# ANNUAL REPORT

OF THE

# ATTORNEY GENERAL

TO THE

# GOVERNOR OF VIRGINIA

FOR THE

# YEAR 1911

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RICHMOND:
DAVIS BOTTOM, SUPERINTENDENT PUBLIC PRINTING.
1912.

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# ATTORNEYS-GENERAL OF VIRGINIA.

FROM 1775 TO 1911.

| | |
|---|---|
| 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 |
| Samuel W. Williams | 1910—— |

Richard B. Davis, Assistant Attorney General, 1910.
T. Gray Haddon, Clerk.

# REPORT.

COMMONWEALTH OF VIRGINIA,
OFFICE OF THE ATTORNEY GENERAL.

*To His Excellency*, WM. HODGES MANN,
*Governor of Virginia.*

SIR:

As required by law, I submit herewith my annual report embracing the work of this office for the year ending October 31, 1911.

The cases in which the Attorney General, or his assistant, have appeared, and which have been disposed of during the year, are mentioned under the titles of the several courts in which those suits have been pending.

## Cases in the Supreme Court of the United States.

1. *Virginia* v. *West Virginia*.—The circumstances which made the institution of this suit necessary for the protection of the interests of the Commonwealth, and the history of the events which led up to the bringing of the suit, are set forth in the annual reports of the former Attorney General, Honorable William A. Anderson, and I will not repeat them here. On page 5 of my annual report for 1910 will also be found the events which had transpired in the case from the beginning of my term of office down to October 31, 1910.

This case was fully argued on January 20, 23, 24, 25 and 26, 1911, and was decided March 6, 1911, in which the court rendering its opinion held that the State of West Virginia was liable to the State of Virginia for the sum of $7,182,507.41 as West Virginia's share of the principal debt. The court withheld its opinion as to the interest due, and suggested the propriety of a conference between the two States, using this language:

> "As this is no ordinary commercial suit, but, as we have said, a quasi-international difference, referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no further, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end."

A full report of this case is to be found in 221 U. S., p. 1, 55 L. Ed., p. 353.

As will be seen from the court's opinion the question of interest due and payable on the principal sum found due was not passed on by the court, but was left open for an effort at adjustment between the two States as suggested in the court's opinion. The Virginia Debt Commission being vested under the law with full authority to act in the premises, and acting through a duly accredited committee, made prompt proposals to the Governor of the State of West Virginia to enter into negotiations with that State with a view to an adjustment of the matter of interest on the principal sum due by West Virginia as fixed in the opinion of the court.

No response having been made to this proposal by the State of West Virginia, the Virginia Debt Commission on the 20th day of September, 1911, authorized the Attorney General of Virginia to give notice to the State of West Virginia, and to move the Supreme Court to proceed to hear and determine the question in regard to the interest which had been left open. This action was taken because of the belief that ample time had been given the State of West Virginia to act in the premises. Said notice was given, and in support thereof a petition was filed by me, concurred in by the associate counsel in the case, in the Supreme Court. The court, on the 30th of October, 1911, rendered its opinion passing on this motion and declined to grant the motion at that time. The court's opinion on this question is to be found in 222 U. S. Rep., p. 1.

The said notice, petition and appendix therewith filed in the United States Supreme Court gives a full history of the transactions and are as follows, to-wit:

RICHMOND, VIRGINIA, *September* 26, 1911.

*To the Honorable*, W. G. CONLEY,
*Attorney General of West Virginia,*
*Charleston, West Virginia.*

Please take notice that in the suit of the *Commonwealth of Virginia* v. *the State of West Virginia*, Original No.——, pending in the Supreme Court of the United States at Washington, D. C., I shall, on Monday, the 9th day of October, 1911, move the said court to proceed with a further hearing and determination of said case, and to settle and determine all questions left open and undetermined by its decision rendered on the sixth day of March, 1911, and will base said motion on the record of the case and the facts stated in the foregoing statement in writing, and exhibits filed therewith.

Respectfully,
COMMONWEALTH OF VIRGINIA,
By SAMUEL W. WILLIAMS.
*Attorney General of Virginia.*

IN THE SUPREME COURT OF THE UNITED STATES.

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Number ——, Original.

October Term, 1911.

COMMONWEALTH OF VIRGINIA,

*vs.*

STATE OF WEST VIRGINIA.

MOTION OF THE COMPLAINANT.

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The Commonwealth of Virginia, through Samuel W. Williams, her Attorney General, shows to the court:

1. That upon the publication of the decision of the court made in the above entitled cause on the 6th day of March, 1911, the Virginia Debt Commission, which by law was "authorized and empowered by and with the advice and approval of the Attorney General of Virginia, to take such action and institute such proceedings on behalf of the State, as may, in the judgment of said Commission and Attorney General, be needful and proper to protect the interest of the State, and bring about and carry into effect a settlement as aforesaid" (see Record, p. 49), held a session in Richmond, Virginia, on the 20th of April, 1911, and proceeded, with the approval of the Attorney General, to take such action on the part of Virginia as in their judgment was proper to carry into effect the suggestion of this court, contained in the opinion delivered by Mr. Justice Holmes, in the following words:

> "As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned, rather than upon ordinary remedies, we think it best at this stage, to go no further, but to await the effect of a conference between the parties which, whatever the outcome, must take place."

2. That this court having determined the share of the principal of the public debt of the Commonwealth of Virginia for which West Virginia is liable, in manner and form as set forth in its decision, but left the question of the interest on said debt to be adjusted by a conference between the two States, the Virginia Debt Commission, by and with the approval of the Attorney General, the official body of the Commonwealth fully empowered to deal with this subject, in obedience to the recommendation of the court, took the following action:

3. It addressed a communication to the Governor of West Virginia in the words and figures following:

RICHMOND, VA., *April* 20, 1911.

*To His Excellency,*
*The Governor of West Virginia.*

Sir:

The "Virginia Debt Commission," constituted and acting on behalf of Virginia under the joint resolution of the General Assembly of that State, approved March 6, 1894, and the act of said General Assembly approved March 6, 1900, was "authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia, proper to be borne by West Virginia," as shown by copies of said resolution and act hereto attached.

In the opinion of the Supreme Court of the United States delivered on the 6th of March, 1911, by Mr. Justice Holmes, in the case of the *Commonwealth of Virginia* v. *State of West Virginia*, there was announced a "decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed."

With respect to the amount of *interest* on such principal, the court made no decision, but in referring thereto said: "As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court, in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best, at this stage, to go no further, but to await the effect of a conference between the parties, which, whatever the outcome, must take place." A copy of said opinion is also hereto attached.

At a meeting of the Virginia Debt Commission, held in Richmond, Va., on the 20th day of April, 1911, the subject of the "conference between the parties," suggested by the court, received consideration, and it was resolved that the Commission, through its chairman, should bring the matter to your attention, and request that you will, at the earliest convenient moment, lay it before the legislature of West Virginia, now soon to assemble, or take such other and more appropriate course as will lead to that conference between the two States, in order to bring about a final and complete conclusion of the cause.

The Virginia Debt Commission ventures to indulge the hope that you are in accord with it in desiring a speedy termination of this litigation, and that you will do whatever lies in your power to bring about an early conference between the representatives of the two States.

Very respectfully,
(Signed) JOHN B. MOON,
*Chairman Virginia Debt Commission.*

Attest:
(Signed) JOSEPH BUTTON,
*Secretary.*

*Resolved Further*, That the said letter be transmitted with all convenient despatch to the Governor of West Virginia by a special committee consisting of Messrs. Flood, Rhea and Downing, any two members to have power to act, who shall report such reply as they may receive to the chairman of this Commission.

The above action of the Virginia Debt Commission is approved as is provided by act approved March 6, 1900.

(Signed) SAMUEL W. WILLIAMS,
*Attorney General of Virginia.*

A copy: Teste
(Signed) JOSEPH BUTTON,
*Secretary.*

And this communication the said Commission caused to be transmitted to the Governor of West Virginia by a committee composed of three members of the Commission, any two of whom were empowered to act, which committee delivered the same into the hands of the Honorable William E. Glasscock, Governor of West Virginia, at Charleston, on the second day of May, 1911, as will appear from the following letter of the Governor of West Virginia to the Governor of Virginia:

STATE OF WEST VIRGINIA,
GOVERNOR'S OFFICE,
CHARLESTON, *May* 9, 1911.

*Hon.* WM. HODGES MANN,
*Governor of Virginia,*
*Richmond, Va.*

DEAR GOVERNOR MANN:

Late in the evening of the 2d instant I received a call from Messrs. Wm. F. Rhea and H. H. Downing, bearing letters of recommendation from you and representing the Virginia Debt Commission. They made the following request:

"At a meeting of the Virginia Debt Commission, held in Richmond, Virginia, on the 20th day of April, 1911, the subject of the 'conference between the parties,' suggested by the court, received consideration, and it was resolved that the Commission, through its chairman, should bring the matter to your attention, and request that you will, at the earliest convenient moment, lay it before the legislature of West Virginia, now soon to assemble, or take such other and more appropriate course as will lead to that conference between the two States, in order to bring about a final and complete conclusion of the cause.

"The Virginia Debt Commission ventures to indulge the hope that you are in accord with it in desiring a speedy termination of this litigation, and that you will do whatever lies in your power to bring about an early conference between the representatives of the two States."

Their request relates to my message to the legislature at the extraordinary session which is to convene on May 16th. Mr. Rhea,

of the Commission, particularly seemed to think that early, if not immediate, response should be made. You, of course, will appreciate the fact that it would be wholly improper to advise anyone of the contents of my communication to the legislature or even in general of my purpose relative thereto in advance of the submission of the message to the legislature itself.

With greatest respect, I remain,

Very truly yours,

(Signed) WM. E. GLASSCOCK,

*Governor.*

4. To this communication the Governor of West Virginia has made no response, either to said committee, or to the Virginia State Debt Commission which it represented; nor has the State of West Virginia, through any of its constituted authorities, or in any other manner, taken any action with reference to the overtures so made by the State of Virginia for a conference between the States to effect an amicable settlement of the matters referred to in the suggestion of this court in its decision above referred to.

5. That on a day prior to the 20th of April, 1911, the Governor of West Virginia had issued a proclamation convening the legislature of West Virginia in extraordinary session for the consideration of two matters of business specified in said proclamation, but that said legislature did not assemble in extra session until the 16th day of May, 1911, and on that day there was sent to the legislature the "Message of Governor Glasscock to the legislature of 1911. Extra session, May 16, 1911," a copy of which will be filed herewith.

6. The attention of the court is respectfully called to so much of said message as relates to the Virginia debt case, and particularly to the paragraph of said message, next to the last, which is in the following words:

> "The Constitution provides that the Governor may convene the legislature whenever in his opinion the public safety or welfare shall require it; and that he shall convene it on application in writing of three-fifths of the members elected to each House. If, however, without such formal action by three-fifths of the members of each House, a majority of the members of your honorable body should in any manner express to me the opinion that the legislature should be called into extraordinary session to consider the conditions presented by the opinion of the Supreme Court of the United States, I should deem it sufficient evidence that a proper condition existed for the convening of the legislature for that purpose. I shall be glad to be advised from time to time of the views of the members of the legislature on this subject."

The Constitution of West Virginia provides (Art. 7, Sec. 7)

> "The Governor may on extraordinary occasions convene, at his own instance, the legislature, but when so convened, it shall enter upon no business except that stated in the proclamation by which it is convened."

7. The proclamation of the Governor convening the legislature in extra session had been issued before the Virginia Debt Commission met in Richmond on the 20th of April, 1911, but the legislature did not assemble in session until the 16th day of May, 1911, so that twenty-six days intervened between the date of the communication from the Commission to the Governor and the assembling of the legislature in extra session.

The Virginia debt case was not one of the subjects of business mentioned in the proclamation convening the legislature, but the intervening time was sufficient to have allowed the Governor to include this subject in a further proclamation, before the legislature assembled, or to have made it the subject of another proclamation, after the legislature had assembled, and before it had adjourned and dispersed from the Capitol.

The Constitution of the State laid the responsibility upon the Governor of convening the legislature, for the consideration of such business as he might state in his proclamation convening that body, but it here appears that the Governor deemed it wisest to cast this responsibility upon the members of the legislature, or upon a majority of that body, by referring to them the question as to "whether a proper condition existed for the convening of the legislature for that purpose."

8. Complainant shows your Honors, that under the Constitution of West Virginia the legislature of that State (unless specifically convened by the Governor in extraordinary session) can meet biennially only, its regular sessions beginning on the second Wednesday in January in each alternate year—and that the last regular session of that body was held under that Constitution beginning on the second Wednesday in January of the present year.

See section 18, article VI, of Constitution of West Virginia, which is in the words and figures following:

> "The legislature shall assemble at the seat of government biennially, and not oftener, unless convened by the Governor. The first session of the legislature, after the adoption of this Constitution, shall commence on the third Tuesday of November, 1872; and the regular biennial session of the legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter, on the same day."

There will accordingly be no regular session of the legislature of that State until the session commencing in due course on the second Wednesday in January, 1913.

9. Complainant further respectfully shows your honors that the Commonwealth of Virginia, and her duly constituted representatives, have been ready and anxious to meet the authorized representatives of West Virginia for the purpose of an amicable adjustment of the important question left undecided by the decision of this court, in an effort to reach some just and equitable conclusion as to what interest, under all of the circumstances of the case, West Virginia should assume and pay on her equitable share of the common indebtedness, provided there was any hope held out that such a conference would result in any equitable and prompt adjustment of that question; but from the manner in which the proposal made by the Com-

monwealth of Virginia in that behalf has been received, and from other facts and circumstances shown by the record, she has been reluctantly constrained to the conclusion that there is no likelihood whatever that any satisfactory result would be attained by a renewal of, or by further pressing the overture already made, and which has been so completely ignored.

10. The foregoing recitals as to the action of the Virginia Debt Commission and the Attorney General, the overtures they made to the Governor of West Virginia, and through him to the legislature of that State, and the comments of the Governor of West Virginia thereon, are supported by the report of the committee appointed by the Virginia Debt Commission to wait upon Governor Glasscock, and the documents filed therewith, especially Governor Glasscock's message to the legislature of West Virginia on the 16th of May last and documents printed in the appendix thereto, a copy of which will be attached hereunto as part hereof.

11. The Commonwealth of Virginia having thus exhausted the means within her control for bringing about a conference between the two States as recommended by the court, can, under the circumstances, derive no hope or expectation that West Virginia will make any agreement with Virginia for a settlement in the manner indicated by this court, and is convinced that the time has come for this court in its own way to determine the questions left open by its decision already rendered, and to grant the complainant complete relief.

To this end she therefore respectfully urges that the court will, in accordance with the alternate suggestion made in its decision, recommit the cause to the special master with instructions to ascertain and report forthwith to the court the amount of interest which the State of West Virginia should be required to pay on the principal sum already indicated by the court, or that the court will proceed otherwise, as it may determine, to adjudicate that question.

The Commonwealth of Virginia respectfully urges and moves the court that the cause be speeded so that a final decree may be made therein and this controversy brought to a close.

COMMONWEALTH OF VIRGINIA,
By SAMUEL W. WILLIAMS.
*Attorney General of Virginia.*

# APPENDIX.

RICHMOND, VA., *September* 20, 1911.

*To the Virginia Debt Commission*
*in session at Richmond.*

GENTLEMEN:

On the 20th day of April, 1911, the Virginia Debt Commission, in session at Richmond, adopted a resolution authorizing and directing John B. Moon, chairman of said Commission, to sign on behalf of the Commission a letter in the following form, the same to be attested by the secretary of the Commission, addressed to His Excellency, the Governor of West Virginia:

*To His Excellency,*
*The Governor of West Virginia.*

SIR:

The "Virginia Debt Commission," constituted and acting on behalf of Virginia under the joint resolution of the General Assembly of that State, approved March 6, 1894, and the act of said General Assembly approved March 6, 1900, was "authorized and directed to negotiate with the State of West Virginia a settlement and adjustment of the proportion of the public debt of the original State of Virginia, proper to be borne by West Virginia," as shown by copies of said resolution and act hereto attached.

In the opinion of the Supreme Court of the United States delivered on the 6th of March, 1911, by Mr. Justice Holmes, in the case of the *Commonwealth of Virginia* v. *State of West Virginia*, there was announced a "decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed."

With respect to the amount of *interest* on such principal, the court made no decision, but in referring thereto said: "As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court, in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best, at this stage, to go no further, but to await the effect of a conference between the parties, which, whatever the outcome, must take place." A copy of said opinion also is hereto attached.

At a meeting of the Virginia Debt Commission, held in Richmond, Va., on the 20th day of April, 1911, the subject of the "conference between the parties," suggested by the court, received consideration, and it was resolved that the Commission, through its chairman, should bring the matter to your attention, and request that you will, at the earliest convenient moment, lay it before the

legislature of West Virginia, now soon to assemble, or take such other and more appropriate course as will lead to that conference between the two States, in order to bring about a final and complete conclusion of the cause.

The Virginia Debt Commission ventures to indulge the hope that you are in accord with it in desiring a speedy termination of this litigation, and that you will do whatever lies in your power to bring about an early conference between the representatives of the two States.

Very respectfully,

(Signed) JOHN B. MOON,
*Chairman Virginia Debt Commission.*

Attest:

(Signed) JOSEPH BUTTON,
*Secretary.*

The said Virginia Debt Commission, at the same meeting, adopted a resolution appointing Mr. Flood and the undersigned, as a special committee, to transact with all convenient dispatch to the Governor of West Virginia, the letter addressed to him as shown above. Mr. Flood not being able to accompany the undersigned at the time arranged for carrying out the resolution last mentioned, the undersigned proceeded to Charleston, West Virginia, on the 2d day of May last, and in the evening of that day called on his Excellency, William E. Glasscock, Governor of West Virginia, and was very cordially received. The undersigned presented to him letters of introduction from Governor William Hodges Mann, of Virginia, and at the same time the undersigned delivered to him the communication above mentioned, together with the opinion of the Supreme Court of the United States in the case of *Commonwealth of Virginia* v. *State of West Virginia*, and with the act of the General Assembly of Virginia of 1894, entitled "A joint resolution to provide for adjusting with the State of West Virginia the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, for the application of whatever may be received from West Virginia to the payment of those found to be entitled to the same," approved March 6, 1894, and with an act of the General Assembly of Virginia of 1900, entitled "An act to provide for the settlement with West Virginia of the proportion of the public debt of the original State of Virginia proper to be borne by West Virginia, and for the due protection of the Commonwealth of Virginia in the premises," approved March 6, 1900, attached thereto. The undersigned advised Governor Glasscock that they had been sent to West Virginia by the Virginia Debt Commission in pursuance of the intimation expressed in the decision of the West Virginia debt question by the Supreme Court of the United States to the effect that the representatives of the Commonwealths of Virginia and West Virginia should undertake to negotiate a settlement of the interest on that part of the debt due by West Virginia to the State of Vir-

ginia, and that they hoped that he, the Governor of West Virginia, would cause to be appointed a representative or representatives of the State of West Virginia with full authority to treat with the Virginia Debt Commission on the subject of interest to be paid by the State of West Virginia; that they believed that representatives of the two States could make an amicable adjustment of the matter in controversy. The Governor of West Virginia expressed his intention of giving the matter very thorough investigation and consideration, after which he would make such reply to said communication as he deemed necessary and proper. Up to this time neither of the undersigned has received any reply from the Governor of West Virginia to the communication delivered to him as above mentioned.

Your committee herewith attaches to this report the message of the Governor of West Virginia to the legislature of that State, being in extra session, May 16, 1911, so far as it relates to the Virginia debt case. Beginning on page 15 of the message aforesaid, under the heading "Virginia Debt Case," will be seen what the Governor of West Virginia has to say to the legislature in regard to the West Virginia debt matter. It will be noticed that the Governor attaches to his message an appendix containing the decision of the Supreme Court of the United States in *Commonwealth of Virginia* v. *State of West Virginia*, and also the act of the General Assembly of Virginia of March 6, 1894, above alluded to, and also the act of the General Assembly of Virginia of March 6, 1900, above alluded to, and also the communication signed by John B. Moon, chairman of Virginia Debt Commission, and addressed to His Excellency, Governor of West Virginia, which communication has been above set forth in this report, and also the resolution of the Virginia Debt Commission appointing Mr. Flood and the undersigned, giving power to any two members to act, to transmit with all convenient dispatch to the Governor of West Virginia the communication aforesaid. The action of the Virginia Debt Commission in communicating as aforesaid with the Governor of West Virginia, and appointing a special committee to transmit said communication to the Governor of West Virginia, was approved by Samuel W. Williams, Attorney General of Virginia, attested by Joseph Button, secretary of said Virginia Debt Commission, as the record will show.

In said appendix, on page 26, will also be seen the letter of the Governor of West Virginia, dated May 9, 1911, addressed to Hon. William Hodges Mann, Governor of Virginia, Richmond, Va., relative to the visit of the undersigned to the Governor of West Virginia, and the purpose of same, the said letter being in answer to the letters of Governor Mann introducing the undersigned to the Governor of West Virginia, which letters are hereto attached.

Respectfully submitted,

WM. F. RHEA,
H. H. DOWNING.

The foregoing is a true copy of the report of the committee appointed by the Virginia Debt Commission to wait upon the Governor of West Virginia in pursuance of the resolutions adopted by said commission on the 20th day of April, 1911.

JOS. BUTTON,
*Secretary of the Virginia Debt Commission.*

*April 25, 1911.*

*Hon.* WILLIAM E. GLASSCOCK,
*Charleston, West Virginia.*

DEAR GOVERNOR:

This will be handed you by my personal friend, Hon. Wm. F. Rhea, who is a member of our State Corporation Commission, and also of the State Debt Commission of Virginia. The high character and standing of Judge Rhea, official and personal, makes it unnecessary for me to say anything in his behalf. I will, however, very highly appreciate any courtesy you can show him while in your State.

With assurance of high regard, I am,

Very truly yours,
(Signed) WM. HODGES MANN,
*Governor.*

*April 25, 1911.*

*Hon.* WILLIAM E. GLASSCOCK,
*Charleston, West Virginia.*

DEAR GOVERNOR:

Mr. H. H. Downing, of Front Royal, a gentleman of high character, a lawyer of distinction, and a member of our State Debt Commission, will, in a short time, with the other members of a committee, visit your State for conference in reference to the matters of difference between the two States, which I trust can be satisfactorily adjusted. I am sure he will so commend himself to your consideration as to receive every courtesy at your hands.

I will appreciate any kindness shown him as a personal kindness to me.

With kind regards, I am,

Very truly yours,
(Signed) WM. HODGES MANN,
*Governor.*

## WEST VIRGINIA.

### MESSAGE OF GOVERNOR GLASSCOCK TO THE LEGISLATURE OF 1911, EXTRA SESSION, MAY 16, 1911.

### GOVERNOR'S MESSAGE.

*To the Members of the Senate and House of Delegates:*

* * * * * * * *

*Virginia Debt Case.*

I deem it my duty to call your attention to the opinion filed on the 6th day of March, 1911, by the Supreme Court of the United

States in the suit in equity brought and now pending in that court by the Commonwealth of Virginia against the State of West Virginia.

Late in the evening of the 2d instant, I was visited here in Charleston by two members of the Virginia Debt Commission claiming to act under the authority of acts of the General Assembly of Virginia, approved, respectively, March 6, 1894, and March 6, 1900. That commission has made the following request in writing:

"At a meeting of the Virginia Debt Commission held in Richmond, Virginia, on the 20th day of April, 1911, the subject of the 'conference between the parties,' suggested by the court, received consideration and it was resolved that the commission, through its chairman, should bring the matter to your attention, and request that you will, at the earliest convenient moment, lay it before the legislature of West Virginia, now soon to assemble, or take such other and more appropriate course as will lead to that conference between the two States, in order to bring about a final and complete conclusion of the cause.

"The Virginia Debt Commission ventures to indulge the hope that you are in accord with it in desiring a speedy termination of this litigation, and that you will do whatever lies in your power to bring about an early conference between the representatives of the two States."

You will observe that my proclamation convoking you in extraordinary session was issued prior to the time of the meeting of the Virginia Debt Commission above referred to. Reference to this question was omitted therefrom, because it was thought that the initiative should come from Virginia; because I was advised that the attorneys for West Virginia were considering further proceedings in the case; and because I was not sufficiently advised of the full effect of the opinion of the court to justify me at that time in including it among the subjects of your action; nor am I yet disposed to force upon you consideration of this matter, nor to recommend to you what steps, if any, should now be taken therein.

I am not disposed to be hurried by influences in this State or elsewhere into action, without ample time for consideration, upon a matter which so very greatly affects the interests and honor of West Virginia. Many persons, aware how seriously the people of Virginia have many times been divided upon the Virginia debt question, and how many and how bitter have been the criminations and the recriminations aroused by the consideration of this question from time to time in the General Assembly of that Commonwealth, had hoped that through the decision of the court we might, whatever the money outcome might be, escape the other and different perils which the people of Virginia have not been able to avoid.

*Questions to Be Considered.*

Whether you will be of opinion that it is your duty to take action in this matter before the General Assembly of Virginia has

acted, or will deem that the former action of the latter body in appointing the Virginia Debt Commission makes it incumbent now upon this State to take the initiative; whether you will be of opinion that a commission should be appointed to meet that commission or some other, are some of the questions which deserve to receive, and I have no doubt are receiving, the most earnest consideration of every one of you.

I append to this message a copy of the decision of the Supreme Court of the United States, of the two acts of the Virginia Assembly above referred to, the written communication of the Virginia Debt Commission to me, and a copy of my letter to Governor Mann with respect thereto.

The Constitution provides that the Governor may convene the legislature whenever in his opinion the public safety or welfare shall require it, and that he shall convene it on application in writing of three-fifths of the members elected to each house. If, however, without such formal action by three-fifths of the members of each house, a majority of the members of your honorable body should in any manner express to me the opinion that the legislature should be called into extraordinary session to consider the condition presented by the opinion of the Supreme Court of the United States I should deem it sufficient evidence that a proper occasion existed for the convening of the legislature for that purpose. I shall be glad to be advised from time to time of the views of the members of the legislature on this subject.

It shall be my pleasure to contribute in any possible way to the success of the work before you and I shall hold myself in readiness to render you any service within my power.

WM. E. GLASSCOCK,
*Governor.*

*Charleston, West Virginia, May 16, 1911.*

The case will be hereafter pressed on behalf of the Commonwealth of Virginia with such diligence as its importance demands.

I desire to express my thanks to Hon. William A. Anderson, Hon. Randolph Harrison and Hon. John B. Moon, associate counsel for the State of Virginia, for the splendid and efficient service which they have rendered the Commonwealth in this suit, and to add my commendation for the value and efficiency of the service rendered by them.

2. *Roselle* v. *Commonwealth.*—This case was appealed from a final decision of the Supreme Court of Appeals of Virginia. Roselle, who was the agent of the Chicago Portrait Company, was fined by the police justice of the city of Charlottesville for peddling picture frames without a license. He took an appeal from the decision of the police justice to the corporation court of Charlottesville, and from that court to the Court of Appeals of Virginia, which said last named court sustained the decision of the corporation court of Charlottesville, and from the Court of Appeals of Virginia he took an appeal to the United States Supreme Court, where the case is now pending.

3. *Richmond, Fredericksburg and Potomac Railroad Co.* v. *Commonwealth.*—This case involves the question of the liability of the said 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 for taxation, State, county and municipal. These questions were decided adversely to the State in the circuit court of the city of Richmond. On appeal to the Supreme Court of Appeals of Virginia, the Supreme Court reversed the circuit court, and the railroad company has now appealed the case to this court on an alleged federal question which I do not believe really exists.

## Cases Before the Corporation Commission.

There have been a number of hearings before the State Corporation Commission since I came into this office on February 1st of this year, in which the Attorney General has felt it his duty to represent the Commonwealth, amongst the number the various rules issued against the non-resident book concerns who have entered into contracts with the State of Virginia to furnish school books. In these proceedings the position is taken that these book concerns are foreign corporations doing business in the State of Virginia, and as such are liable to pay the franchise tax, fees and other taxes required by the Constitution and laws of this State to be paid by foreign corporations doing business in this State, and these will be pressed with proper diligence.

## Cases Decided in the Supreme Court of Appeals of Virginia.

1. *Robinson* v. *Commonwealth.* Misdemeanor. Appeal from the hustings court of the city of Richmond. Affirmed.

2. *Cates* v. *Commonwealth.* On conviction of rape. From the hustings court of the city of Portsmouth. Reversed.

3. *Jones* v. *Commonwealth.* On conviction of murder. Appeal from the circuit court of the county of Buckingham. Reversed.

4. *Perkins* v. *Commonwealth.* On conviction of murder. From the circuit court of the county of Buckingham. Reversed.

5. *Wright* v. *Commonwealth.* On conviction of murder. Appeal from the circuit court of the county of Buckingham. Affirmed.

6. *Williams* v. *Commonwealth.* On conviction of selling liquor unlawfully. Appeal from the circuit court of Gloucester county. Affirmed.

7. *Johnson* v. *Commonwealth.* On conviction of murder. Appeal from the circuit court of Westmoreland county. Affirmed.

8. *Wright* v. *Commonwealth.* Misdemeanor. Appeal from the corporation court of the city of Roanoke. Reversed.

9. *Washington-Southern Railway Company* v. *Commonwealth.* Appeal from the State Corporation Commission from an order prescribing a passenger rate of two and one-half cents per mile. Affirmed.

10. *Green's and Parker's Administrators* v. *Marye, Auditor.* This is a suit brought by the plaintiffs to collect $172,358.26 commissions due by the State of Virginia in connection with the settlement of the old Revolutionary claims against the United States Government. Appeal from the circuit court of the city of Richmond. Affirmed.

11. *Western State Hospital* v. *General Board of State Hospitals.* Appeal from the circuit court of the city of Richmond. This is a suit brought by the Western State Hospital to have the will of the late Sydney Murkland construed. This suit was dismissed by the circuit court of the city of Richmond for want of jurisdiction. Affirmed.

12. *Commonwealth* v. *Richmond, Fredericksburg and Potomac Railroad* Company. Appeal from the circuit court of the city of Richmond. For the correction of an erroneous assessment of taxes. Affirmed.

13. *Jesse* v. *Commonwealth.* On conviction of murder. Appeal from the corporation court of the city of Roanoke. Reversed.

14. *Commonwealth* v. *Willcox, Hannan and Kellinger.* Appeal from the corporation court of the city of Norfolk, in which court it was held that the primary law of Virginia was unconstitutional. The Supreme Court, however, in its decision in this case, holds that the primary law is constitutional.

## Cases pending in the Supreme Court of Appeals of Virginia.

1. *Thornton* v. *Commonwealth.* On conviction of felony. Appeal from the circuit court of Charlotte county. Argued and submitted.

2. *Ferrimer* v. *Commonwealth.* Misdemeanor. Appeal from the circuit court of Tazewell county. Argued and submitted.

3. *Pocahontas Consolidated Collieries Co. Inc.* v. *Commonwealth, et al.* This case involves the validity of the tax imposed by section 13 of the Virginia revenue law upon the recordation of 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. The case was decided in favor of the Commonwealth in the circuit court of the city of Richmond. There are two other cases pending in said circuit court involving the same principles as this case and, of course, will be controlled by the decision in this case. Argued and submitted.

4. *Harris et als.* v. *Commonwealth.* This is an important case, as it involves the question whether or not insurance companies have the right under the common law to combine and fix the premiums to be paid for fire insurance. The corporation court of the city of Newport News found the defendants guilty, from which judgment they have appealed to this court. Argued and submitted.

5. *Davis* v. *Commonwealth.* Misdemeanor. From the corporation court of the city of Newport News. Argued and submitted.

6. *Potts* v. *Commonwealth.* On conviction of murder. Appeal from the corporation court of the city of Portsmouth. Argued and submitted.

7. *Virginia Brewing Company* v. *Commonwealth.* Suit to recover back liquor license tax. Argued and submitted.

8. *Jeffries* v. *Commonwealth.* Misdemeanor. Appeal from the corporation court of the city of Roanoke.

9. *Mullins* v. *Commonwealth.* On conviction of murder. Appeal from the circuit court of Wise county.

10. *Pack* v. *Commonwealth.* On conviction of murder. Appeal from the circuit court of Tazewell county.

## Cases Decided in the Circuit Court of the City of Richmond.

1. *Commonwealth* v. *Joseph Mayo, Jr., late treasurer et al.* Suit instituted April, 1884. Dismissed as there seemed to be no possible chance of recovering anything in the case and to keep it on the docket simply meant an accumulation of clerk's fees to be paid by the Commonwealth.

2. *Commonwealth* v. *Same.* Another suit instituted April, 1884. Dismissed for the reasons stated in No. 1.

3. *Commonwealth* v. *G. H. Baughman, et al.* Suit instituted November, 1886. This case was compromised on the payment of the sum of $200.00 by Mr. Baughman.

4. *Commonwealth* v. *John H. Sears, treasurer of Mathews county.* Suit instituted April, 1887. Dismissed for the reasons stated in No. 1 above.

5-6-7. *Commonwealth* v. *C. H. Ingles, treasurer Henry county, et al.* Suit instituted October, 1886. The following decree was entered in these suits:

"This cause coming on this day to be further heard on the papers formerly read, and was argued by counsel, and it appearing to the court that under contract in writing of July 19, 1902, duly approved by the Auditor of Public Accounts, the Attorney General of Virginia and the judge of this court, all matters in controversy in this cause are compromised on a basis in said contract set forth, and which contract is filed with the records in this case, and it appearing to the court from a statement from the Auditor of Public Accounts that said compromise agreement has been fully carried out, and the amount paid into the treasury of the Commonwealth, and nothing further remaining to be done in this case, it is ordered that the same be stricken from the docket, but without prejudice, and that the complainant recover of the defendant the costs in this suit incurred."

8. *Commonwealth* v. *Board of Supervisors of Russell county.* Suit instituted October, 1899. Judgment for $200.00 was rendered against said board of supervisors.

9. *Commonwealth* v. *Board of Supervisors of Bedford county.* This suit was dismissed on the payment of costs by the board of supervisors of Bedford county.

10. *Commonwealth* v. *H. L. Stone and sureties.* Motion for judgment which was duly docketed October 15, 1900. The following decree has been entered in said cause:

"This day came again the parties by their attorneys, and the Attorney General produced in court a statement from the Auditor's office, which is in the following words and figures, to-wit:

" 'In the case of the *Commonwealth* v. *H. L. Stone, treasurer of Pulaski county,* for arrears of taxes 1899 and 1900, amounting, without interest to $10,986.67. On January 27, 1910, The United States Fidelity and Guarantee Company paid the sum of $10,986.67 in discharge of their liability on the bond of the said H. L. Stone, under and by virtue of a compromise agreement made and entered into by the Auditor of Public Accounts, William A. Anderson, Attorney General of Virginia and R. Carter Scott, judge of the

circuit court of the city of Richmond, with the said The United States Fidelity and Guarantee Company dated January 14, 1910.

'"W. F. SMYTH,

'"Bookkeeper, State Auditor's Office.'"

"It is therefore considered by the court that this case be dismissed as to the defendant, The United States Fidelity and Guarantee Company, and it is further considered by the court that the Commonwealth recover of the defendant, H. L. Stone, late treasurer of Pulaski county, Virginia, the debt in the notice mentioned, to-wit, the sum of $10,986.67, with damages thereon at the rate of.... per cent. per annum in lieu of interest until paid, and it is further considered by the court that the plaintiff recover of both the defendants her costs in this behalf expended."

11. *Commonwealth* v. *T. H. Martin et als.* Suit instituted January, 1902. The following decree has been entered in said suit.

"The complainants, T. H. Martin and E. D. McCray, on December 8, 1909, presented, as prescribed by law, a petition offering a compromise and settlement of the matters involved in this suit, so far as said Martin and McCray were concerned, which compromise was duly accepted by Morton Marye, then Auditor of Public Accounts, and approved by William A. Anderson, then Attorney General, and by R. Carter Scott, judge of this court, upon the idea that said fund was payable into the treasury of the Commonwealth to the credit of the general fund of the State, it appearing, however, that said fund belongs to the Literary Fund of the State, the said compromise is ratified by the Superintendent of Public Instruction of the State acting under authority of a resolution of the State Board of Education, and is approved by Samuel W. Williams, Attorney General, and a copy thereof filed with the records of this suit, by the terms whereof the said Martin and McCray were to pay to the Commonwealth the sum of one hundred dollars, in full of their liability on the judgment for $500.00 rendered on recognizance, as is in the bill and in said petition mentioned, and the said T. H. Martin and E. D. McCray having duly paid the said sum of $100.00 into the treasury of this State, as prescribed by law, and have filed in this cause a copy of the receipt of the Second Auditor, showing said payment to the credit of the Literary Fund, said compromise is ratified and affirmed by the court, and the clerk of the circuit court of Roanoke county, Virginia, is hereby authorized to endorse on the margin of the said judgment of the Commonwealth against J. L. Henry, R. L. Martin, T. H. Martin and E. D. McCray, full satisfaction on compromise of said judgment, so far as said T. H. Martin and E. D. McCray are concerned, but not satisfied as to the said J. L. Henry and R. L. Martin, and this case is dismissed without any costs against the Commonwealth, and without prejudice to the rights of the Commonwealth to enforce the said judgment as against said J. L. Henry and R. L. Martin."

12. *Rountree* v. *Saville, clerk.* Mandamus to compel said clerk to record deed of bargain and sale granted.

13. *Edward W. Jones* v. *J. B. Wood, Superintendent of Penitentiary.* Writ of habeas corpus denied.

14. *Roland Baker* v. *Same.* Writ of habeas corpus denied.

15. *David Hines* v. *Same.* Writ of habeas corpus denied.

16. *Clarence E. Woodward* v. *Same.* Writ of habeas corpus denied.

## In Equity.

1. *Commonwealth* v. *Samuel M. Page.* Suit instituted March, 1872. This suit was dismissed as it appeared from the books of the Auditor of Public Accounts that the full amount claimed in the suit had been paid.

2. *Commonwealth* v. *Grantham et al.* Suit instituted 1874. After full investigation of this matter I came to the conclusion that it would not be possible to recover anything in this suit, and therefore had it dismissed.

3. *Commonwealth* v. *George Dusner's Curator and Admr.* Suit instituted March, 1897. It appearing from the books of the Auditor of Public Accounts that the full amount of this suit had been paid in, I had it dismissed, the amount being $4,801.84.

4. *Coffee Stemming Company* v. *Commonwealth.* As this case was not pressed by the plaintiff it was dismissed under the five year rule.

5. *Hampton Roads Railway and Electric Company.* For correction of erroneous assessment for 1903. It was not pressed by the plaintiff and was therefore dismissed, the company having already paid the taxes.

6. *Hampton Roads Traction Company* v. *Commonwealth.* Petition filed December 6, 1906, for correction of erroneous assessment for 1906. It seems that the company had not paid the disputed taxes, and therefore on their agreeing to pay the sum of $1,907.47 I had the suit dismissed.

7. *Commonwealth* v. *W. L. Bilisoly, A. W. Butt and A. E. Warner.* Judgment against the above named parties for $264.87, with interest and costs, for Virginia Reports furnished said W. L. Bilisoly.

It will be seen by comparison with my former report that a number of old cases mentioned therein, pending on the docket of the circuit court of the city of Richmond, have been either dismissed or disposed of by compromise. This policy will be pursued as to a number of other cases pending on this docket.

## OPINIONS GIVEN

*From November, 1910, to November, 1911.*

The following are some of the more important opinions which have been given by this office during the past year.

A great many others were given in writing, and many more orally, to the Auditor of Public Accounts, and other officers of the State government; and a large number in writing and orally to the Superintendent of Public Instruction as to the title to school house lots in school districts which desired to borrow money from the Literary Fund under the statute authorizing such loans to be made for the building of school-houses.

In my former report I took occasion to say that I had found it the custom of the people of this State to write a great many letters to this office asking for opinions upon various questions arising under the laws of the Commonwealth, to which the Attorney General is neither required, authorized nor warranted in giving official opinions, but in all cases I had acted upon the theory that all letters received at this office from citizens of this State or elsewhere were entitled to a prompt and courteous reply.

and this course was pursued and often unofficial opinions were expressed in reply to such letters. This custom has continued and the volume of correspondence in fact very greatly increased, all of which has been attended to as promptly and as fully as possible.

## To the Governor

RICHMOND, VIRGINIA, MARCH 7, 1911.

*To His Excellency,* WM. HODGES MANN,
*Governor of Virginia, Richmond, Virginia.*

MY DEAR SIR:

Your communication of this date to hand, in which you request that I give you my opinion as to the "law of the State of Virginia on the subject of horse racing, betting and making books, as set out in Mr. Smith's letter, and if the law prohibits these things in Virginia, be kind enough to express your (my) opinion as to my (your) power in the premises."

As I understand the question submitted, the law of this State governing the subject is to be found in section 3618-c of Pollard's Code of Virginia, and in the manner and to the extent therein stated does prohibit betting and book making upon the results of horse racing in Virginia. This is the controlling existing statute on the subject in this State. We have another statute relating to the subject of betting, pool selling, etc., on horse racing which is to take place beyond the limits of this State. See Pollard's Code of 1904, section 3818-b. This statute has been the subject of review by the Court of Appeals of this State in the case of *Lacey* v. *Palmer, sheriff*, 93 Va., p. 159, in which it was held:

> "The State of Virginia has authority, by statute, to forbid its citizens to bet on horse racing in another State, and this right is not affected by the fact that the money is to be placed in a third State. The act forbidden is the wager, and over it and the actors in it, the State has complete jurisdiction. It is immaterial where the race takes place."

Replying to that part of your communication in which you ask that I express my opinion as to your power in the premises, I can only say in a general way that the Constitution of this State provides in section 73 that the Governor shall take care that the laws be faithfully executed; but this Constitutional provision has no more specific reference to the laws relating to betting and making books on horse racing than to any of the other general criminal laws of the State.

I have the honor to be,

Yours very truly,
SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *April* 6, 1911.

*To His Excellency,* WM. HODGES MANN,
*Governor of Virginia, Richmond.*

DEAR GOVERNOR:

Referring to our conversation this morning, after full investigation, I have the honor to reply to your inquiries as follows:

By section 97 of Pollard's Code of 1904 it is provided as follows:

> "Whenever a circuit court shall be of opinion that the public service requires a greater number of justices or constables in any district than those specified in section ninety-six, and shall enter of record and designate the number of such additional officers, notice thereof shall be published in such district, and at the next succeeding general election for district officers such additional officers shall be elected in the mode prescribed for the election of district officers, and continue to be elected at each succeeding general election of district officers until otherwise ordered by the court. And it shall be lawful for the said court to appoint officers to serve until such additional officers are elected and qualified. Such officers, whether elected or appointed, shall qualify and give bond as prescribed for district officers. The said court may, in its discretion, revoke the order requiring such additional officers, such revocation to take effect at the expiration of the terms of such officers."

Under this statute the judge of the circuit court has ample power to appoint such additional justices of the peace or constables as in his opinion the public service may require, and he can make the appointment of such officers and they can qualify and at once enter upon the discharge of their duties. This power is found in the following language contained in this section: "And it shall be lawful for the said court to appoint officers to serve until such additional officers are elected and qualified."

Our Court of Appeals has held that the authority conferred by this section is valid and is not an unwarranted delegation of the legislative power. See *ex parte* Basset, 90 Va., p. 679.

*Special Police*—Ample authority is provided by statute for the appointment of special police by the circuit courts whenever such court may deem it advisable so to do.

By section 3922 of the Code, as amended by Acts of 1908, p. 573, it is provided as follows:

> "The circuit court of any county may, if it deem it advisable, appoint a special police force to consist of one or more suitable and discreet persons, who shall serve as such until others are appointed in their place by the court. Such person or persons so appointed by the court shall be conservators of the peace in their respective counties. Such court may, if it see proper, allow compensation to said police and any expense incurred in the execution of their duties to be paid out of the county levy."

And in the following sections of the Code power is given to the court to remove any or all of such police and appoint others. It is further provided that removal from the county will vacate the office of such person. And by section 3925 it is provided that "Before entering upon the duties of their office the persons so appointed shall take an oath to support the constitution of the State and faithfully to discharge their official duties."

By section 3926 of the Code, the jurisdiction and authority of such police is confined to the limits of the county in which they are appointed, and by section 3927 very broad powers are vested in this special police force. This statute provides as follows:

> "It shall be the duty of said police to apprehend and carry before a justice, to be dealt with according to law, all persons whom they may be directed by the warrant of a justice to apprehend, or whom they have cause to suspect have violated or intend to violate any law of the State."

From the foregoing sections of the Code it will be seen that the judge of the circuit court has the power to appoint special justices of the peace and constables whenever in his opinion it is proper to do so, and in addition thereto he has all the power and authority conferred by law which authorizes the appointment of a special police force under the statutes quoted above.

Believing that the foregoing covers in full the questions submitted, I have the honor to be,

Yours very truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *May* 20, 1911.

*To His Excellency,* WM. HODGES MANN,
*Governor of Virginia, Richmond.*

DEAR GOVERNOR:

Your favor of the 17th, addressed to the Attorney General, and asking for an opinion as to what is to be done with persons who are sent to the State hospital as insane, but who are in reality only "chronic inebriates." came duly to hand, together with copy of your letter to the Eastern State Hospital stating that you would get the Attorney General to give his opinion in the matter at once, and as you desire an immediate answer and the Attorney General will not return to the office before probably the middle of next week, I am writing in his place.

The custom which seems to have obtained of sending habitual drunkards to the hospitals is no doubt a great annoyance to the authorities of the institution, but I have been unable to find any statute making provision for remedying the evil complained of.

The difficulty seems to arise from the action of the county or city authorities in declaring a man to be insane when in point of fact he is not so, and there is no provision, so far as I have been able to find in the statutes, for correcting this action on the part of the local authorities; but

there is some provision for the authorities at the hospital to rid themselves of persons who are improperly sent there.

The provisions of the statute, so far as they are applicable to the questions involved, are contained in the following sections of Pollard's Code of 1904.

By section 1669 provision is made for any corporation judge or justice of the peace suspecting a person to be insane, to issue his warrant ordering such person to be produced before him, and requiring the judge or justice to summons two licensed physicians, who, together with the judge or justice, shall form a commission to inquire whether such person "be insane and a suitable subject for a hospital for the care and treatment of insane persons, and for that purpose the judge or the justice shall summon witnesses. The physicians shall, in the presence of the judge or justice, by personal examination of such person, and by inquiry, satisfy themselves and the judge or justice as to the mental condition of the patient. If the two physicians do not agree, a third physician shall be summoned."

Section 1670 provides that where the commission decides a person to be insane and ought to be confined in a hospital, an order shall be entered that such insane person be delivered to the care and custody of the sheriff of the county, or sergeant of the city, "to be safely kept and confined in jail by him until he is conveyed to a hospital for the insane, or otherwise discharged from custody."

Section 1672 provides as follows: "The sheriff or sergeant to whose custody an insane person has been committed, or within whose bailiwick the commission is held, shall forthwith on the same day the person is so adjudged insane make application to an appropriate hospital for the admission and transfer of such insane person to such hospital, transmitting a copy of the record of proceedings before the commission with such application."

Section 1672-a provides as follows: "All persons who have been legally adjudged insane who have or may hereafter make application for admission into a State hospital shall be received. The superintendents of the several State hospitals shall be required to send promptly for all such insane persons and receive them until all vacancies in the same are filled."

Section 1674 provides as follows: "When a person who has been adjudged insane is admitted to a hospital, he shall be detained until the superintendent and his assistants shall have ample opportunity to observe and examine him, and if upon such examination such authorities are of the opinion that said person is not insane, then such person, unless he be charged with or convicted of crime, shall be returned by said hospital authorities to the county or city from whence said insane person was committed, with a certificate of discharge, and a copy of said certificate shall be forwarded by said superintendent to the clerk of said county or clerk of said city court, to be filed with the commitment papers of said persons."

These are the only provisions of the statute that I find bearing upon the subject, and it seems to me that under these provisions where the person has been duly adjudged to be insane by the proper authorities of any county in the mode prescribed by law, the authorities of the several

hospitals are required by law to receive such patient as an insane person and provide for him; but the authorities of the hospital are authorized whenever in their judgment the man has been restored to sanity, or in case he was not insane at the time he was put into the asylum, to return him to the county from whence he was brought in the mode prescribed in the statute above.

There seems to be no appeal from the decision of the commission provided for under section 1669, upon the question of insanity, except that given to the hospital authorities under section 1674, under which statute the only action that can be taken by the hospital authorities is to return the patient to the county from whence he was committed.

The "chronic inebriates" referred to by Dr. Brown in his letter no doubt occasion great annoyance and trouble to the hospital authorities, as no doubt they occasion their friends and associates in the counties from which they are sent annoyance and trouble, but I have not been able to find any provision in the statute by which this condition of things can be improved, except by the prompt action of the hospital authorities in returning to the counties from which they were sent, such persons as are simply "chronic inebriates" so that the authorities of the counties will become impressed with the idea that it is useless to be sending such persons to the asylum when they will be immediately returned by the hospital authorities. These "chronic inebriates" cause great annoyance and trouble to every one, and it seems to be almost impossible to provide any law for the amelioration of their condition, or for relieving their friends and the public of the annoyance caused by their excesses, and it seems to me that the better plan to be adopted by the hospital authorities is to promptly send them back to the community from whence they came.

Very respectfully,

RICHD. B. DAVIS,
*Assistant Attorney General.*

RICHMOND, VIRGINIA, *October* 27, 1911.

*To His Excellency,* WM. HODGES MANN,
*Governor of Virginia, Richmond.*

DEAR SIR:

I have the honor to reply to your communication of October 11, 1911, which is as follows:

> DEAR SIR:
>
> On yesterday, as I was leaving my office for the State fair, I received a letter from Dr. Chas. V. Carrington, surgeon of the Penitentiary, which for your information and convenience is copied here.
>
> "'In a communication addressed to the public, and printed in the Richmond papers of "October 2, 1911, four members of the board of directors of the State penitentiary over their signatures made the following statement:
>
> "'Had the conditions at the penitentiary been different, we would certainly have voted to retain the present surgeon, but

knowing conditions as we do, we believe that the best interests of the penitentiary demand a change.'

"'This is in effect a charge against my administration as surgeon at the penitentiary and gives me the right to demand and have as prompt an investigation as possible. Such an investigation I have requested at the hands of the State Board of Charities and Corrections, but have received from Dr. George H. Denny, the president of that board, a letter stating that he doubted the authority of his board to make such an investigation unless directed so to do by you, as governor.

"'In view of this expressed doubt as to the authority of the board to make this investigation of its own initiative, I request as a mere matter of simple justice to myself, that you will direct the the Board of Charities and Corrections to make this investigation at the earliest possible moment.

"'I will be obliged if you will acknowledge the receipt of this communication, and will do me the honor of informing me promptly as to your official action in the premises.'

"The investigation asked for by Dr. Carrington must come under the provisions of the sixteenth section of an act of the General Assembly of Virginia, approved March 13, 1908, to establish a board of charities and corrections, to define its duties, etc.

"You will, of course, examine the whole of that act, but I will give the section referred to:

"'16. Whenever the governor considers it proper or necessary to investigate the management of any institution receiving aid from the State, and required to be inspected under the provisions of this act, he may direct the Board of Charities and Corrections, or any committee thereof, to make such investigation as he may require. And for the purpose of this investigation, the board or the committee thereof designated by the governor, shall have the power to administer oaths, and to summon officers, employees or other persons to attend as witnesses and to enforce their attendance, and to compel them to produce documents and give evidence. Each member of said board conducting such investigation shall be paid out of the funds of the institution investigated, his necessary expenses and five dollars a day during actual service.'

"You will understand that unless authorized by some other act of the legislature, my power to direct the investigation asked for and the power of the Board of Charities and Corrections to make it, must be found in the section quoted, and it is upon this point that I desire your opinion as Attorney General.

"Yours truly,

"WM. HODGES MANN,

*"Governor."*

Section 148 of the Constitution provides as follows: "There shall be appointed by the Governor, subject to confirmation by the Senate, a board of five directors which, subject to such regulations and requirements as may be prescribed by law, shall have the government and control of the

penitentiary, branch prisons, and prison farms, and shall appoint the superintendents and surgeons thereof." Section 232 of the Code carries out this provision of the Constitution in practically the same language as is used in the Constitution itself.

I can find no other statute which would authorize or warrant you in directing the investigation asked for, nor have I been able to find anything, either in the Constitution or in the statute law of the State, giving the Governor the power of control over, or in any way to interfere with, the discretion vested by the Constitution and laws in the board of directors of the penitentiary in the matter of the selection of a surgeon.

The question then must turn upon the true intent, legal effect and meaning of the statute to which you refer. See Acts of 1908, p. 395. The title to the act is as follows:

> "Chapter 276.—An act to establish a board of charities and corrections, to define its duties and to fix the compensation of said board and subordinates and to provide for the manner in which they shall be appointed to said offices."

After providing for the creation of the board, and making provisions in regard to the office of the board, the appointment of a secretary, and making an appropriation for the maintenance of the office of said board, including the salaries and traveling expenses of the members and its paid employees and other expenses, and after providing for the qualification of the said board and its officers, in section 8 it is provided as follows: "That the duties of the board shall be strictly visitorial and advisory, without administrative or executive powers."

Provision is then made as to the duties of the said board, amongst which is the duty to visit, inspect and examine, amongst other institutions, the penitentiary of the State. The act also makes other provisions as to the duties of the board, unnecessary to be mentioned here.

Section 9 requires quarterly reports to be made to the board by the superintendent of the penitentiary.

Passing over the other provisions of the act not germane to the point now under investigation, in section 16 which you quote, I find the following provision:

> "Whenever the Governor considers it proper or necessary to investigate the management of any institution receiving aid from the State and required to be inspected under the provisions of this act, he may direct the Board of Charities and Corrections, or any committee thereof, to make such investigation as he may require."

Construing the whole act together, its evident object and intent, and construing said provision of section 16 in the light, and under the limitations contained in section 8, which denies to this board any admnistrative or executive powers in regard to said institutions, I am of opinion that the only investigation which the Board of Charities is authorized to make of the penitentiary is such investigation as is prescribed in section 8, the language of the statute on this point being as follows:

"The board shall make reports regarding the condition of said institutions or associations, the care of their inmates, the efficiency of their administration and such other matters pertaining thereto as it may deem proper."

It seems to me that this law does not authorize either the Governor to direct, or the Board of Charities to make, any investigation in regard to the manner in which the Board of Directors of the Penitentiary shall exercise the functions, powers and discretion in regard to the management of the penitentiary which is vested in said board by the Constitution and laws of this Commonwealth.

It is the results of the management of this institution which the Board of Charities and Corrections can be called upon to investigate and report on.

They have no administrative or executive powers, either to revise or to have executed any of the powers of administration which have been vested by the Constitution and laws in the Board of Directors of the Penitentiary. The board of directors is alone vested by the Constitution with the power of appointing the surgeon of the penitentiary, and in my opinion the reasons which actuated the board in making such appointment cannot be made the subject of an investigation at the hands of the Board of Charities and Corrections; nor can the Governor direct the board to make such inquiry.

It is true that by the Constitution the Governor is charged with the duty of seeing that the laws are duly executed, and should the penitentiary board refuse to perform any of its constitutional or statutory duties, and refuse to appoint the surgeon, or to perform any of their plain duties, or should the board improperly perform these duties, then the corrective is to be found either in the courts or by legislation.

For these reasons, I am of opinion that the Governor has no power to order the investigation requested; nor has the Board of Charities and Corrections any power under the statutes to institute any such investigation for the purpose indicated in your communication. I have the honor to be,

Yours very respectfully,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

## To The Auditor of Public Accounts

RICHMOND, VIRGINIA, *November 25, 1910.*

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

DEAR SIR:

Replying to your communication of recent date, in which you submit for my opinion the question as to whether the salary of a retired United States army or naval officer residing in the city of Portsmouth, Virginia, is or is not liable to be assessed with an income tax, I would say that I have heretofore given an opinion to which I now adhere, to the effect that under

the law the salary of a United States officer is not liable under the State law to pay an income tax, and I have duly considered the question as to whether the salary of an officer of the United States army or navy who is on the retired list, but whose salary is continued by the Government, is or is not liable to this tax.

The weight of authority seems to be very decidedly in favor of the proposition that the salary of this retired officer is also exempt from an income tax, and you can so advise the commissioner of the revenue of the city of Portsmouth. If, however, I should arrive at a different conclusion on this subject I will advise you.

Very truly yours,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *November 27, 1910.*

*Hon.* C. LEE MOORE,
*Acting Auditor of Public Accounts.*
*Richmond, Virginia.*

DEAR SIR:

You have referred to my office the question submitted by Mr. S. M. Bolling, clerk of the circuit court of Bedford county, as to what tax is due and payable on a deed therein referred to, being a deed from the trustees of the New London Academy to the county school boards of Bedford and Campbell counties, made under the act of the General Assembly of March 2, 1910, and you also refer in this connection to a letter addressed to you by Mr. S. S. Lambeth, Jr., the superintendent of schools for Bedford county, Virginia, which is on the same subject.

My attention is also called to copy of reply made by you to Mr. Bolling, the clerk, under date of November 18, 1910, in which you say that the only deeds exempt from taxation are deeds conveying land as a site for a school house or church. It appears from the letter of Mr. Bolling that this deed not only conveys real estate as a site for a school house, but it is described as a certain tract or parcel of land, and it conveys not only the tract of land mentioned "as the land known as the New London Academy", but it conveys all other lands or real estate of whatever character, and wheresoever situate, held by the trustees for the benefit of the said New London Academy. The deed also conveys all the personal property located upon the lands aforesaid, or within the buildings thereon, including everything of whatever character used in or about or in connection with the New London Academy. It also conveys Certificate No. 15 for $6,500.00 issued by the Commonwealth of Virginia, bearing date April 28, 1892, and the conveyance is made in pursuance of the act of the General Assembly of March 2, 1910. It is clear that this deed conveys more than a mere site for a school house. Section 590 of the Code of Virginia provides that "no deed or contract shall be admitted to record until the tax on said deed or contract is paid to the clerk (except a deed conveying land as a site for a school house or church)." By section 13 of the Tax Law of 1910 (see page 7) it is provided that on every deed, except a deed exempt

from taxation by law, which is admitted to record, the tax shall be as is provided in said section.

Now, the question submitted is, can the deed mentioned in the letter of the clerk, Mr. Bolling, and in the letter of Mr. Lambeth, the superintendent of schools, be admitted to record by the clerk without the payment of the tax required in said section 13 of the Tax Law? I am of opinion that it cannot. I am of opinion that this deed is not a deed exempt by law, and that the deed in question does not come within the language contained in section 590 of the Code, for the obvious reason that while it may be truly said of this deed that it does convey a site for a school house within the meaning of that law, yet it does more—it conveys real estate, the exact amount, quantity and value of which is not clearly set forth, but it is spoken of as a tract or parcel of land, and is not specifically described as a mere lot or parcel of land intended for and as a site for a school house. But if it could be held that under a liberal construction of the law the land was in fact and in truth a site for a school house, and was, therefore, exempt from this recording tax, yet this would not be decisive of the question, for the reason that the deed conveys all the personal property located upon the lands in question, and conveys a valuable certificate issued by the Commonwealth of Virginia for $6,500.00, which, of course, is a solvent asset or chose in action, and this clearly cannot be embraced within the exception contained in section 590 of the Code, and this fact alone clearly takes this deed out of the class of deeds embraced, or intended to be embraced, within the exception contained in section 13 aforesaid of the Tax Law. I am therefore of opinion that it is the duty of the clerk to collect this tax.

But it is contended that this deed is exempt from this tax under sub-section (a) of section 183 of the Constitution of Virginia.

I do not think this contention is sound. All exemptions from taxation, whether contained in the Constitution or statutes, are to be strictly construed and not extended by mere implication. It is very doubtful to my mind whether the language of the Constitution referred to applies to this case. It is very doubtful whether it can be held that this property is owned either directly or indirectly by the State, or that it is lawfully owned and held either by the counties or by the district school boards, as the act of March, 1910, requires that it shall be held by the county school boards of Bedford and Campbell counties, thereby excluding the idea of ownership in Bedford county or Campbell county, and clearly excluding the idea of ownership in either of the school districts of said county, and the rule of strict construction would exclude the idea of this exemption even of the property; but I hope that a liberal construction will prevail and that the property as such will be held to be exempt from taxation either for county or State purposes, but it might be well for this question to be put at rest by an amendment of the act of March 2, 1910.

But if it be conceded that the property itself is exempt from taxation, the exemption of the property does not exempt the deed from the recording tax mentioned above, for there is in the law a very clear distinction between the property itself and the deed which is but the evidence of the title to the

property, and the legislature has seen fit to make this distinction, and in construing and applying the law the distinction must be recognized and applied.

So that under the true construction of the statute and Constitution as applied to the case under consideration, I think the clerk must collect the tax described in section 13 of the Tax Law, before admitting this deed to record.

Very truly yours,

SAMUEL W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *January 11, 1911.*

*Hon.* S. R. DONAHOE,
*Auditor of Public Accounts,*
*Richmond, Virginia.*

DEAR SIR:

Replying to your favor of December 30, 1910, in which you submit to me for my opinion the question as to whether the clerk of a court, under section 3527 of the Code, as amended by Acts of 1908, p. 604, is entitled to one-half of the specific fee of $2.50 which is provided for in section 3529 of the Code, I beg to say that after due consideration of the question submitted, I am of opinion that section 3529 is positive and is restrictive, and that the clerk is not entitled to the fee, or any part of it, except in felony cases tried in his court. I do not think he is entitled to one-half of this fee under section 3527 of the Code.

I herewith return the enclosures submitted in your letter.

Very truly yours,

SAMUEL W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *January 31, 1911.*

*Hon.* S. R. DONAHOE,
*Auditor of Public Accounts,*
*Richmond, Virginia.*

DEAR SIR:

I have duly considered your communication of the 24th instant, in which you enclosed deed sent you by Mr. John H. Gose, and in which you state that you are of opinion that the amount of notes secured by the mortgage is $120,000.00, and that the tax for recording the mortgage under section 13 of the Tax Law is $120.00. I feel constrained to concur in this construction. The law in express terms provides that on deeds of trust or mortgage the tax shall be upon the amount of bonds or other obligations secured thereby. This mortgage provides for securing the payment of $20,000.00, evidenced by note of even date with the mortgage, and for the securing of the further sum of not exceeding $100,000.00 to be evidenced by notes in the mortgage mentioned; and it is further provided as follows: "Now this indenture witnesseth, that the said party of the first part, for and in consideration of the premises, and for the better securing the payment of the debt heretofore and hereafter to be created, as aforesaid."

I am forced to conclude that the amount secured by this mortgage, within the meaning of the law, is $120,000.00, and that the recording tax should be charged and collected accordingly.

Very truly yours,

SAMUEL W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *February 20, 1911.*

*Hon.* S. R. DONAHOE,
*Auditor of Public Accounts,*
*Richmond, Virginia.*

DEAR SIR:

I have your favor of February 18th, in the following words:

> "DEAR SIR:
>
> "By an act approved March 13, 1908, amending section 647 of the Code, the legislature fixes the compensation of clerks for furnishing to the Auditor of Public Accounts a certified copy of the list of delinquent lands sold to the Commonwealth, in lieu of the compensation previously allowed under that section and under section 662, but makes no reference to section 669, which provides for a different compensation. This has created some confusion in the matter, many of the clerks claiming compensation under the latter section, as well as under the act of March 13, 1908. It is desirable that there should be uniformity in this regard, and I respectfully request your opinion as to the proper compensation to be allowed clerks for their services in such cases."

As we understand the question, it is whether or not clerks are entitled to charge for services rendered under section 669 of the Code, as well as under section 647, as amended by the act approved March 13, 1908 (Acts 1908, p. 539).

Under the sections of the Code as they originally stood the payment made to the clerks under section 669 was for services rendered by them under section 662.

As amended by the Acts of 1908, section 647 provides specifically for the payment of the clerks for services rendered under section 662, and this act being a special act in reference to the same subject-matter so far as the clerk is concerned, as was contained in section 669, must, we take it, be considered as a repeal of section 669 so far as it refers to the compensation of clerks under section 662; so that, in our opinion the clerks for the services rendered in reference to certifying the accounts for delinquent lands are only entitled to the compensation provided for in section 647, as amended, and are not entitled to any further compensation under the provisions of section 669.

Very truly yours,

RICHARD B. DAVIS,
*Assistant Attorney General.*

RICHMOND, VA., *March 9, 1911.*

*Hon.* S. R. DONAHOE,
*Auditor of Public Accounts,*
*Richmond, Virginia.*

DEAR SIR:

Your favor of March 1st, enclosing letter just received by you from Mr. H. H. Holt, clerk of the circuit court of Elizabeth City county, and other papers, with reference to the clerks' fees for certifying the list of delinquent lands, is duly to hand, and the Attorney General has referred it to me for answer. In reply thereto I would say that I have gone carefully over the matter again and see no reason for changing the conclusion expressed in my former letter, to-wit, that the clerks are not entitled to be paid for certifying to the Auditor of Public Accounts the list of delinquent lands under section 669, but are only entitled to be paid for that service upon the scales set out in section 647 of the Code, as amended by the act approved March 13, 1908, and printed in the Acts of 1908, page 639.

For your own information I enclose herewith memorandum of the provisions of the statute on the subject, from which the conclusion I arrived at was reached.

Very truly yours,

RICHARD B. DAVIS,
*Assistant Attorney General.*

I have read the above letter, and also the memorandum accompanying it, and concur in the conclusions there arrived at.

SAMUEL W. WILLIAMS,
*Attorney General of Virginia.*

Under the law as it existed prior to March 13, 1908, the treasurers of the several cities and counties were required to make out two separate lists of delinquent lands sold, one of them embracing the list of the lands sold to persons other than the Commonwealth and the second the list of lands sold to the Commonwealth. Each of these lists the treasurer was required to return to the corporation or circuit court having jurisdiction of the county or city and the clerk of that court was required by various acts to certify a copy of each of these reports to the Auditor of Public Accounts.

By section 642 of the Code the treasurer was required to return to the court a list of delinquent lands sold to persons other than the Commonwealth, which list the court was to inspect and correct.

By section 647, as it read prior to 1908, the clerk of the court was required to certify a copy of the report made by the treasurer to the Auditor of Public Accounts within thirty days after its confirmation by the court, for which service he was entitled to $1.00, to be paid out of the public treasury, and this was all the compensation which was made to the clerk for certifying to the Auditor of Public Accounts this list of delinquent lands sold to persons other than the Commonwealth.

By section 662 the treasurer was required to return to the court a list of the delinquent real estate purchased by the State for its correction, and provided that the court, after correcting the same, should direct its

clerk to transmit a copy thereof to the Auditor of Public Accounts, etc., and to record the same in the delinquent land book, "for which he shall receive a fee of $1.00."

By section 669 it was provided that the Auditor should issue his warrant for fees of the treasurer, clerk and printer, etc., on all purchases in the name of the Auditor for the benefit of the State as follows: "Clerk's fee five cents for each lot, tract or parcel of land."

By the law as it then stood the clerk's duties with reference to the list of lands sold to others than the Commonwealth was fixed by section 647, and his compensation was limited to the fee of $1.00 therein prescribed.

With reference to the list of lands sold to the Commonwealth the duty of the clerk is to certify the same to the Auditor and recording the same in the delinquent tax book was prescribed by section 662, and his compensation for certifying the list to the Auditor was fixed by section 669.

The compensation to the clerk for certifying the list of lands sold to others than the Commonwealth and that for certifying a similar list for lands sold to the Commonwealth was different, as the clerk was not allowed anything for certifying the list of lands sold to persons other than the Commonwealth except the $1.00, whereas in the other case he was allowed five cents for each tract or parcel of land, etc., appearing on the list; and the compensation so fixed was ascertained by sections 647 and 669.

By the act approved March 13, 1906, above referred to, the legislature provided for the payment to be made to the clerk in both of these cases, and put them both upon the same basis in the following language:

"The clerk of the said court shall certify a copy of his report to the Auditor of Public Accounts within thirty days after the date of such confirmation" (that is for certifying the list of lands sold to persons other than the Commonwealth) "for which service and for the service required of the said clerk under section 662 of the Code of 1887 the clerk shall be entitled to the sum of two cents per each name on the reports, for each copy of the reports required to be made by this section and by said section 662, to be paid out of the public treasury, upon the certificate of the court." And it is evident that the legislature intended by this act to provide for the payment to be made to the clerk for certifying both of these accounts—those which were required to be made under section 647 as well as for those certified under section 662, and did provide for such compensation for both.

Section 669 so far as the clerk is concerned, specifically provided for the payment for services rendered under section 662, and as the legislature, by the amendment in 1908 above referred to, has transferred this compensation from section 669 to section 647 as amended, and therein (that is in the amendment) provided a different compensation from what was previously provided under section 669, this last provision must be taken to have repealed the provision that was made under section 669.

The compensation provided for in section 647, as amended, so far as the clerk is concerned, is for identically the same service for which the compensation was previously provided under section 669, and it is impossible to conceive that the legislature intended to make two separate and distinct provisions for payment for the same identical service.

It will be noticed that under the prior law the only fee that the clerk got for certifying the list of delinquent lands sold to persons other than the Commonwealth was the $1.00 provided in section 647, while under the amended statute that $1.00 is omitted and the clerk in lieu thereof is allowed two cents for each name upon that report; and in reference to the other list (to-wit, the list of lands sold to the Commonwealth) he is allowed two cents for each name upon the report showing the lands sold to the Commonwealth in lieu of the five cents for each tract, lot, etc., that was previously allowed under section 669.

From the plain wording of the statute it is evident that the legislature meant to change the law and to fix the compensation of the clerk for services rendered with reference to both of the lists of land sold, upon the same basis, that is to say, upon the specific fee of two cents for each name appearing upon these reports or lists.

By all rules of construction that we are familiar with, where the legislature, as in this case, by a subsequent act has provided compensation for the specific service to be rendered, differing from that allowed for the same service by a previous act, the subsequent act so fixing the compensation is held to have repealed the former act and to have been intended by the legislature to be substituted in the place of the original act for the purpose of fixing the compensation for the service so rendered.

Here, prior to the amendment of section 647 above referred to, the clerk was given a specific fee of five cents for each lot, tract or parcel of land included in the list of delinquent lands sold to the State, as provided for in section 669, while by the amendment of the said section 647 the compensation for the same identical service is fixed at the specific sum of two cents for each name appearing upon the list. It is impossible to escape the conclusion that this subsequent statute fixing the compensation for the specific service is to be taken as the last expression of the legislative will in the matter, and as repealing the former provision contained in section 669.

## To the Superintendent of Public Instruction.

RICHMOND, VIRGINIA, *August 29, 1911.*

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

DEAR SIR:

You have referred to me letter to you from Mr. David Walker, in which he complains of the action of the school trustee electoral board of Campbell county, Virginia, in appointing Mr. John W. Gills as school trustee for Brookville district in said county, and you request my opinion as to the proper answer that you should make to this letter. The letter states that the people of the district are indignant at this appointment; that numerous petitions are being circulated and freely signed protesting against the appointment, and requesting the board to reconsider its action. The letter states that Mr. W. M. Murrell, chairman of the board, entered his protest against the appointment on the ground that Mr. Gills was of such a character that the board should not appoint him, and the letter asks

what recourse or appeal the petitioners will have should the school trustee electoral board not reconsider said appointment.

In reply, the law is very clear as to how the trustees shall be appointed, namely, by the school trustee electoral board, and the law says that this board has power to declare and fill vacancies, and determine appeals, and the law prescribes certain cases in which the electoral board shall declare the office of trustee vacant and proceed to fill the vacancy. See section 23 of the Virginia School Law for 1911, p. 27, Code of Virginia, section 1455. I cannot gather from this letter that any of the causes for removal mentioned in this law exists in this case. I rather infer from the letter that the opposition is based upon alleged moral unfitness of the applicant. If this be true, then the question is not so clear as to what board or tribunal is vested with the power to remove the trustee, nor does either the statute or the regulations of the State Board of Education, so far as I can find, clearly define the rights of appeal, but it is to be remembered that under the Constitution and laws of the State the State Superintendent of Public Instruction is the head of the school department of the State and is vested with very large administrative powers and a broad width of discretion in dealing with all matters pertaining to the public free schools, especially those not specifically provided for by the statute or regulation of the State Board of Education. It must also be remembered that the broadest powers are vested in the State Board of Education for dealing with all questions in regard to the public free school system which may arise in the State, and if the right of appeal from the action of the school trustee electoral board in refusing to remove a trustee is not granted by existing laws and regulations, I would suggest the propriety of your taking cognizance of the appeal so far as to refer the matter to the State Board of Education, and this board can then adopt such method of procedure as will be perfectly fair to all parties concerned for a full and fair hearing, and this case may result in the enactment of a statute, or the adoption of a regulation by the State Board of Education which will meet what seems to me to be a case of omission in the existing laws and statutes on the subject.

Yours truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *November 29, 1911.*

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

DEAR SIR:

Your communication of the 8th instant to hand, in which you request that I shall indicate to you how a letter to you from Mr. T. G. Michie, of Albemarle county, should be answered. This letter is now before me, from which I find that Mr. Michie is the clerk of the board of school trustees of the Samuel Miller district of Albemarle county, in which he asks you the question as to whether Hon. S. M. Page, one of the school trustees of said district, and who has been elected a member of the General Assembly of Virginia can legally hold office of school trustee whilst he is a member of

the General Assembly of Virginia. You will find the answer to this question contained in the act of the General Assembly in force March 5, 1908. See Acts of 1908, p. 187, amending section 1459 of the Code. See also Pollard's Supplement, volume 3, section 1459, in which it is provided that no State or county officer shall be chosen or allowed to act as district school trustee, except as therein stated, that is, this law does not apply to fourth class postmasters, county superintendents of the poor, commissioners in chancery, commissioners of accounts and notaries public.

It therefore follows that Mr. Page cannot be allowed to act as district school trustee whilst he is a member of the General Assembly of Virginia.

Yours truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *November 17, 1911.*

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

DEAR SIR:

Yours of the 16th instant at hand, in which you ask the advice of this office as to what answer you should make to the letter of Mr. James Allen, treasurer of Vienna, Virginia, on the question submitted by you as to whether the treasurer of a town which constitutes a separate school district, in making his report under section 1518 of the Code, should report the five per cent. penalty on levies remaining unpaid on the 1st of December, the town council having passed no ordinance authorizing the five per cent. penalty to be added.

The question thus submitted opens up the whole question as to the levy, collection and disposition of school levies in towns constituting separate school districts. I have several times been called upon to consider this question, and must confess that there is a great deal of difficulty in arriving at a correct solution of it, and as I have heretofore stated, additional legislation should be had to remove the doubts and uncertainties existing in regard to it, and with some diffidence as to the absolute correctness of my position I advise that it is the duty of the treasurer to add the five per cent. penalty, proceed to collect it, and make due report of it just as a county treasurer would do under similar circumstances, and if a taxpayer desires to raise the question let him come into court and do so, and thus all doubt on the subject can be removed by judicial construction of the law, or by referring the matter to the next session of the legislature.

Very truly yours,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *February 14, 1911.*

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

DEAR SIR:

Yours of this instant to hand, in which you submit for my consideration and opinion the letter addressed to you by Mr. I. E. French, division

superintendent of schools for Dickenson county, Virginia. Mr. French is correct in stating that under the school law of this State before a loan can be made by the State Board of Education from the Literary Fund the district school board must have a good and sufficient title in fee to the land on which the building is proposed to be erected. This is the plain letter of the law and where coal or other minerals exist under the surface of land which has been conveyed to any person, and the surface is owned by another, then neither party has a complete fee simple title to the whole of the property. The owner of the mineral may have a complete title to the minerals and the owner of the surface a complete title to the surface, yet neither owns a title in fee to the whole land. I am aware of the fact that the general condition referred to by Mr. French exists in his county, and a strict application of the law to that county may result in preventing any loan from being made in Dickenson county, and this condition of affairs seems to present a proper case in which the State Board of Education in the interest of the schools of the county may be called upon from the very necessity of the case to exercise its discretion and give a somewhat broad or liberal construction to the statute, and if the board should feel warranted in doing so and holding that under the provisions of the statute the school trustees were required only to have the fee simple title to the surface as contradistinguished from the fee simple title to the whole land, then I would not feel as the law officer of the State called upon to interpose any objection.

I therefore suggest that you write Mr. French to send you at once the evidence of the title, that is the deed, etc., which he has, and that you call his attention to the necessity of this title being vested in the district school board as is required by section 1468 of the Code; and when this is received and it appears that the board has good title to the surface, I would so state to the board, and the matter can be then determined.

Very truly yours,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *June 28, 1911.*

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

MY DEAR SIR:

Your letter of June 27th instant to hand, which is as follows:

"I have an inquiry as to whether an oyster inspector may serve as school trustee. Will you please advise me?"

In reply to your letter I beg leave to say that I had an occasion to consider this matter several months ago, and then wrote the following letter to Mr. J. J. Hovey, of York county, Virginia:

"Your letter of March 16th was duly received. After getting the name of the inspector to whom you refer, I have found his bond filed with the Auditor of Public Accounts as is required by law, and from which it appears

that he was appointed for District No. 30 "B", York county, for a term of two years from the 1st day of May, 1908. If this appointment and qualification make Mr. Maynard a county officer, then under section 1459 of the Code he is ineligible to hold the office of school trustee. With the lights now before me I conclude that he is a county officer within the meaning of the law, and therefore is ineligible; but this opinion is unofficial, and upon fuller investigation, if called upon to act officially, I might see cause to change my present views; but as at present advised I would hold that he is a county officer and ineligible."

Being called upon now to express an official opinion on the matter, I am prepared to say that an oyster inspector is ineligible to the office of school trustee.

Yours truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

## Miscellaneous.

RICHMOND, VIRGINIA, *April 14, 1911.*

*Col.* JOHN W. RICHARDSON,
*Register of the Land Office,*
*Richmond, Va.*

MY DEAR SIR:

Replying to your communication of this date relative to the propriety of your receiving and filing the survey returned by W. L. Kinzie, deputy surveyor of Giles county, as a basis on which to issue patents to J. M. Puckett as therein stated, I beg to advise that under the law this survey must be made and reported by the county surveyor who can act in person or through his deputy, but it must be the act of the surveyor, and you having received official information from the surveyor of Giles county, Mr. James Hoge, that he did not make or authorize this survey, and does not approve of same, but repudiates the same, I am of opinion that you have no authority to receive, but should return the papers to the party.

Yours truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *May 13, 1911.*

*Hon.* W. J. HENSON,
*Roanoke, Virginia.*

DEAR JUDGE:

Your letter to hand. Of course I will be very glad to take up the matter to which you refer with you for full review and a rehearing and if I am wrong I want to get right, as I have but one pride of opinion in the administration of this office, and that pride is to be right. I think my letter to the Register of Land Office, upon the fullest information, will be found to be right. Code, section 2315, provides that every surveyor by himself or his deputies shall make the survey, and section 2322 provides expressly that the plat and certificate shall be tried and examined by the principal

surveyor whether truly made, etc., and to be recorded in a book kept by him; and section 2326 provides that the surveyor shall within two months deliver a copy of his certificate to the clerk. The law also prescribes a penalty for failure to perform this duty, all of which to my mind is conclusive of the proposition that, whilst the mere actual civil work may be done by the deputy surveyor, yet he cannot perform these duties which the law prescribes shall be done by the surveyor himself, and I do not think that the deputy surveyor can ignore his principal and make a survey and plat, either without authority from his principal, or without having his acts ratified and approved by the principal surveyor, and where the facts are made to appear to the Register of the Land Office that the law has not been complied with, I think it is his plain duty to refuse to issue the grant, and having any doubt about his duty in the premises he had the right to call on this office for a legal opinion, which he did, and after careful investigation the opinion was rendered which was embodied in my letter, and I think it is correct; though, as stated above, I am perfectly willing to take it up with you, and if I am wrong, why then, of course, I will try and get right.

Yours very truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *June 23, 1911.*

*Hon.* B. O. JAMES,
*Secretary of the Commonwealth,*
*Richmond, Virginia.*

DEAR SIR:

I have duly considered the matter suggested in the letter of Mr. Carter Braxton, attorney for the Commonwealth for the city of Staunton, and mentioned in his letter to you of June 21, 1911, and by you referred to me, and which involves the true construction of the law in regard to the license for the sale of automobiles.

In reply I beg to state that I do not agree with the construction placed upon the law by Colonel Rudolph Bumgardner, of Staunton, as stated in the letter of Mr. Braxton. On the contrary I am of opinion that under the law (section 3-b of the act, which went into effect June 15, 1910) every agent for the sale of automobiles shall take out a license as prescribed in that section, and the language of the act on which the contrary opinion, I suppose, is based, is as follows: "Every agent before he commences to operate machines to be sold by him", etc. This language, in my opinion, has no such meaning as is contended for, but construing the section as a whole, the law evidently means that the agent shall take out his license on or before the first day of January of each year, or before he commences the business of handling, that is dealing in, automobiles; and to hold that an agent could buy one machine, operate it, and carry on the business of an agent for the sale of automobiles, and in effect sell by sample, and thereby evade the payment of a license, would be to adopt a construction of the law which in my opinion is not warranted. Nor do I think that a person who takes out the license prescribed in section 3-a of the act has

any right whatever under the law to sell automobiles. This license only confers the right to operate a machine in the State of Virginia.

I herewith return Mr. Braxton's letter.

I have the honor to be,

Very truly yours,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *July 17, 1911.*

*Hon.* B. O. JAMES,
*Secretary of the Commonwealth,*
*Richmond, Virginia.*

DEAR SIR:

Your favor of recent date with reference to what disposition is to be made of the proceeds of the sale of the index to the enrolled bills of Virginia, prepared by John W. Williams, clerk, under the provisions of the act approved March 16, 1910, together with a letter from Dr. H. R. McIlwaine, State Librarian, are duly to hand, and in the absence of the Attorney General I am writing to say that I have read very carefully the letter of Dr. McIlwaine, and it appeals to me greatly, but I am sorry that I cannot entirely concur with the conclusions he has reached in that letter.

The general laws of the State found in section 248 of the Code, under the head "Library Fund" provides that all publications, documents, etc., published by the State, "*and not otherwise disposed of by law* shall be sold and the proceeds thereof shall constitute a *Library Fund* for the support and improvement of the library and the publication of records." This law was the general law in effect at the time provision was made for the making and publication of the index to the enrolled bills made by Mr. Williams. By act approved March 16, 1911 (the general appropriation bill), Acts of Assembly of 1910, p. 395, the first section provides as follows: "Be it enacted by the general assembly of Virginia, That the public taxes and arrears of taxes, due prior to the first day of March, in the year nineteen hundred and eleven and nineteen hundred and twelve, respectively, as well as the revenue derived *from all sources* and all money not otherwise appropriated, which shall come into the treasury prior to the first day of March, nineteen hundred and eleven, and the first day of March, nineteen hundred and twelve, respectively, *shall establish a general fund,* and be, and the same is hereby, appropriated for the fiscal years to close on the twenty-eighth day of February, nineteen hundred and eleven, and the twenty-ninth day of February, nineteen hundred and twelve, respectively, in the following manner and for the following uses, to-wit:"

Afterwards, in the same act of Assembly, on page 421 of the Acts referred to, provision is made requiring the Clerk of the House of Delegates to make up the index referred to, which, together with the former index made by him, the statute requires shall be printed and bound together by the Superintendent of Public Printing, and then proceeds as follows: "fifteen hundred copies shall be sold by the Secretary of the Commonwealth at such price as may be fixed by the authority authorized to fix the price of State publications, and the proceeds from such sale to be paid into the treasury to the credit of the *general fund.*"

It would seem that the words "general fund" referred to here means the same "general fund" that is provided for in the first section of the act as above set out, and I do not see the force of the argument of Dr. McIlwaine that the words "general fund" means "general library fund", as I do not find any provision for a "general library fund" in the statute, and it would have been more natural for the statute to have said shall be applied to the "library fund" if that had been its intention, instead of saying to the "general fund" before mentioned in the same act.

It may have been the intention of the legislature to allow the proceeds derived from the sale of this index to go in the same direction that the proceeds from the sale of other publications of the State are directed to be applied; but the provision in the statute, section 248 of the Code, only provides for the payment into the "Library Fund" of the proceeds from such sales as are "not otherwise disposed of by law", and since the proceeds from the sale of this particular publication is provided for in the general act of March 16, 1910, as above indicated, which provides for a general fund, the subsequent provisions of that same statute requiring the proceeds to be paid *into the treasury to the credit of the "general fund"*, must refer to the *general fund* that is created and specified in the same act in which this language is used.

Under the general rules of construction of statutes it seems to me that the act approved March 16, 1910, directing the sale of this book and the application of the proceeds to the *general fund* must be construed to mean the *general fund* that is specified and provided for in that particular statute.

I would be very glad to come to a different conclusion, and one in conformity to that reached by Dr. McIlwaine, but after reading the statute very carefully I have been unable to bring myself to that conclusion, and am therefore compelled to say that in my judgment the proceeds of the sale of the index referred to goes into the *general fund* which is mentioned in the act approved March 16, 1910, and not to the Library Fund.

Very respectfully,

RICHARD B. DAVIS.
*Assistant Attorney General.*

RICHMOND, VA., *October 21, 1911.*

*Hon.* JAMES B. DOHERTY,
*Commissioner of Labor,*
*Richmond, Virginia.*

DEAR SIR:

In your favor of the 27th ultimo, you submit the following question: "Is it unlawful for mothers to employ their children in the manufacture of paper boxes at their homes; that is to say, the mothers secure the work from the factories in this city, carry the same home and with the assistance of their children make the boxes and return them to the factory?"

I have looked into the statute and do not find any provision preventing a mother in her own home from employing her children in any work that she may think suitable to them, and it therefore follows as a matter of course

that the employment you refer to does not constitute any violation of the child labor law.

Very truly yours,

RICHARD B. DAVIS.
*Assistant Attorney General.*

RICHMOND, VIRGINIA, *July 1, 1911.*

*Captain* P. ST. J. WILSON,
*State Highway Commissioner,*
*Richmond, Virginia.*

DEAR SIR:

With reference to the matter of the controversy under the contract between the board of Loudoun county and the town council of Purcellville, which you handed to the Attorney General, together with a letter from Mr. J. W. Gregg, I am writing to say that the Attorney General has turned the matter over to me, with the request that I attend to it for him. You will understand that the matters referred to in the letter, and the controversy arising under the contract, is not a matter as to which this office is authorized by law to give any opinion, or to take any steps, and for that reason you will appreciate that it would be improper for us to express any opinion with reference to it.

The matter in controversy between the town and the supervisors of the county ought to be settled between them in some satisfactory way, and I do not see how, under the statute, either you or this office can be called upon to take any steps with reference to it. The contract or agreement between the board of supervisors of the county and the council of the town of Purcellville speaks for itself, and if either party fails to carry out and abide by the provisions of that contract to the detriment of the other party, they will have to proceed at law like any other person or corporation having rights under a contract.

If we can be of any service to you personally we would be very glad to do it, and if you will call at our office I will be very glad to talk the matter over with you and give you any assistance I can, but if it was proper for us to give an opinion, I could not do so without gaining a great deal more information than is contained in Mr. Gregg's letter as to the facts and circumstances of the case.

I am returning herewith the papers left with us.

Very truly yours,

RICHARD B. DAVIS.
*Assistant Attorney General.*

RICHMOND, VIRGINIA, *September 1, 1911.*

MR. A. S. GRAVELY,
*Clerk Town Council,*
*Martinsville, Virginia.*

DEAR SIR:

Returning to my office from my vacation I find unanswered your letter of August 3, 1910, which is as follows:

"Members of the town council have instructed me to ask your opinion as to whether a United States referee in bankruptcy is eligible for appointment by the council as district school trustee.
"The town of Martinsville constitutes a separate school district. Your response to this will be appreciated."

By the provisions of the bankruptcy law referees in bankruptcy are appointed by the courts of bankruptcy, which are, of course, United States courts, and he is clearly a federal officer within the law construed by the United States Supreme Court. See *United States* v. *Smith*, 124 U. S., 525, 31 L. Ed., 534.

I therefore conclude that a referee in bankruptcy is clearly a federal officer within the meaning of the law, and under section 1459 of the Code, as amended by the act in force March 5, 1908, (Acts of 1908, p. 187) he cannot be legally appointed as a district school trustee. This law occurs in the chapter relating to the appointment of school trustees by the school trustee electoral board, and it might be contended that this election applies alone to trustees so appointed. On the other hand it might be contended that the language is broad enough to apply to all district school trustees.

But I think the provision contained in the chapter of the Code dealing with the subject of the appointment of district school trustees by town councils in the cases where the towns constitute separate school districts, also covers the case and makes a referee in bankruptcy incompetent to hold the office of district school trustee. See Code, section 1538 as amended by act in force June 13, 1906, Acts of 1906, p. 513, where it is provided that no federal officer during his term of office shall be allowed to act as a school trustee, but this provision shall not have the effect of prohibiting a commissioner in chancery or commissioner in bankruptcy from holding such office. I do not think that a referee in bankruptcy is identical with commissioner in chancery within the meaning of this law—in other words, that a referee in bankruptcy does not come within the proviso named above.

For the reasons stated I am of opinion that a referee in bankruptcy cannot be lawfully appointed to the office of district school trustee in a town which constitutes a separate school district.

Yours truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *February 8, 1911.*

*Hon.* S. GORDON CUMMING,
*Hampton, Virginia.*

DEAR SIR:

Since our conference here on the 6th instant I have carefully gone over and reviewed the matter in regard to the amount of tax required to be paid for recording the paper which we had under discussion, and which is mentioned in your letter of the 6th instant. My review of this case but confirms my first impressions. The paper in question in legal effect, in my opinion, is a deed of trust conveying valuable rights, properties and benefits to secure obligations amounting to $4,000,000.00 as set forth therein,

but if it is not technically a deed of trust, then it is certainly a mortgage, and in either event comes directly within the purview and meaning of section 13 of the revenue law which is clear and explicit, the following being the language thereof:

> "On deeds of trust or mortgages the tax shall be upon the amount of bonds or other obligations secured thereby."

I cannot advise otherwise in this case, and if the parties desire to test the question by mandamus, why I shall interpose no objection, but will accept service of any process necessary to mature the case.

I remain,

Yours very truly,

SAML. W. WILLIAMS,
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *August 31, 1191.*

*Mr.* JAMES E. CHAPMAN,
*Smithfield, Virginia.*

DEAR SIR:

I received a letter from Mr. J. Waverly Thomas, dated August 25, 1911, enclosing written request signed by yourself and others, in which you request my opinion on the point therein stated, and Mr. Thomas requests that I send my reply to you.

The delay in answering has been caused by attention to a mass of matters which accumulated during my absence on my vacation. The point suggested as to the number of councilmen which the town of Smithfield can lawfully elect is purely a local matter in which the Commonwealth of Virginia has no such direct interest as would warrant an official opinion at my hands, but writing you informally and unofficially, I will refer you to the following: Code, section 1030, provides that the council of a town shall be judges of the election, qualification and returns of its own members. Section 117 of the Constitution worked a very decided change in the law as to the councilmen of the several cities and towns in the State, and provides that after the adoption of this Constitution only general laws shall be passed for the government of the cities and towns, but preserved intact charters then in existence to the extent and as stated in said article. The Court of Appeals has decided that this section of the Constitution is self executing, and that the legislature cannot pass special laws conferring rights and privileges different from those prescribed by the general laws. See *Campbell et als.* v. *Bryant*, 104 Va., 509; see also *Beale* v. *Pankey*, 107 Va., p. 215.

Now the first act of the legislature passed after the new Constitution went into effect provided for the election of six councilmen in the towns of the State. See Code, section 1021. This statute was amended by act in force June 26, 1908, and provides that not less than three nor more than nine electors shall constitute the council. See Acts of 1908, p. 46, referred to in Pollard's Supplement of 1910, section 1021.

This latter statute leaves the question open as to how, when and by whom the number of councilmen for a given town is to be determined, and a serious question here arises as to whether this must be determined by

the town council itself by proper ordinance or resolution, or whether the legislature, notwithstanding the provisions of section 117 of the Constitution and the decisions of the court to which I have called your attention, has the power by amendment of the charter or otherwise, to fix the number of councilmen to be elected in any town in the State under this statute. I desire simply to suggest this question, in order that your own attorney and town council may take such steps to determine the matter as they may think proper.

Hoping that this sufficiently answers your question and may at least be of some service in enabling you to reach a proper solution of the matter, I am,

Yours very truly,

SAMUEL W. WILLIAMS.
*Attorney General of Virginia.*

RICHMOND, VIRGINIA, *April 12, 1911.*

*Mr.* FRED HARPER,
*Lynchburg, Virginia.*

DEAR SIR:

Your letter to hand. I have carefully considered the several cases to which you refer, but they do not change my opinion on the point suggested. They discuss in a general way the subject of residence, as it enters into the question of the qualification of a voter, and in the main assert general principles about which there can be no serious controversy, but they do not reach the direct point as it arises under the Constitution of this State, for it may be conceded that residence for the purpose of qualifying a person to vote as a general proposition may be either actual or constructive, as stated in the cases to which you refer, yet the language and evident intent and meaning of the Constitution of Virginia must determine the question, which expressly provides that an inmate of any charitable institution shall not be regarded as having gained a residence as to the right of suffrage by reason of his location or sojourn in such institution, the language of section 24 of the Constitution in full being as follows:

> "No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof, by reason of being stationed therein; nor shall an inmate of any charitable institution or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution."

Now, an inmate of a charitable institution is a person who in the regular way prescribed by the institution is received therein to become and be a recipient of the charity dispensed by the institution, and the Elks' Home being a charitable institution, then the inmates of this home are certainly within the plain purview and obvious meaning of this constitutional provision, and such inmates cannot gain a residence for the purpose of voting by their sojourn therein, nor would such an inmate lose his

residence—that is, he could stay or sojourn in the institution until election day and then go back to his place of residence, if he had one, and cast his vote. His status as a voter, so far as residence is concerned, is not at all affected by the fact that he is an inmate of such charitable institution.

I shall regret very much if this constitutional provision and its plain and manifest construction and application shall have any important bearing upon the question of the removal of the Elks' Home from our State, but if it does it cannot be helped. I am proud to say that I am myself a member of this noble order, but this fact and what effect this constitutional provision and its proper application to the inmates of the Elks' Home, may have on the question of removal should not have any bearing on the proper construction of this constitutional provision. I have tried to consider the question absolutely free from such considerations and have given you the result of my best opinion upon the subject.

I remain,

Yours very truly,

SAMUEL W. WILLIAMS.
*Attorney General of Virginia.*

In the month of October, 1911, I received from the Honorable T. W. Bickett, Attorney General of the State of North Carolina, a letter requesting me, as the Attorney General of Virginia, to co-operate with him and the Attorney General of the State of South Carolina in an effort to secure from the United States District Court for the Southern District of New York as favorable decrees as possible to protect the tobacco growing industry in the three States in the proceedings pending in said court having for their object the dissolution of the tobacco trust under the anti-trust laws of the United States.

Being in thorough accord and sympathy with the movements and objects expressed in the letter of the Attorney General of North Carolina, I heartily co-operated with him in doing all I could to accomplish the desired result, and made two trips to the city of New York, and in co-operation with the said Attorney General of North Carolina and with the Attorney General of South Carolina, we, by leave of the court, filed an answer in said case in which the rights of the tobacco growers of the three States were presented to the court. The answer filed by us is in the words and figures following, to-wit:

**In the Circuit Court of the United States**

*For the Southern District of New York.*

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| UNITED STATES OF AMERICA<br>v.<br>THE AMERICAN TOBACCO CO. ET AL. | Objections. |

Now comes Samuel W. Williams, Attorney General of the Commonwealth of Virginia, T. W. Bickett, Attorney General of the State of North Carolina and J. Frayser Lyon, Attorney General of the State of South Carolina, and first acknowledging the courtesy of

this court in permitting these petitioners to be heard, respectfully show:

I.

That the States represented by your petitioners are among the largest tobacco growing States in the Union; North Carolina ranking second and Virginia third in the production of tobacco, and in the State of South Carolina the growth of tobacco is a large and important industry. In these States hundreds of thousands of people cultivate tobacco as their chief if not their only means of support, and these people directly, and all the other people of the States named incidentally, are vitally interested and deeply concerned in the dissolution of The American Tobacco Company in accordance with the judgment of the Supreme Court of the United States rendered in this cause.

II.

That for a number of years the men who grow tobacco, by reason of the fact that The American Tobacco Company has been practically the only purchaser of their tobaccos and has arbitrarily fixed the price of the same, have felt that they were in a state of financial servitude to the said tobacco company, and this feeling has engendered much of bitterness and discontent. Your petitioners earnestly insist that in the dissolution of The American Tobacco Company the rights and interests of the tobacco growers should receive the first consideration. To the consumer tobacco is a luxury, to the grower it is a living. The stockholders and bondholders invested their funds in the securities of this company as a matter of choice. The tobacco grower cultivates tobacco as a matter of necessity. His land is ill adapted to the growth of other crops, and having spent his life in learning how to cultivate tobacco, he knows how to do little else. The independent manufacturers may possibly be able to maintain a more or less compact defensive organization and secure for themselves a certain measure of protection, but the tobacco growers by reason of their great number and by reason of their being scattered over such a wide extent of territory and by reason of their poverty are unable to permanently maintain any effective defensive organization.

It is the high mission of government to protect the defenseless, and the utter helplessness of the tobacco grower makes a strong appeal to the government to secure for him the largest measure of protection possible under the law of the land.

III.

The findings of this court, sustained and emphasized by the Supreme Court of the United States, that The American Tobacco Company is a combination in restraint of trade and has designedly monopolized the tobacco business of the country and the consequent

mandate of the Supreme Court requiring a dissolution of the combination and a destruction of the monopoly inspired the tobacco farmers with a faith that the days of their servitude were at an end, and that hereafter they would realize the reasonable value of the product of their toil.

IV.

That the plan submitted to this court by The American Tobacco Company does not have the merit of even looking like a dissolution of the combination or a destruction of the monopoly. We earnestly protest that said plan is in no sense a compliance with the judgment of the Supreme Court of the United States, but tested by the rule of reason which the Supreme Court invoked in the interpretation of the law, it is plain that the plan is a bold attempt to nullify the judgment of the court. The one purpose of the bill in equity filed in this cause and the one purpose of the decree obtained in answer to its prayer was to restore the competition that had been destroyed. The plan of The American Tobacco Company contributed nothing to this end. It turns loose no asset and no agency by which it now maintains its absolute dominion over the tobacco trade. Its avarice for power and its utter unwillingness to loosen its grip on the tobacco business is strikingly illustrated in its refusal to give up one of the least of its subsidiary companies, R. P. Richardson, Jr., & Company, Inc., although that company has from the inception of this suit petitioned to be allowed to do an independent business.

The division of the company into four or fourteen working organizations each and every of them dominated and controlled by the present common stockholders of The American Tobacco Company will effect a change in the method of bookkeeping and nothing more. Oneness of ownership necessarily means oneness of control, and the plan submitted contains the same kind of dismemberment that takes place when the hand divides into the fingers. We submit that if the evidence taken in this cause had disclosed the precise condition which the tobacco company proposes now to create, the findings of the court would have been in no way different. The combination would have been as effective, the monopoly as complete, and the violation of the law as clear as under a single organization.

It is axiomatic that business moves along lines of self interest, and there can be no real competition between persons or corporations unless their interests are antagonistic. The plan proposed by the tobacco company, maintains a community of interests between all the companies it is proposed to create and this makes real competition between them impossible. In its patent failure to separate into independent entities, in the utter absence of a serious effort to restore the competition which has been destroyed, the plan submitted by The American Tobacco Company falls far short of the primary and imperative requirement of the court "that complete and efficacious effect shall be given to the prohibitions of the statute and a condition

created which shall be honestly in harmony with and not repugnant to law." We maintain that if The American Tobacco Company shall be allowed to break up into any number of parts and the present stockholders shall receive stock in each and every of the new companies in proportion to their holdings in the original company, the decision of the Supreme Court will not be a thing of value. Diversity of ownership is absolutely necessary to secure diversity of control. To reject the plan as fundamentally defective on this account is far from holding that an individual may not hold stock in competing corporations. We are not dealing with abstract propositions, but with aggregations of men and corporations that have been found guilty of violating the law and have been ordered to restore the competition they have destroyed. To require these violators of the law to disband and to forbid them by oneness of ownership to perpetuate the monopoly they have created, will cause no alarm to stockholders in corporations that are doing a legitimate business. This is the crucial question to be settled by this court, and the answer to this question will determine whether under existing law relief can be awarded "coterminous with the ultimate redress of the wrongs which are found to exist." A fundamental error in the plan proposed by The American Tobacco Company is that in determining where the ultimate control of the several companies will reside, it distinguishes between the common stock held by the twenty-nine individual defendants and that held by other individuals not named as parties in this cause. This distinction is wholly arbitrary. The court finds "that the combination as a whole involving all its co-operating or associated parts in whatever form clothed, constitutes a restraint of trade within the first section and an attempt to monopolize or a monopolization within the second section of the anti-trust act." This finding reaches every common stockholder and taints every share of the common stock with the vice of illegality. If the twenty-nine individual defendants are to bear the sins of the whole company, they should be put into a class and company all to themselves and the other companies should be left free from their unwholesome influence.

V.

We furthermore submit that there are no insurmountable difficulties in the way of an actual division of the assets of The American Tobacco Company and the formation of new corporations having no connection with each other either in ownership or control. The genius that could triumph over bitter rivalries, over international pride and prejudices, and reduce a thousand warring elements to a compact harmonious unit would find it easy to accomplish an equitable partition if it would concentrate its energies upon that task. Vast estates, kingdoms have been and are constantly partitioned. The principles of owelty of partition and in some instances of sales for division, could be justly invoked in a serious effort to comply with the mandate of the court. The difficulty of an equitable partition

lies not so much in the inability as in the unwillingness to make one. In its petition filed herein the tobacco company says, upon oath, that the assets of the company can be fairly distributed among fourteen companies. This is a complete answer to the suggestion that an actual equitable partition is impracticable. Give to the fourteen companies proposed the elements of complete independence; forbid the stockholders in any one of these companies from owning stock in any of the others and perpetually enjoin them from acquiring such stock, and a condition will be created in compliance with the judgment of the court. If A holds fourteen shares of common stock of The American Tobacco Company, what is the necessity for alloting to him a single share in fourteen different corporations? Why not give him his entire holdings in a single company? Possibly he would then have some incentive to give some attention to the management of his company. The necessary and doubtless sought for result of distributing the holdings of each individual among a large number of companies would be to render indifferent the five thousand and nine hundred small stockholders and leave the real control of all the companies in the hands of the twenty-nine individual defendants and a few other individuals not named as defendants, but who have always been allied with or under the control of the twenty-nine.

VI.

But if the difficulties in the way of a real dissolution of the combination and a real destruction of the monopoly are so great that they cannot be overcome, then let there be a candid confession of that fact and let the Supreme Court make such further orders as indicated in its opinion that the exigencies of the situation may require. The present status is more tolerable than the plan proposed by the trust, for if this plan shall receive judicial sanction, henceforward the trust will carry the law as an asset instead of a liability; henceforward the trust will do in the name of the law what it has heretofore done in its fear. If the law is powerless to save, it can at least refuse to sanction evil.

All of which is respectfully submitted for the consideration of this honorable court.

SAMUEL W. WILLIAMS,
*Attorney General of the Commonwealth of Virginia.*

T. W. BICKETT,
*Attorney General of the State of North Carolina.*

J. FRAYSER LYON,
*Attorney General of the State of South Carolina.*

If the actions taken in this case by the Attorneys General of the three States named had no other beneficial effect, it at lease called public attention to the great injustice done by the court's decision in said case to

the toiling masses of our people who are engaged in the tobacco industry.

My action in this matter was taken after consultation with you, and with others for whose opinion I entertain the highest respect, and my course in the matter was approved by them.

## Death of Hon. William E. Bibb, Assistant Attorney General.

It becomes my painful duty to record the death of the Assistant Attorney General of Virginia, the Honorable William E. Bibb, which occurred at his home in the city of Richmond on the —— day of December, 1910. I desire to record my high appreciation of the splendid character and worth of Mr. Bibb, both as a man and as a lawyer. He had faithfully discharged the duties devolving upon him as Assistant Attorney General, and with signal fidelity and ability, and in his death I feel that I have lost a dear friend, and that the State has lost a faithful and efficient public officer. His funeral and burial were attended by your Excellency, who in this manner attested your high appreciation of Mr. Bibb, both as a friend and as a public official.

## Hon. R. B. Davis.

On the 19th day of December, 1910, I appointed Honorable R. B. Davis, of Petersburg, Virginia, a gallant Confederate soldier and a lawyer of splendid ability and a citizen of fine character, and a Virginian of the highest type, to be the Assistant Attorney General of Virginia. Very much to my gratification and to the gratification of every one who knew Mr. Davis, he accepted the appointment, and is now in the faithful and efficient discharge of his duties as Assistant Attorney General of the State. I congratulate the State on securing his services in this important position.

## Conclusion.

Before concluding this report I must again, as in my former report, commend the valuable services of Mr. T. Gray Haddon, who, though styled on the pay-roll of the State as "Stenographer to the Attorney General," is really and in fact a most valuable assistant in the discharge of the important duties of this office, and I recommend that the next General Assembly of Virginia shall make a reasonable increase in his salary.

I append hereto as a part of this report an itemized statement of the expenditures of the appropriation made for the contingent expenses of this office.

Respectfully,

SAMUEL W. WILLIAMS,
*Attorney General of Virginia.*

## Statement.

*Showing the Current Expenses of the Office of the Attorney General from November 1, 1910, to November 1, 1911.*

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|---|---|---|---|---|
| 1910. | | | | |
| Nov. | 1. | Balance to credit of contingent fund..... | | $ 297 63 |
| | 9. | Beaufont Lithia Water Company for 100 gallons of lithia water.. ..... | $ 5 00 | |
| | 28. | Western Union Telegraph Company..... | 2 41 | |
| Dec. | 5. | Western Union Telegraph Company..... | 1 32 | |
| | | Southern Bell Telephone and Telegraph Company ..... | 13 05 | |
| | | Samuel W. Williams, Attorney General, for various items paid for by him..... | 14 40 | |
| 1911. | | | | |
| Jany. | 9. | Everett Waddey Company, for book cases and sundry supplies..... | 57 60 | |
| | | Western Union Telegraph Company..... | 2 22 | |
| | | Southern Bell Telephone and Telegraph Company ..... | 14 75 | |
| | | Samuel W. Williams, Attorney General, for various items paid for by him..... | 11 55 | |
| | 21. | John A. Skinner for taking down awnings.. | 1 50 | |
| Feby. | 9. | Samuel W. Williams, Attorney General, for various items paid for by him..... | 15 00 | |
| | 23. | Ideal Ventilator Company..... | 8 00 | |
| | | Lawyers Co-operative Publishing Company, for 26 to 28 L. R. A., N. S..... | 12 00 | |
| | | Western Union Telegraph Company..... | 2 42 | |
| | | Southern Bell Telephone and Telegraph Company ..... | 13 55 | |
| | | Everett Waddey Company, for sundry items furnished office..... | 7 00 | |
| | | M. B. Watts, for one year's subscription to Virginia Appeals..... | 5 00 | |
| | | Samuel W. Williams to be deposited in bank to credit of contingent fund..... | 110 86 | |
| | | | | $ 297 63 |
| March | 1. | Appropriation to defray current expenses to March 1, 1912. ..... | | $ 400 00 |
| | | To Eugene F. Ware for book "From Court to Court"..... | 2 00 | |
| | | Expressage on books from Wytheville, Va.. | 50 | |
| | | Typewriter ribbon ..... | .. 75 | |
| | | Postage ..... ..... | 13 55 | |
| | 6. | Telegram from E. H. Jackson, Washington. | 1 00 | |

| | | | | |
|---|---|---|---|---|
| April | 5. | To expenses of trip of T. G. Haddon to Petersburg, Va., to take some papers.... | 50 | |
| | 15. | To 150 1c stamps..... | 1 50 | |
| Aug. | 1. | To R. B. Davis, travelling expenses to Norfolk, Va., in connection with Jamestown Jockey Club case..... | 20 00 | |
| | 16. | Everett Waddey Company for sundry expenses ..... | 13 10 | |
| | 18. | Western Union Telegraph Company..... | 4 52 | |
| | | Southern Bell Telephone and Telegraph Company ..... | 18 00 | |
| | | Lawyers Co-operative Publishing Company. | 13 00 | |
| | 31. | S. W. Williams for items paid for by him.. | 6 20 | |
| Sept. | 27. | Postage ..... | 15 00 | |
| | | Bell Book and Stationery Company..... | 2 25 | |
| | | Southern Bell Telephone and Telegraph Company ..... | 8 65 | |
| | | | | $ 120 52 |
| Nov. | 1. | Balance to credit of contingent fund..... | | $ 279 48 |