiry, I would say, that in the event that any part of the State aid fund can be, or is given to this road, it is immaterial

from what source the money comes to meet and offset the State funds so applied—it is sufficient if the proper authorities “put up” the requisite amount.

I am,

Very truly yours,

WILLIAM A. ANDERSON.

As to the Transportation of Dead Bodies.

RICHMOND, VA., January 30, 1909.

DR. ENNION G. WILLIAMS,
Health Commissioner,
Richmond, Virginia.

DEAR SIR:

I regret to say that the statute in regard to the transportation of dead bodies found in section 1743-f of the Code of 1904, furnishes no answer to the inquiry made in your favor of the 26th instant.

The General Assembly failed in that statute to declare who should prepare transportation permits.

I presumed the railroad companies had them printed and kept them on hand, because the statute prohibited dead bodies from being transported without such permits.

It is manifest that the duty ought to have been devolved upon some public official, State or county, from whom citizens could obtain such permits conveniently.

I know of no way in which this omission in the law could be effectively remedied, unless your board can have blank forms for these permits printed and furnished to the local authorities and to the railroad companies.

The railroad companies would probably pay the cost of printing them, but the form of the permit should be prescribed by your board.

Very truly yours,

WILLIAM A. ANDERSON.

The Printer Who Has in His Possession the Manuscript Records of Suits Pending in the Supreme Court Under Contract to Print the Same is Not Liable for Their Destruction by a Fire Not Caused by His Negligence.

RICHMOND, VA., February 9, 1909.

H. STEWART JONES, ESQ.,
Clerk Supreme Court of Appeals of Virginia,
Richmond.

MY DEAR SIR:

You submitted a question to me based upon the following facts:

Several manuscript records in cases upon which appeals had been allowed, had been received by you and turned over by you to the printer to print the same for the use of the court.

Before the printing of these records were completed, and while they were in the custody of the printer, they were destroyed by accidental fire, along with his printing establishment.

In one or more cases the printer had actually printed a considerable

portion, if not all, of the record, and these printed copies were also destroyed by the fire referred to.

The printer was under contract to print and furnish the printed copies of these records to you promptly. The printer was in no default in the matter of the time of printing and delivering the printed copies to you.

The question you submit is, whether the printer is responsible for the destruction of these records in this manner, and should be required to pay the costs of reproducing the same.

The transaction referred to, if not precisely, is in the nature of, a bailment *locatio operis faciendi*, and it seems to me is governed by the same principles which control an ordinary bailment of that kind.

The printer was a bailee of the records referred to.

Under such circumstances, the bailee is not responsible for any loss or injury to the property entrusted to his custody, unless such injury was occasioned by his negligence. He is not an insurer against, nor liable to any extent for, any loss occasioned by *accidental* fire. He would be liable for a loss occasioned by a fire, the result of his own negligence.

In support of the above views, I beg leave to refer you to *Slaughter v. Green, &c.*, 1 Rand., pp. 3, 9-11; and 5 Syc., pp. 184-186.

Very truly yours,

WILLIAM A. ANDERSON.

As to Who is Liable for the Payment of a Collateral Inheritance Tax as Between Life Tenants and Remaindermen.

RICHMOND, VA., February 10, 1909.

CHARLES M. WHITE, Esq.,
Warrenton, Virginia.

DEAR SIR:

Your favor of the 8th instant has been received.

I fear I can be of no great assistance to you in solving the questions you submit.

The question involved in both inquiries is who should be charged with, and pay, a collateral inheritance tax where there is a devise for life or other particular estate to A, and remainder over, say, to B, C and D.

If, as the statute might be construed to import, the tax was upon the *property* devised, then it would attach to that property, and would be payable out of the *corpus* of the estate passing.

But our Court of Appeals has decided in *Eyre v. Jacob*, 14 Gratt., 422, and in *Miller's Executor v. Commonwealth* and *Barrett's Admrs. v. Commonwealth*, 27 Gratt., 110, 117, that a collateral inheritance tax "cannot be regarded in a proper legal sense as a tax upon property. * * * The intention of the legislature was plainly to tax the transmission of property, by devise or descent, to collateral kindred; to require that a party thus taking the benefit of a civil right, secured to him under the law, should pay a certain premium for its enjoyment."

And yet the court go on to say in the case last cited, that:

"Having plenary powers, only restricted by the Constitution, over the subject of taxation, it certainly has the power to appropriate a

modicum of the estate, call it a tax or what you will, as a condition upon which those who take the estate shall be permitted to enjoy it."

This seems to clearly imply that whether it is a "tax" or not on the property devised, it is an appropriation by the State of a portion of the estate devised as a condition of its transmission to, and enjoyment by, the devisees.

So that it appears to me that it would be equitable, and in harmony with this adjudication of the court, and with the language of the statute itself, that under the circumstances which you mention, the tax should be treated as a charge, or an appropriation of a part of the tract of land devised, and that whoever takes that land under the devise, whether it be the life tenant or the remainderman, would be liable for the tax, and should be required to pay it.

While this view occurs to me as being sound, I am not prepared to say that it is the legal rule which the courts would adopt.

It may be that the courts will hold that the collateral inheritance tax is a charge primarily upon the first taker of the estate. In one of the cases you mention, this would be W. S. Hunton, who, under the will of Joseph G. Hunton, as recited by you, took a conditional fee in the tract of land devised. In the other case the collateral inheritance tax would be chargeable upon M. L. Lunceford, who, as I understand the recitals of your letter, took a life estate in another tract of land devised to him and his children.

Col. Catlett, who has given some attention to the subject, inclines to the view that in each case the treasurer can and should look to the first taker of the estate under the will, or to the estate of such first taker after his death.

On the other hand, it seems to me that it would be more equitable to apportion the tax between the estate of W. S. Hunton, the taker of the conditional fee, and the remaindermen as to the farm devised to W. S. Hunton, etc., ratably according to the value of the several estates which they respectively took under the will; and that a similar apportionment of the collateral inheritance tax between the life tenant, M. L. Lunceford, and his children would be equitable as to the farm devised to them.

The statute now embraced in section 44 of the revenue law, in paragraph (f) thereof, makes the personal representative and the devisee liable for the payment of the tax, and for damages for a failure to pay it. This seems to make every devisee of a particular tract of land liable for the collateral inheritance tax, and I concur with Col. Catlett in the view, that it imposes a legal liability, whatever may be the equitable view of the case, upon the first taker.

It is not easy to give a definite and satisfactory answer to the questions which you submit, because of the indefiniteness of the statute itself; and the decisions of the courts throw very little light upon this phase of the subject.

Very truly yours,

WILLIAM A. ANDERSON.

P. S.—This letter is not entirely consistent with one which I wrote to Mr. J. A. C. Keith upon this same subject on the 22d day of November, 1907, a copy of which I herewith enclose. But I am inclined to the view that the

opinion here indicated, in so far as it may be inconsistent with anything suggested in my letter to Mr. Keith, is the better view.

The above was written before I had recalled what I had written to Mr. Keith, and before I had examined that letter. The view I take in that letter is that the tax should be charged upon the *corpus* of the estate, but that seems to be somewhat in conflict with some things said by the court in *Eyre v. Jacob* and in *Miller's Exors. v. Commonwealth, &c.*

And yet I am not prepared to say that the courts would not sustain the proposition that the tax should be charged upon the *corpus* of the estate, and equitably apportioned between the devisee of the particular estate and the remaindermen, according to the value of the respective estates which each devisee takes under the will, notwithstanding the intimations in the opinions referred to.

The value of the life estate in the case of the devise to Lunceford for life, could be ascertained by taking the annual rental value and applying the tables of mortality according to the expectancy of life of the life tenant.

There is more difficulty as to the devise to W. S. Hunton, for he took a conditional fee, which might have been converted into a fee simple by the birth and survival of issue.

The trouble is that the law furnishes no definite answer to your inquiry, and we are to a great extent left to grope in the dark.

Very truly yours,

WILLIAM A. ANDERSON.

Lands Bought in by the Commonwealth for Delinquent Taxes Cannot Under the Rule and Practice Sanctioned by the Auditor's Office be Rented Out to Pay Current Taxes Nor Can the Trustee Standing Thereon be Sold to Satisfy the Same.

RICHMOND, VA., March 16, 1909.

H. N. DILLARD, ESQ.,

Attorney for the Commonwealth,

Rocky Mount, Virginia.

MY DEAR SIR:

Yours of the 4th instant came duly to hand, and the delay in reply has been caused by pressing matters, which have prevented me from seeing the Auditor on the subject of your inquiry.

I have at last seen the Auditor, who alone is charged with the construction and enforcement of the laws relating to the revenue, and he is of opinion that the county treasurer has no authority to sell the timber on, or to rent the lands bought by the Commonwealth for delinquent taxes, for the taxes currently assessed thereon.

I am inclined to concur in this view, though I can see no reason why such lands should not be rented to pay current taxes, even though previously bought by the Commonwealth.

The Auditor thinks that the only way of subjecting such lands, is under section 666—which provides only for their purchase, for the amount of all of the taxes which have been or should have been assessed thereon.

As you have well said, the law is in such a state of confusion it is difficult, indeed impossible to reconcile all of its provisions and in construing

it the Auditor now feels constrained to follow the precedents heretofore established in his office, and which have been followed generally by the collecting officers.

However, he rules as above, viz.: that lands bought by the Commonwealth for delinquent taxes, cannot be rented by treasurers for current taxes, where such have been extended thereon.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Election and Appointment of Commissioners of the Revenue in the Counties and Cities of the State, Respectively.

RICHMOND, VA., April 3, 1909.

M. C. THOMAS, ESQ.,

Charlottesville, Virginia.

MY DEAR SIR:

Yours of March 30th has been received, and I am directed by the Attorney General to answer the same.

1. The Constitution provides that commissioners of the revenue shall be elected by the people or appointed, as the legislature may provide, and since the new Constitution has been in force, the law has been changed several times.

2. By an act approved February 25, 1908—Acts 1908, page 66—it is provided: "The commissioners of the revenue for each county shall be chosen by the qualified voters of the respective counties at the general election on the Tuesday after the first Monday in November, 1911, and every four years thereafter, and shall hold their offices for the term of four years from the first of January next succeeding their election."

3. By the same act it is provided: "The commissioners of the revenue for each of the cities of the Commonwealth shall be appointed by the corporation or hustings court of their respective cities, * * * sometime between the first day of July and the first day of October in the year 1909, and shall hold their offices for four years from the first day of January next succeeding their appointment. On Tuesday after the first Monday in November, 1913, and every four years thereafter, the qualified voters of each of the cities of this Commonwealth shall elect a commissioner of the revenue, whose term of office shall begin on the first day of January next succeeding his election and continue for four years thereafter."

You can get access to the act of Assembly quoted above, at either the clerk's office of your corporation or circuit courts.

I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

As to What is a Public Place in the Meaning of the Anti-Gambling Act.

RICHMOND, VA., April 3, 1909.

R. J. SUMMERS, ESQ.,
Commonwealth's Attorney,
Abingdon, Virginia.

MY DEAR SIR:

Yours of the 2d instant, has been received, and noted. In reply thereto, I would say that the question of what is, and what is not, a public place, in contemplation of section 3818 of the Code has been passed on several times by the Supreme Court—the cases being cited in the note to this section, as found in Pollard's Code of 1904. Ordinarily, I would say that an insurance office is not a public place, within the meaning of this section; but if the house in which such a business is carried on, is situated on a public street of a city or town, and games are played therein, in full view of the passing public as well as of those who might go there on business, it may be considered a "public place" in contemplation of the said act. But if games are played therein, after business hours, and with closed doors, or even during business hours with closed doors. I hardly think the act will be violated thereby.

You will understand that I give you this as my personal view only, of the question, as I have no authority to give an official opinion in such cases.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Requirements of the Constitution in Regard to the Publication of Proposed Amendments to the Constitution.

RICHMOND, VA., April 23, 1909.

JOHN W. WILLIAMS, ESQ.,
Clerk of the House of Delegates,
Richmond, Virginia.

DEAR SIR:

Yours of the 22d this instant received.

In order to certainly comply with the requirements of the Constitution as to the time during which amendments to the Constitution proposed by the General Assembly shall be published, I would say that the publication should be consecutively for at least three months before, and up to, the day of election.

There can be no question but that such a continuous publication for three months before, and up to, the day of election would satisfy the requirements of section 196 of the Constitution that the proposed amendments "shall be published for three months previous to the time of such election."

There has been no decision in Virginia upon this question, nor have I found any decision of any other State, except the case of *State v. Guraggy*, 84 Iowa, 177, which seems to fully sustain the opinion expressed.

With my best wishes,

Very truly yours,

WILLIAM A. ANDERSON.

As to the Compensation of Clerks in Connection With Sales of Delinquent Lands.

RICHMOND, VA., April 29, 1909.

H. H. HOLT, Esq.,
County Clerk,
Hampton, Virginia.

MY DEAR SIR:

Yours of the 17th instant was duly received.

The question therein presented was also submitted to me by the Auditor of Public Accounts.

After careful consideration I have advised the Auditor that by the terms of section 669 of the Code as amended, the clerk is allowed five cents for each lot, tract, or parcel of land purchased in the name of the Auditor for the benefit of the State and county, for the services therein mentioned, and that by section 647 as amended by the act in force June 26, 1908, the clerk is allowed two cents per name for each copy of the reports required to be made by that section, and by section 662, to be paid out of the public treasury upon the certificate of the court.

The Auditor informs me that he will rule accordingly.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Powers of the State Board of Embalming as to the Examination of An Applicant for a License.

RICHMOND, VA., May 1, 1909.

Major L. T. CHRISTIAN.

Secretary State Board of Embalmers.
Richmond, Virginia.

DEAR SIR:

In reply to your favor of the 30th ultimo, this instant received, I beg leave to say that under chapter 625 of the Acts of 1893-4, as amended by chapter 93 of the Acts of 1902-3-4, the State Board of Embalming of Virginia is authorized to prescribe the manner in which the examination of an applicant for a license under these acts shall be conducted.

Such examination, in my opinion, may be either wholly oral or wholly written, or partly in writing and partly oral.

Neither of said acts prescribes the manner in which the examination shall be conducted, but they leave it entirely to the board to determine how it shall be conducted.

A wide discretion is thus vested in your board, but only, of course, to be exercised fairly and impartially.

I beg leave to call your attention to an error in the printed copy of the law enclosed by you to me, in that this printed copy enumerates section "6" of the act of March 16, 1903, as section "5," and section "7" of the act of March 5, 1894, as section "6."

Very truly yours,

WILLIAM A. ANDERSON.

As to the Status of the Surgeon of the Richmond Light Infantry Blues Battalion.

RICHMOND, VA., June 10, 1909.

Gen'l C. J. ANDERSON,
Adjutant General,
Richmond, Virginia.

DEAR SIR:

In response to your request for an opinion as to the question raised by the letter of Maj. E. W. Bowles, addressed to you on the 20th of April last, I beg leave to say that I have considered the matter presented in the light of the general orders issued from your office; the general laws governing the militia of the State, and the original and amended charters of the Richmond Light Infantry Blues Association, and I have reached the conclusion that General Order No. 8 of date April 10, 1909, whereby "Capt. J. Fulmer Bright, surgeon, Richmond Light Infantry Blues Battalion, is transferred to the medical corps, but assigned to duty with the same battalion"—is not in conflict with any provision of the charter of the R. L. I. B. Association, nor with the laws regulating the State militia.

It may be true, as Major Bowles says in his letter to you, that neither the "Dick Bill" nor the "Conformity Act" passed by the legislature of Virginia, have any application to the organization of the Blues Battalion; and as he further says, if there is any conflict between Federal and State laws, the latter must prevail in time of peace; yet as I view the question presented, there is no conflict between any of the laws referred to, and General Order No. 8—indeed it seems to me that on the whole the purpose and effect of this order is in harmony with all of these laws.

By section 5 of the act of February 12, 1894, it is provided: "The company or companies organized under this act, and the battalion when formed, shall be subject to all laws now in force touching volunteer militia, except as follows:" and I find nothing in the exceptions following in conflict with the view above expressed. The same section provides that the said battalion shall have such officers as may be prescribed by law for a battalion of infantry, and section 317 of the Code provides that a battalion of infantry not attached to a regiment, shall be allowed one surgeon with the rank of captain; hence the officers of the Blues Battalion—including its surgeon—are defined by the general law, and not by the charter of that association.

It seems to me, therefore, that General Order No. 8 in its entirety applies to the surgeon of that battalion as well as to all other surgeons in the militia service of the State.

I am,

Very truly yours,

WILLIAM A. ANDERSON.

N. B.—It may be proper to add that section 4 of the act of February 12, 1904, gives the Governor a much larger authority in the premises than he has exercised in the orders in question, and in my view undoubtedly clothe him with power to give those orders.

WILLIAM A. ANDERSON.

As to Absence of Authority in State Board of Medical Examiners to Inquire Into the Moral Character of an Applicant.

RICHMOND, VA., June 24, 1909.

Doctor A. S. PRIDDY,

Committee on Behalf of the State Board of Medical Examiners.

DEAR SIR:

Replying to the inquiry submitted by your board, I beg leave to say that the Virginia statutes regulating the practice of medicine and surgery (Code of Virginia of 1904, chapter 77) do not authorize the State Board of Medical Examiners to inquire into the moral character of any applicant for a certificate to practice medicine and surgery. These statutes merely authorize your board to pass upon the attainments and acquirements of an applicant for a certificate to practice medicine and surgery in the different branches of medicine and surgery.

I do not find that your board is authorized to inquire into the moral habits or personal or professional conduct of such applicant.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Necessity that an Application for Registration as a Voter Shall be in the English Language.

RICHMOND, VA., July 2, 1909.

GEORGE N. WISE, ESQ.,

Newport News, Virginia.

DEAR SIR:

Your favor of the 28th ultimo has been received.

The question you mention is presented to me for the first time. It is a question which can only be decided by the courts, or by some official body authorized to pass upon such a question, as for instance the House of Delegates or the Senate of Virginia in passing upon a contested election case in which the question has arisen.

My own view, however, is that the requirements of the second section of the second clause of section 20 of the Constitution would not be satisfied by a citizen making out his application in the Hebrew, French, German, or the language of any other foreign country.

I think it may be fairly claimed that the application must be made in the English language—the language of the country, the language in which the proceedings of our courts and of all public bodies and of all public transactions are conducted.

I think it may be reasonably assumed that it was contemplated by the framers of the Constitution that the application would be made in a language which the registrar could understand.

I know of no provision in the Constitution, or statutes made pursuant thereto, which authorizes any voter who cannot make application in the English language, to have the assistance of an interpreter; indeed, the Con-

stitution and the laws provide that he shall prepare the application "in his own handwriting without aid, suggestion, or memorandum."

Very truly yours,

WILLIAM A. ANDERSON.

As to Tax on the Recordation of a Deed to the United States Government.

RICHMOND, VA., July 3, 1909.

Hon. THOMAS L. MOORE.

United States Attorney,

Roanoke, Virginia.

MY DEAR SIR:

Your favor of the 2d instant, enclosing decision of acting Comptroller Mitchell rendered November 7, 1907, in the matter of \$400.00 paid by Pay Director W. W. Galt, United States Navy, upon the recordation of a deed to the United States, this instant received.

You will observe that acting Comptroller Mitchell does not refer to the opinion of Attorney General Garland, October 21, 1887, 18 Op. Atty. Gen., p. 491, in which United States Attorney General Garland rules upon the very question presented in your recent correspondence with me, and takes precisely the same view which I had ventured to present in the opinion I gave to Governor Swanson on the 12th day of July, 1907, a copy of which I sent you on the 22d ultimo.

I did not see Attorney General Garland's opinion until within the last few months.

I take it that great weight would be attached to the opinion of the Attorney General of the United States, and particularly to the opinion of one of such learning and ability as Attorney General Garland, who was one of the ablest lawyers the country produced during his time.

The opinion of acting Attorney General C. H. Robb, 25 Op. Atty. Gen., p. 234, cited by acting Comptroller Mitchell, refers to an entirely different question from that now presented by you, as you will see upon reading it, and a question as to which there cannot be the slightest doubt as to the correctness of Mr. Robb's position.

In such a matter, I would suppose that the opinion of the Attorney General of the United States would prevail over the ruling of the Comptroller.

I have never thought, since the question was first presented to me, that it was free from difficulty, and but for the clear and pronounced opinion of Attorney General Garland, would be glad to reconsider it.

It is a question which certainly the legislature can solve by expressly providing that no charge shall be made to the United States government upon the recordation of any deed to the United States, and I think it more than likely that such amendment of the statute would be made by the General Assembly if its attention is called to it.

In the meantime, and as to future transactions, the United States government can secure itself against any such charge by having a stipulation that the vendor or grantor of any lands in Virginia which it may acquire for its purposes, shall pay the charge made by the Commonwealth upon the recordation of the conveyance of such lands to the United States.

I am not informed as to what weight it attached by the subordinate officers of the United States government to opinions of the Attorney General of the United States, but I had supposed that they controlled until overruled by some higher authority.

In the view indicated by Attorney General Garland, it is just as incumbent upon the United States to pay the tax or charge imposed by Virginia upon the recordation of a deed to that government, as it is to pay the clerk's fees upon such recordation.

I shall mention this matter in my report to the Governor next fall, which is laid before the General Assembly, and hope that there will be such amendment of the law as will avoid any question about any such charge in the future.

Very truly yours,

WILLIAM A. ANDERSON.

As to Who May Vote at a Local Option Election, and as to When a Voter May be Registered Previous to Such Election.

RICHMOND, VA., July 6, 1909.

R. M. WHEELER, Esq.,

Shenandoah, Virginia.

DEAR SIR:

As you will see from the Virginia Code, the Attorney General is not authorized or required to give an official opinion upon any county, town, city or other local question, or to any one except the officers of the State government and boards at the capital. He is required to represent the State in suits in the Supreme Court of the State, in the Circuit Court of Richmond city, and in the United States courts, and to give advice to the officers of the State government, and to State boards whenever called on, and this gives him quite as much as two men can do.

As there are 100 counties, about 500 magisterial districts, 200 towns, 20 cities, over 15,000 local officers, and 2,000,000 people in the State, you will see how impossible it would be for any one or 100 Attorney Generals to pass intelligently upon the many thousand questions which are annually arising in all of these communities and localities.

Nevertheless, it gives me pleasure personally and unofficially to answer your inquiries as well as I can; but please understand distinctly that I have no right to rule on them.

1. In a recent case the Supreme Court of Appeals of Virginia decided that what is known as "The Ward Law" is constitutional.

You will see that law at pages 83 and 84 of the Acts of 1908, which you will find in the clerk's office of your county, and ought to find in the office of every justice of the peace.

That law clearly prescribes who may vote at any special or local option election.

By that act any person qualified to vote at the election to be held on the 2d of November next, will be a qualified voter at a local option election to be held on the 27th of July, 1909, or at a local option election held at any time during the year 1909 after the second Tuesday in June.

2. The law is silent as to how long before such election a citizen can register. So, while it would be perhaps safer for him to be registered 30 days before such election, I would say he may probably be lawfully registered up to the day of election. This has to be a good deal of a guess, for the reason that the law is so indefinite about it. It is a question, of course, which the courts alone can decide.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Newspapers in Which the Proposed Amendments to the Constitution Should be Published.

LEXINGTON, VA., July 27, 1909.

JOHN W. WILLIAMS, ESQ.,

Clerk House of Delegates,

Pearisburg and Richmond, Virginia.

DEAR SIR:

Yours of the 22d, forwarded from Richmond, has been received here.

The law makes no *specific* provision for the publication of the proposed amendments to the Constitution in a city of the first class in which no daily newspaper is actually printed; nor does it define what is publication within the meaning of the statute, further than to require that the proposed amendments shall be published for three months "in at least one daily newspaper published in each city of the first class."

Manchester is a city of the first class, and no daily newspaper is actually printed there, but I understand that each of the three dailies printed in the city of Richmond, "The Times-Dispatch," "The Evening Journal" and "The News-Leader," are regularly, daily, distributed and circulated through the city of Manchester practically as they are distributed and circulated through the city of Richmond. The News-Leader as appears from its heading and date line, hails from both Manchester and Richmond.

It being impossible to publish the proposed amendments in a daily newspaper actually printed in Manchester, the best you can do is to publish them in one or more daily newspapers of general circulation actually printed across James River in Richmond city, but to all intents and purposes, as may be fairly claimed, published in Manchester also.

My view is that this will satisfy the spirit, if not the letter, of the law, and I am inclined to think it will satisfy both; but if I am in error in this, it is a situation which cannot be helped or bettered by any act of yours.

Out of abundant caution, I would venture to suggest that you have the amendments published in the News-Leader of "Richmond and Manchester," whether you have them also published in another paper printed in Richmond or not. The act requires you to have the publication in "at least one daily newspaper published in each city of the first class"; which clothes you with authority in your discretion to have the publication in more than one daily newspaper, in each first class city of the State.

You would certainly be justified in having the publication, if it can be secured on any fair terms, in two dailies of general circulation printed in the capital and the largest city in the State.

In a matter of such very great importance, the cost of such additional publication is a matter of no moment as compared with the great interests involved.

Very truly yours,

WILLIAM A. ANDERSON.

*As to Right to Arrest a Person Who Has Been Adjudicated to be a Lunatic
But Who is Not in a Lunatic Hospital.*

RICHMOND, VA., August 20, 1909.

J. S. YOWELL, ESQ.,

Culpeper, Virginia.

MY DEAR SIR:

Yours of the 17th instant, addressed to the Attorney General, came to hand during his absence, and as he is still away, and very closely occupied by the public business, I take the liberty of replying to your letter.

Let me say first, that the Attorney General is not authorized by law to officially advise others than the State officers at the seat of government; but is always willing to assist other officers—when it is proper that he should do so—in a personal or unofficial capacity.

Following this necessary rule, I would say that it is not very clear under the law, what your duties are in the case presented.

Whatever they are, I think depends on sections 1683-1684 of the Code, and if the person having the insane person in charge has given a bond for his safe-keeping, it would seem that he has a right to deliver the insane person to the sheriff, who shall dispose of him as section 1684 provides. If no bond has been given, and such person has been discharged from the hospital, the same proceedings should be had as in an original case—under section 1669.

You do not make it clear for what the person referred to, is wanted to be arrested by you. If because he is accused of any crime, you should have a warrant for his arrest—Whether sane or insane; if the trouble is that his insanity has returned, then he should be taken up on the order of a judge or justice in the usual way.

If he has not been discharged from the hospital, nor let out on bond, but only permitted to come home, he is still in the custody of the hospital, and on notice to them, they should send for him, or direct some one to bring him back to the hospital. On the facts as you state them, I see no reason why you should arrest the party, without some authority from the hospital, or on a warrant from a judge or justice—charging insanity or some violation of the law.

I give you these views, unofficially, for what they may be worth.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

*As to Compensation of Jurors, Witnesses and Officers in an Inquest Held
Under the Statute in Regard to Escheats.*

RICHMOND, VA., August 25, 1909.

Judge J. G. DEW.

Second Auditor,

Richmond, Virginia.

MY DEAR SIR:

I have considered the letter of Mr. P. J. Berkeley, of date July 26, 1909, handed me by you several days ago, and beg leave to say that I can find no provision whatever, in the laws of this State, for the payment of fees to jurors, witnesses and officers for summoning jurors in cases of inquest by escheators.

It seems clear that the escheator and the attorney for the Commonwealth are each allowed a fee of \$10, payable out of any money in the treasury to the credit of the literary fund; but there is not even a suggestion in the law, as to either the allowance of or the payment of jurors, witnesses, etc. Nor do I find any authority for such payment in the general law providing for the payment of jurors and witnesses. It seems to me, therefore, to be a clear case of omission; and in the absence of any provision therefor, it seems to me that the board of education will be warranted in paying such fees out of the literary fund, on accounts therefor, certified by the escheator who held the inquest, at the rate fixed by law for a similar service in civil cases before courts. This is merely a suggestion, as I must repeat that I can find no provision of law covering the case presented.

I suggest further, that you submit this letter, together with Mr. Berkeley's, to the board of education for its consideration, and formal reference to the Attorney General, if deemed necessary.

I am,

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

A Disturber of Public Worship May be Punished by Both Fine and Imprisonment and May be Tried Before the Justice Who Issued the Warrant or Before Some Other Justice.

RICHMOND, VA., September 3, 1909.

C. F. GREER, ESQ., J. P.,

Rugby, Virginia.

MY DEAR SIR:

Yours of the 30th of August addressed to the Attorney General, has been received.

In the absence of the Attorney General, I beg leave to say in reply thereto, that as you may know, the Attorney General is not authorized or required by law, to give official opinions or advice to any officials or persons other than certain officers and boards *at the seat of government*, and the reason for this is too obvious to need explanation—it is simply impossible to do so.

Wishing, however, to be courteous, and to serve you as far as we can with propriety, I will say personally and unofficially, and for what it may be worth, that section 3805 of the Code, as amended by the act of February 3, 1908, *does* provide that a person convicted of disturbing public worship shall be BOTH fined and imprisoned, and *not* simply fined. The discretion given to the court or justice applies only to the amount of the fine and the length of confinement in jail, within the limitations of the law.

Whilst it is usual for the officer executing a warrant of arrest to take the accused before the justice who issued the warrant, the law does not oblige him to do so, and in misdemeanor cases it is sufficient if the accused is taken before some justice of the district in which the offence was committed; hence to do so raises no presumption of improper conduct on the part of the officer, but *subsequent* events may show that there was an improper motive in doing so.

If in the case you mention, the facts indicate that the officer as well as the justice who tried the case, were influenced by improper motives, the only remedy is removal from office by the circuit court, under section 821 of the Code, Acts 1902-3-4, page 655.

As to the merits of this case, we can, of course, say nothing.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

The Aggregate of the Deposits of Money of the Taxpayer is Not Liable to Taxation, but Only the Money Which a Taxpayer Had on Deposit in Any Bank or Banks, or With Any Other Corporation, Firm or Person on the 1st Day of February in the Tax Year is Liable to Taxation.

RICHMOND, VA., *September 4, 1909.*

Messrs. WATKINS & WATKINS,
Attorneys-at-Law,
Houston, Virginia.

GENTLEMEN:

Yours of the 3rd instant, addressed to the Attorney General, has been received and noted.

In reply to your inquiry made therein, I beg leave to say, that under clause 7 of schedule C of the tax law, a taxpayer is only required to list for taxation the amount of money which he had on deposit with any bank or other corporation or person or firm, ON the first day of February of each year, and NOT the aggregate of deposits in bank for the preceding year. This is the construction which the Auditor has given this law for many years.

Mr. Anderson is away just now, hence I take the liberty of answering your inquiry.

Very truly yours,

ROBERT CATLETT,

Assistant to the Attorney General.

As to What Constitutes Residence in the Meaning of the Election Laws.

RICHMOND, VA., September 4, 1909.

S. W. TARDY, Esq.,

Buena Vista, Virginia.

DEAR SIR:

Yours of the 3d instant addressed to the Attorney General, has been received, and in his absence I take the liberty of replying thereto. As you may know, the Attorney General is not authorized by law to give official opinions to others than certain officers and boards at the seat of government; but wishing to be courteous, and to serve you as far as we can with propriety, I will say:

1. That *residence* is a question of intention largely, and if the party to whom you refer, has only removed his family out of the city for temporary sojourn, and not to remain in the county permanently, he will have the right to vote in the city in the fall election; but if he has removed to the county without a fixed purpose to return to the city, he cannot vote in the city in the fall or in any other election.
2. A young man who will become of age before the 2d of November next may pay a poll tax for one year in advance, register and vote in the election to be held on that day.
3. The clerk appointed by the court to fill out the term of a deceased clerk, holds the office for the unexpired term; see section 106 of the Code of 1904.

Very truly yours,

ROBERT CATLETT,

*Assistant to the Attorney General.**As to Certain Costs and Fines in Criminal Cases.*

RICHMOND, VA., September 9, 1909.

F. L. DUNN, Esq.,

*Deputy Sheriff,**Nottoway, Virginia.*

DEAR SIR:

Yours of the 4th instant, addressed to the Attorney General, has been referred to me for reply.

As you will see by reference to the law—section 3203 of the Code—the Attorney General has no authority to officially advise anyone or any official, except certain officers and boards at the seat of government; indeed it would be impossible for him to do so, if he so desired. Wishing, however, to serve you as far as we can, I will say unofficially, and for what it may be worth, that you can get the information desired from section 3531 of the Code, as amended by act of 1908—Acts 1908, page 297—in just as good form as any one can give it. In a case of misdemeanor before a *justice*, where the Commonwealth pays any costs, an account for summoning witnesses for the Commonwealth should be made out against the Commonwealth, and presented to

the circuit court of the county for its approval, and certification to the Auditor for payment. Only 45 cents can be paid out of the treasury for summoning any number of witnesses for the Commonwealth before a justice in a misdemeanor case; but if the same case is taken to court, there is no limit to the fees for summoning witnesses for the Commonwealth before the court, if the case is of such nature that the Commonwealth pays fees of the officers. In felony cases before a justice as you say, the fees are limited to \$1, unless the justice certifies that more than five witnesses were examined, and were material; and these fees must be certified by the court to the Auditor for payment, just as in the case of misdemeanor. As to the fees for summoning witnesses for the Commonwealth before a bail commissioner, there is no specific provision made therefor; but I take it that the officer may collect same out of the treasury when certified by the court, as in the other cases.

The fee of \$1.50 allowed to sheriffs for impaneling and summoning a petit jury, is not payable out of the State treasury; but should be taxed in the cost of each suit wherein the jury is impaneled, against the party who has the costs thereof to pay.

It seems to me that the judge who has these fees to approve, is the proper source from which you may get the information.

Very truly yours,

ROBERT CATLETT,
Assistant to the Attorney General.

As to the Limit of Time in Which a County Must Comply With the Requirements of the Act Providing for State Aid for the Improvement of Public Roads in Order to be Entitled to Such Aid.

RICHMOND, VA., October 6, 1909.

Captain P. ST. J. WILSON,

*State Highway Commissioner,
Richmond, Virginia.*

DEAR SIR:

Replying to the inquiry made in your favor of the 5th, this instant received, I beg leave to say that the provision in the act approved February 25, 1908, chapter 76 of Acts of 1908, providing for State money aid for the improvement of the public roads, by which a county loses any right to participate in the State fund appropriated by that act, does not take effect until the 1st day of March in the year in which the default is made.

The act does not seem to confer any discretion upon the State Highway Commissioner in this regard, and the only limit of time within which a county is required to comply with the requirements of sections 2, 3, 4 & 8 of the act, is the first of March in the year 1909, and the first of March in each year thereafter, as prescribed in section 5 of said act.

Very truly yours,

WILLIAM A. ANDERSON.

*As to When the Senate Finance Committee is Required to Begin its Sessions
Under the Resolution of the Senate Quoted.*

RICHMOND, VA., October 13, 1909.

M. B. BOOKER, Esq.,
Clerk Virginia Senate.
Richmond, Virginia.

DEAR SIR:

Replying to the inquiry submitted by Senator Keezell, and communicated in your favor of this instant just received, I beg to say that the language of the resolution of the Senate to which you refer, pertinent to said inquiry, is as follows:

“Resolved by the Senate, That the finance committee of this body shall assemble thirty days before the time of the meeting of the next General Assembly and prepare the appropriation bill proper without an increase of salary or an annuity.” Senate Journal 1908, p. 837.

That resolution, as I understand it, plainly provides that the Senate Finance Committee shall begin its sessions on the thirtieth day before the time of meeting of the next General Assembly.

Of course, the resolution imports that that committee shall continue its sessions thereafter until its work shall have been completed.

Very truly yours,

WILLIAM A. ANDERSON.

*As to Duty Imposed by Law on Officers of the United States Army to Aid the
Civil Authorities in the Apprehension of a Soldier of the United States
Army Who is Charged With Crime.*

RICHMOND, VA., October 14, 1909.

RICHARD H. MANN, Esq.,
Commonwealth's Attorney.
Petersburg, Virginia.

DEAR SIR:

I could find nothing in the State Law Library, either in the volumes of the opinions of the Attorney General of the United States (a number of which are not to be found there), or in any other book to be found in that library which gave any assistance in reaching a definite conclusion upon the question which you submitted: But fortunately that subject is satisfactorily disposed of by article 59 of the Articles of War of the United States as enacted by Congress, which articles constitute the code of laws for the government of the army of the United States, and all persons connected therewith.

You will find that article to be entirely satisfactory and to meet the situation absolutely.

Article 59 is as follows:

“ART. 59. When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen

of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service."

From this you will see that there will be no trouble whatever in securing a surrender of the fugitive from justice about whom Mr. Ragland and yourself conferred with me this morning.

I find from a note in the copy of the Military Laws of the United States which I have in my office, that this article has been construed repeatedly by the Attorney General of the United States in various particulars, but none of which are of special interest with reference to the case which you have in hand.

None of the volumes referred to in this note happen to be in the State Law Library. Article 59, however, seems to be sufficient for our purposes.

It would be well, nevertheless, for the Governor to write to the Adjutant General of the United States, as suggested, and secure the co-operation of the War Department in the detention of the criminal until he can be duly extradited upon the requisition papers which you will sue out, and a copy of which it might be well for the Governor to send to the Adjutant General, informing that officer at the same time that there is another and far more serious criminal charge pending against the fugitive from justice, as to which he has not yet been indicted, but will be doubtless at the next term of the court, if that is the case.

Very truly yours,

WILLIAM A. ANDERSON.

As to the Virginia Statute Restricting Child Labor in Manufacturing Establishments.

RICHMOND, VA., November 12, 1909.

JAMES B. DOHERTY, Esq.,

Commissioner of Labor,

Richmond, Virginia.

DEAR SIR:

Your favor of the 5th instant, enclosing letter of McMenamin & Company to you of the 30th ultimo, has been received, and I have carefully considered the question presented.

I presume that your inquiry relates to the provisions of either section 3657-b or of section 3657-bb of the Code of 1904. The first prohibits any female, or any child under 14 years of age from being employed or allowed to

work as an operative in any manufacturing establishment in this State, for more than 10 hours in any one day.

The second statute, which will also be found in the Acts of 1902-3-4, p. 233, prohibits the employment of any child under 14 and over 12 years of age, between the hours of 6 o'clock P. M. and 7 o'clock A. M.; or the employment of any child under 12 years of age in any manufacturing, or mechanical, or mining operation in this Commonwealth.

The question as to what is a manufacturing or a mechanical operation has never been decided by the courts of this State, and the decisions of the courts of other States which would throw any light upon the subject, as well as the definitions given by lexicographers, are either so conflicting or so indefinite, that it is difficult to come to any satisfactory conclusion as to whether the business conducted by McMenamin & Company is either a mechanical or a manufacturing operation.

From such consideration as I have been able to give to the subject, and from an examination of authorities as far as they have been accessible to me, I am inclined to the view that, taking the terms in their general and popular sense, the operation conducted by McMenamin & Company may be considered in the broadest meaning of the words, a manufacturing operation.

The statute referred to is a penal statute, and will be strictly construed in favor of the party accused of its violation. In other words, where the language of a penal statute is reasonably susceptible of a construction which would take a party charged with its violation, out of its provisions, the courts will give such construction to it.

Under these circumstances, I am not prepared to advise you that the business conducted by McMenamin & Company, as described in their letter to you (herewith returned), comes within the provisions of the child labor law.

Very truly yours,

WILLIAM A. ANDERSON.

A Cannery is a Factory Within the Meaning of the Virginia Child Labor Law.

RICHMOND, VA., November 23, 1908.

JAMES B. DOHERTY, Esq.,

Commissioner of Labor,

Richmond, Virginia.

MY DEAR SIR:

In response to your request that I would advise you as to whether, in my judgment, the cannery of McMenamin & Company comes within the provisions of chapter 301 of the Acts of 1908(entitled "An act to regulate the employment of children in factories, mercantile establishments, workshops and mines in this Commonwealth, on and after March 1, 1909," etc., permit me to say that the employment of children in such operations as that described in the letter of McMenamin & Company to you, of date October 30, 1908, clearly, I think, comes within the reason of this statute.

Indeed, such employment would also, I think, come within the reason of the statute embodied in section 3657-bb of the Code of 1904, referred to in my letter to you of the 13th instant.

The first question to be considered in construing either statute is, whether such a cannery as is defined in said letter of McMenemy & Company is a factory within the meaning of either act.

I am inclined to the view that such a business is a manufacturing operation within the meaning of section 3657-bb of the Code of 1904, and that it is a "factory" within the meaning of chapter 301 of the Acts of 1908.

Upon the latter question there is, I think, little or no doubt, for the reason that in the last mentioned act (chapter 301 of the Acts of 1908), the General Assembly seems, as is shown by the terms of the act itself, clearly to have considered that all "canneries" were factories, and deemed it necessary to except "fruit and vegetable canneries" from the operation of the act.

There is only one conclusion to draw from this, namely, that the General Assembly understood and intended that "canneries"*** should be regarded as factories within the meaning of the act, and that it was necessary, in order to provide that the act should not apply to fruit and vegetable canneries, to expressly except factories of that kind. The effect of this was, in my judgment, to make the act apply to all other canneries, whether of oysters, of fish, of crabs, of what not.

In view of this legislative construction of the word "factory" (which was not before me when I replied to your inquiry in regard to the proper interpretation of section 3657-bb of the Code of 1904), and upon farther consideration, I am disposed to solve the doubt expressed in my letter of the 16th instant, in favor of the view that the Acts of 1902-3-4, p. 233, now published as section 3657-bb of the Code of 1904, applies to an operation of the kind conducted by Messrs. McMenemy & Company, and that the employment of a child under 12 years of age in such a cannery as they are operating, is prohibited by that statute.

Very truly yours,

WILLIAM A. ANDERSON.

Statement

*Showing the Current Expenses of the Office of the Attorney General from
November 1, 1908, to December 1, 1909.*

1908.		
Nov. 1	Balance to credit of contingent fund.....	\$176 82
6	Warrant on Auditor for Everett Waddey Company for Pollard's Code, biennial, for 1908.....	\$ 4 50
19	Warrant on Auditor for Neostyle Company of New York, for rotary neostyle for this office.....	36 75
Dec. 16	Warrant on Auditor to cover items paid for by William A. Anderson, as follows:	
	Expressage	\$ 65
	Telegrams	2 26
	500 2c. stamps	10 00
	100 1c. stamps	1 00
		13 91
	Warrant on Auditor for Southern Bell Telegraph and Telephone Company	13 90
1909.		
Jan. 11	Warrant on Auditor for L. D. Powell Co., law book publishers, for Vol. 10, Encyclopedia of Evidence, and expressage on same..	6 74
13	Warrant on Auditor for James H. McKenney, clerk United States Supreme Court, for copy of opinion of that court.....	5 00
Feb. 3	Warrant on Auditor for E. B. Pierce, for "Digest of Decisions Under Act to Regulate Commerce, 1887 to 1908".....	6 00
16	Warrant on Auditor for Houseman Printing Company, for 100 extra copies of the annual report of the Attorney General for 1908	6 72
	Warrant on Auditor for C. A. Coles, for services as janitor in cleaning up room used by the accountants for West Virginia.....	9 50
27	Warrant on Auditor for William A. Anderson, to cover items paid for by him as follows:	
	150 2c. stamps	\$3 00
	80 1c. stamps	80
		3 80
	Warrant on Auditor for Lawyers' Co-operative Publishing Company for books, as follows:	
	15 and 16 L. R. A. (N. S.).....	\$ 8 00
	Vols. 5 and 6 of Digest of United States Supreme Court Reports	12 00
	Vol. 52, United States Reports.....	5 00
		25 00
	Warrant on Auditor for Callaghan & Company, for books, as follows:	
	Cook on Corporations, 4 volumes.....	\$26 00
	Ivins & Masons, Public Utilities.....	7 00
	Sutherland Statutory Construction, 2 volumes.....	12 00
		45 00
		176 82
Mar. 1	Appropriation to defray current expenses to March 1, 1910.....	\$400 00

22	Warrant on Auditor to cover items paid by William A. Anderson, as follows:	
	Long distance telephone messages.....	\$ 1 84
	500 2c. stamps	10 00
	200 1c. stamps	2 00
		<hr/> \$13 84
	Warrant on Auditor for Everett Waddey Company, for sundries furnished this office	12 95
	Warrant on Auditor for M. B. Watts, publisher, for one year's subscription to Virginia Appeals.....	5 00
	Warrant on Auditor for W. E. Ross, for Justice's Annotations of Code of West Virginia.....	3 75
Apr. 5	Warrant on Auditor for C. A. Coles, for services as janitor in cleaning up room used by accountants for West Virginia.....	5 00
21	Hill Directory Company, for Richmond and Manchester Directory for 1909	5 00
28	Warrant on Auditor for William A. Anderson, expenses paid by him	2 50
	Warrant on Auditor for Beaufont Lithia Water Company for 100 gallons of lithia water	5 00
May 3	Warrant on Auditor for C. A. Coles, for janitor service.....	5 00
10	Warrant on Auditor for C. A. Coles, for services as janitor and attendant upon the hearings before the special master in the suit of Virginia vs. West Virginia.....	6 00
15	Warrant on Auditor for O. D. Peters, manufacturing agent, for 100 sheets of carbon paper.....	4 00
June 23	Warrant on Auditor for the Michie Company, for Virginia Law Register from May, 1909, to May, 1910.....	5 00
1	Warrant on Auditor for C. A. Coles, for services as janitor in cleaning up room used by accountants for West Virginia.....	5 00
23	Warrant on Auditor to cover items paid for by William A. Anderson, as follows:	
	Telegrams	\$ 3 09
	20 gallons of lithia water used at the hearings before the special master in the West Virginia case.....	2 00
	500 2c. stamps	10 00
	100 1c. stamps	1 00
		<hr/> 16 09
23	Warrant on Auditor for Rochester Carbon Manufacturing Co., for 100 sheets of carbon paper.....	3 50
July 1	Warrant on Auditor for C. A. Coles, for services as janitor.....	5 00
4	Warrant on Auditor for Shepherd W. Shorts, for services as janitor in cleaning up room used by the special master for hearings in the Virginia-West Virginia suit.....	3 00
7	Warrant on Auditor to cover items paid for by William A. Anderson, as follows:	
	Long distance telephone messages.....	\$3 78
	Telephone messages in excess of contract price.....	2 19
		<hr/> 5 97
Aug. 2	Warrant on Auditor for C. A. Coles, for services as janitor in cleaning up room used by accountants for West Virginia.....	5 00
Sept. 8	Warrant on Auditor to cover items paid for by William A. Anderson, as follows:	
	Telegram	\$ 71
	400 2c. stamps	8 00
	200 1c. stamps	2 00
		<hr/> 10 71
17	Warrant on Auditor for T. Gray Haddon, to cover his expenses to Lexington, Va., to act as stenographer to Attorney General during his vacation.....	25 15

REPORT OF THE ATTORNEY GENERAL.

Oct. 8	Warrant on Auditor for Southern Bell Telegraph and Telephone Company	5 25	
8	Warrant on Auditor for Everett Waddey Company, for sundries furnished this office	11 90	
Nov. 13	Warrant on Auditor for Lawyers' Co-operative Publishing Company, for books, as follows:		
	Page & Jones on Taxation.....	\$12 00	
	Supp. Roses Notes, Vol. 4.....	6 50	
	17 and 18 L. R. A.....	8 00	
	19 L. R. A.....	4 00	
	Case and Comment.....	50	
	Supp. Roses Notes, Vol. 5.....	6 50	
	20 L. R. A.....	4 00	
		41 50	
	Warrant on Auditor for Rochester Carbon Manufacturing Company, for 100 sheets carbon paper.....	3 50	
	Warrant on Auditor for William A. Anderson, to pay for items paid for him, as follows:		
	Telegrams	\$ 1 85	
	Expressage	30	
	Typewriter ribbon	1 00	
	500 2c. stamps	10 00	
	100 1c. stamps	1 00	
		14 15	
Oct. 12	Warrant on Auditor for Winston Electric Construction Company, for one electric fan for this office.....	12 50	
			\$241 26
Dec. 1	Balance to credit of contingent fund.....		\$158 74

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