

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1912

RICHMOND:
DAVIS BOTTOM, SUPERINTENDENT PUBLIC PRINTING.
1913

ANNUAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF VIRGINIA

FOR THE

YEAR 1912

RICHMOND:
DAVIS BOTTOM, SUPERINTENDENT PUBLIC PRINTING.
1913

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. Bocok	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	1902-1910
Samuel W. Williams	1910—
Richard B. Davis, Assistant Attorney-General, 1910.	
T. Gray Haddon, Clerk.	

REPORT.

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

SIR:

As required by law, I herewith submit my annual report embracing the work of this office for the year ending October 31, 1912.

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 these suits have been pending.

Cases in the Supreme Court of the United States.

1. *Virginia v. West Virginia*. By reference to my annual report for 1911 (pp. 13-18), will be seen a full report of the case down to the time that that report was published. The United States Supreme Court having refused to speed the cause until after the meeting of the West Virginia legislature, and as that body does not meet until January, 1913, nothing has been done in the case since the date of the last report. However, after the meeting of the West Virginia legislature the case will be pressed on behalf of the Commonwealth with such diligence as its importance demands and the then existing conditions will warrant.

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. On the 12th of March, 1912, the United States Supreme Court affirmed the decision of the Supreme Court of Appeals of Virginia.

3. *Norfolk and Suburban Turnpike Company v. Virginia*. This was on appeal from the decision of the Supreme Court of Appeals of Virginia refusing to grant a writ of error to review the order of the circuit court of Princess Anne county suspending the taking of tolls by said turnpike company until the roads were put in proper repair. The case was submitted on the 8th of April, 1912, and decided on June 10, 1912, the United States Supreme Court affirming the decision of the Supreme Court of Appeals of Virginia.

4. *Richmond, Fredericksburg and Potomac Railroad Company v. Commonwealth*. The status of this case, which is still pending in the United States Supreme Court, on appeal, has not changed since my last report, and the case has not yet been reached for hearing in the Supreme Court.

The legislature, by the act approved on the 14th day of March, 1912 (see Acts of 1912, p. 641), passed a law creating a special commission of five consisting of the Governor and the three members of the State Corporation Commission, together with a fifth man to be selected by the affirmative vote of any three of the above-named four officers, "with power and authority to represent,

to act for, and bind the Commonwealth and all of its political sub-divisions in negotiating and executing a contract with the Richmond, Fredericksburg and Potomac Railroad Company for "the compromise, adjustment and settlement of certain matters between the Commonwealth and the company," set forth in said act, which matters are the same as those involved in this litigation, that is to say, that whilst the litigation involved only a franchise tax assessed by the State Corporation Commission for the year 1907, the important principles involved in the case are, first, as to whether the said railroad company continues to enjoy immunity from taxation, and secondly, how much the company is due the State and its political sub-divisions on account of past due taxes, if anything. All of these matters by said act is made the subject of compromise, adjustment and settlement contemplated by said act.

The four members of the commission designated in the act selected Hon. M. P. Burks, of Washington and Lee University, as the fifth man on the commission.

The commission has entered upon the discharge of its duties, and negotiations have been opened and are now pending between the commission and the railroad company, and it is to be hoped and expected that a compromise and adjustment of the matters involved in this long drawn out controversy will be effected, and a result reached which will be satisfactory to the State and the said railroad company, and that hereafter this company will bear its proper burdens of taxation along with the other railroads of the Commonwealth.

Whilst the Attorney-General is not specifically mentioned in the act, the said special commission has called upon him to render such service and advice on behalf of the State as he might be able to do. I have cheerfully given the commission all the assistance in my power and will continue to do so until the matter is finally disposed of.

Cases Pending in the District Court of the United States.

1. *American Milling Company v. W. D. Saunders, Dairy and Food Commissioner et als.* This is a suit pending in the United States District Court involving important questions, both of law and fact, and the main question is whether the said District Court has any power or jurisdiction to interfere with the State Dairy and Food Commissioner in the administration of the pure food statute passed by the General Assembly of Virginia at the suit of a non-resident who proposes to sell pure food-stuffs in this State. This suit will be defended with such diligence as its importance demands.

2. *Dalton Adding Machine Company v. State Corporation Commission, of Virginia et als.* This suit involved the important question as to whether the said United States District Court, or the special tribunal of three judges contemplated by the recent act of Congress, has power to enjoin a threatened proceeding before the State Corporation Commission of Virginia against a foreign corporation for doing business in the State of Virginia for failing to comply with the laws of this State in failing to pay the fees and charges required by our laws of all foreign corporations before they are authorized to do business in this State. This case will be defended with that diligence which its importance demands, and it is confidently expected that the court will hold that it is without jurisdiction to grant a temporary injunction as prayed for in the bill.

Cases Before the Corporation Commission.

There have been a large number of hearings before the State Corporation Commission since my last annual report, in which the Attorney-General has felt it his duty to represent the Commonwealth, or to have his assistant present to represent the Commonwealth.

Cases Decided in the Supreme Court of Appeals of Virginia.

1. *Thornton v. Commonwealth*. On conviction of felony. Appeal from the circuit court of Charlotte county. Reversed.
2. *Ferrimer v. Commonwealth*. Misdemeanor. Appeal from the circuit court of Tazewell county. Affirmed.
3. *Pocahontas Consolidated Collieries Company, Inc., v. Commonwealth et al.* This case involved the validity of the tax imposed by section 13 of the revenue law of Virginia 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. Affirmed.
4. *Harris v. Commonwealth*. Misdemeanor. Appeal from the corporation court of Newport News. Reversed.
5. *Davis v. Commonwealth*. Misdemeanor. From the corporation court of the city of Newport News. Affirmed.
6. *Potts v. Commonwealth*. On conviction of murder. Appeal from the corporation court of the city of Portsmouth. Reversed.
7. *Virginia Brewing Company v. Commonwealth*. Suit to recover back liquor license tax. Appeal from the corporation court of the city of Lynchburg. Affirmed.
8. *Jeffries v. Commonwealth*. Misdemeanor. Appeal from the corporation court of the city of Roanoke. Reversed.
9. *Mullins v. Commonwealth*. On conviction of murder. Appeal from the circuit court of Wise county. Reversed.
10. *Commonwealth v. Armistead*. Misdemeanor. Appeal from the circuit court of Orange county. Reversed.
11. *Bass v. Commonwealth*. Misdemeanor. Revenue case. Appeal from the circuit court of Hanover county. Affirmed.
12. *Patterson v. Commonwealth*. On conviction of murder. From the circuit court of Rockbridge county. Reversed.
13. *Holly v. Commonwealth*. On conviction of larceny. From the circuit court of Tazewell county. Affirmed.

Cases Pending in the Supreme Court of Appeals of Virginia.

1. *Flint v. Commonwealth*. Misdemeanor. Appeal from the corporation court of the city of Buena Vista. Argued and submitted.
2. *Boyenton v. Commonwealth*. Felony. Appeal from the circuit court of Fauquier county.
3. *Commonwealth v. Wellford et als.* This case involves the proper construction of the collateral inheritance tax law of Virginia.
4. *Commonwealth et als. v. Schmelz, surviving partner*. From circuit court of Elizabeth City county.

5. *Tisdale v. Commonwealth*. Misdemeanor. From the corporation court of the city of Norfolk.

6. *Wright v. Commonwealth*. Rape. From the circuit court of Appomattox county.

7. *Polglaise v. Commonwealth*. Misdemeanor. From the circuit court of Spotsylvania county.

8. *Looney v. Commonwealth*. Murder. From the circuit court of Craig county.

9. *Saville, Clerk, v. Virginia Railway and Power Company*. This case involves the proper construction of the law providing for a recordation tax on deeds and other instruments. From the circuit court of the city of Richmond.

10. *Premium Register Company v. Tresnon, Commissioner of Revenue, etc.* Petition for mandamus.

11. *National Automatic Machine Company of Virginia v. J. B. Pace, treasurer of the city of Richmond*. Petition for mandamus.

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

AT LAW.

1. *Commonwealth v. John T. Jones, treasurer of Craig county* (2 cases). As there seemed to be no possible chance of recovering anything in these cases, and to keep them on the docket simply meant an accumulation of clerk's fees to be paid by the Commonwealth, I thought it best to have them dismissed.

2. *Commonwealth v. Phil. H. Gold et als., clerk of the circuit court of Frederick county*. Suit brought by the Commonwealth for the sum of \$1,250.00 claimed to be due by the said clerk. The decision was against the Commonwealth, and same will be appealed to the Supreme Court of Appeals of Virginia.

3. *Commonwealth v. W. H. Purkins, late treasurer of Middlesex county*. This was a suit by the Commonwealth to recover the sum of \$122.34, with interest, due by the said Purkins to the Commonwealth. Judgment for the Commonwealth.

4. *Radford Water Power Company v. State Corporation Commission*. Petition for correction of erroneous assessment of taxes. Petition refused.

5. *Whiting Manufacturing Company v. Commonwealth*. Suit dismissed at the request of plaintiff.

Cases Pending in the Circuit Court of the City of Richmond.

AT LAW.

1. *Commonwealth v. O. B. Thomas, treasurer Fluvanna county et als.*

2. *Commonwealth v. G. P. Barr, treasurer Washington county et als.*

3. *Commonwealth v. O. D. Foster, administrator R. D. Adams.*

4. *Commonwealth v. A. D. Phillis et als., sureties of Adams.*

5. *Commonwealth v. D. Mott Robertson et als.*

6. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

7. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

8. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

9. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

10. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

11. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

12. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

13. *Commonwealth v. Richmond, Fredericksburg and Potomac Railroad Company.*

IN CHANCERY.

1. *Commonwealth v. P. H. Huffman et als.*

2. *Commonwealth v. Walter Millan.*

3. *Commonwealth v. Jas. Hilton's administrator.*

4. *Commonwealth v. Martha Goode.*

5. *Commonwealth v. Spencer D. Ivey.*

6. *Commonwealth v. J. T. Young.*

7. *Commonwealth v. A. A. Chapman.*

8. *Commonwealth v. V. Vandegrift et als.*

9. *Commonwealth v. Sarah E. French.*

10. *Commonwealth v. Donohoe, treasurer.*

11. *Richmond, Fredericksburg and Potomac Railroad Company v. Morton Marye, Auditor, etc.*

12. *Richmond, Fredericksburg and Potomac Railroad Company v. Morton Marye, Auditor, etc.*

13. *Richmond, Fredericksburg and Potomac Railroad Company v. Morton Marye, Auditor, etc.*

14. *Richmond, Fredericksburg and Potomac Railroad Company v. R. T. Wilson, clerk, etc.*

15. *Shenandoah Lime Company et als. v. Wm. Hodges Mann, Governor, etc.*
This is an important case, as it involves the constitutionality of the act passed by the legislature in 1912, entitled "An act to provide for the working of certain long-term or desperate convicts by the Superintendent of the Penitentiary, the Governor and the Commissioner of Agriculture, for the manufacture of ground limestone and oyster shells, and incidentally for the disposition of the same, and the by-products suitable for road construction, to the citizens of the State." The lime companies in the State have been granted a temporary injunction restraining the officers named in the act from carrying out the provisions of the act, pending the decision of the court on the question of the constitutionality of the act, which question was submitted to the court in the early part of this month. I wish to acknowledge, with thanks, the valuable services which have been rendered in the case by Messrs. C. V. Meredith, John Pickrell, Wm. Hodges Mann, Jr., and A. E. Strode. Realizing the importance of this legislation to the farmers of the State, I shall push the case with all due diligence, and I deem it proper to add that Mr. Westmoreland Davis, the president of the State Farmers' Association, secured the services of Messrs. Meredith and Pickrell, and has rendered valuable services in furnishing data and information to the attorneys engaged in the defense of this important case.

16. *City of Lynchburg v. County of Amherst et als.* This case involves the question whether or not the property of the city of Lynchburg, situate in

the county of Amherst, and used in connection with its water-works, is exempt from taxation. The commissioner of the revenue of the county of Amherst assessed the property for State and county taxation, and the city of Lynchburg is now seeking to enjoin the treasurer of Amherst county from selling its property to satisfy these taxes.

It will be seen from the above that I am gradually having these old cases, some of which have been pending for thirty years or more, disposed of. I shall continue my efforts along this line.

Opinions Given from November, 1911, to November, 1912.

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 at the seat of government; and a large number in writing and orally to the Superintendent of Public Instruction as to the title to school property in school districts which desire to borrow money from the Literary Fund under the statute authorizing such loans to be made for the building of school-houses:

To the Governor.

RICHMOND, VIRGINIA, *November 15, 1911.*

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

DEAR SIR:

I have given due consideration to the question submitted to me by you in your letter of October 17, 1911, which is as follows:

DEAR SIR:

Please advise me whether the General Assembly of Virginia can, without violating the Constitution of the State, pass an act requiring the several counties composing the congressional districts to establish an institution in each of said districts to care for the poor of the counties comprising the districts, instead of doing so under the system at present in operation.

If district institutions can be established the aggregate fixed charges can be reduced, better buildings and arrangements for the care of the poor and infirm of the State can be constructed, and made, and some important and troublesome problems can be solved.

Very truly,

WM. HODGES MANN,
Governor.

I am of opinion that the General Assembly of Virginia can, without violating any provision of the Constitution of this State, pass an act for the purpose mentioned in your letter. It is a well-settled rule that the legislature of Virginia is omnipotent on all questions of legislation except so far as restrained by some positive inhibition of the Constitution of the State of Virginia, or of the Constitution of the United States, and I find no constitutional provisions bearing

directly on this question, except the provision contained in section 110 of the Constitution, which provides for the appointment, in such manner as may be provided by law, of one superintendent of the poor for each county. The office of overseer of the poor is not a constitutional office under the present Constitution, and can therefore be dealt with or abolished at any time at the will of the legislature.

To carry out the scheme and accomplish the objects set forth in your letter will require an amendment of all the laws on the statute books relating to this subject, as well as the laws which prescribe the powers of the boards of supervisors for the State; but this, in my opinion, presents a legislative problem and not a constitutional difficulty.

The same may be said of the new legislation which will be necessary to carry out the objects sought to be obtained by the establishment of the institution referred to in your letter.

Your letter and this opinion deal only with the question so far as the counties are concerned. You have not submitted, and I have not considered, the question as to how far, if at all, the existence of a city in a given congressional district may or may not affect the constitutional question presented.

I have the honor to remain,

Very truly yours,

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

RICHMOND, VIRGINIA, *February 19, 1912.*

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

MY DEAR SIR:

I beg to acknowledge receipt of your communication of February 16, 1912, addressed to me, and which is as follows:

DEAR SIR:

On the 14th of February, 1912, an act passed by the legislature of Virginia re-submitting to the people for approval and ratification the amendments to section 119 of article 8 of the Constitution of Virginia in relation to the commissioners of the revenue in the cities, and section 120 of article 8 of the Constitution of Virginia in relation to treasurers in the cities, was presented to me for action. The question of the constitutionality of this act, if it can be called an act within the meaning of that instrument, is one which I am considering and upon which I desire to have your opinion as Attorney-General of this Commonwealth. The act in question was passed because, in the opinion of the legislature, the previous submission of the amendments to the people was not properly made, and that therefore the legislature had the right by this act to resubmit it. I will not go into the facts because I suppose you are entirely familiar with them.

There is another question upon which I also desire your opinion; that is, whether the so-called act is an act at all under the provisions of section 50, section 76, and section 196 of the Constitution. That is, whether the Governor has anything to do with the proceedings of the legislature for amendment to the Constitution of the State of Virginia.

I have, as you know, five days in which to decide the question, not including Sunday, and will be very glad for you to let me have your opinion as soon as possible.

Very truly yours,

WM. HODGES MANN,
Governor.

I have the honor to reply thereto as follows:

The only provision of the Virginia Constitution which deals with the question of amendments to the Constitution is section 196 of article V of the Constitution, which was adopted in 1902.

This provision of the Virginia Constitution is in substance the same as article XVIII of the Constitution of the State of Pennsylvania, which is as follows:

“Article 18.—Future Amendments.—Section 1. Any amendment or amendments to this Constitution may be proposed in the senate or house of representatives; and if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon and the secretary of the Commonwealth shall cause the same to be published three months before the next general election in at least two newspapers in every county in which such newspapers shall be published; and if in the General Assembly next afterwards chosen such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house the secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time, at least three months after being so agreed to by the two houses, as the General Assembly shall prescribe; and if such amendment or amendments shall be approved by a majority of those voting thereon such amendment or amendments shall become a part of the Constitution: but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately.”

Section 196 of the Virginia Constitution is as follows:

“Section 196.—Any amendment or amendments to the Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and noes taken thereon, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates, and shall be published for three months previous to the time of such election. If, at such regular session, the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such

times as it shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors, qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become a part of the Constitution."

The Supreme Court of Pennsylvania in passing on the above provision of the Pennsylvania Constitution, in the case of *Commonwealth ex rel. Jno. P. Elkins, Attorney General, v. W. W. Griest*, 196 Pa. St., 396, 50 L. R. A., 568, and following, held that the proceedings taken by the legislature under this article of the Constitution of Pennsylvania for an amendment to that Constitution "is not law-making, which is a distinct and separate function, but it is a specific exercise of the power of a people to make its constitution." "It is constitution-making, it is a concentration of all the power of the people in establishing organic law for the Commonwealth, for it is provided by the article that, 'if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution.'"

"The question is, must a proposed amendment to the Constitution be submitted to the Governor, and be subjected to the requirement of his approval? The first and most obvious answer to this question is that the article which provides for the adoption of an amendment is a complete system in itself, from which the submission to the Governor is carefully excluded, and therefore such submission is not only not required, but cannot be permitted."

The court further holds that the only authorities which have any right to assent to, or dissent from, proposed amendments to the Constitution are the two houses of the General Assembly and the people. And the court further holds that the necessity for the assent or dissent of the Governor cannot be read into the Constitution by implication. The opinion further discusses the question as to whether provisions of the Pennsylvania Constitution, which are in substance the same as sections 50 and 76 of the Constitution of Virginia, have any bearing upon the question, and the Pennsylvania court holds that it does not, but on the contrary holds that the provisions similar to sections 50 and 76 referred to above, apply exclusively to the subject of *legislation*, that is to the actual exercise of the *law-making power* of the Commonwealth in its usual and ordinary acceptation, and the court lays down the rule as being too plain for argument that unless there was somewhere else in the Constitution provisions for creating amendments thereto, than the power of legislation conferred by sections 50 and 76, that the power could not be exercised under those provisions of the Constitution. See also specially the authorities cited on page 574.

It is a well-settled rule of construction that where a constitutional provision or statute of one State which has been construed by its highest court is adopted by another State, the construction so given is also adopted. See *Norfolk and Western Railroad v. Old Dominion Baggage Company*, 99 Va., 11; *Norfolk and Western Railroad Company v. Cheatwood*, 103 Va., 356, 357.

In the case of *Hollingsworth v. Virginia*, 3 Dallas, 378, 1 L. Ed. 644, the question submitted to the Supreme Court of the United States was whether or not an amendment to the Constitution of the United States had to be submitted to the President for his approbation under section 7, article I, of the Constitution of the United States, which declared that "every order, resolution

or vote to which the concurrence of the Senate or House of Representatives may be necessary (except on the question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him. On being disapproved by him shall be repassed by two-thirds of the Senate and House of Representatives."

In the course of the argument of Attorney-General Lee as to whether it was necessary that the proposed amendment should be approved by the President, Mr. Justice Chase stated to the counsel as follows: "There can surely be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition of adoption of amendments to the Constitution." On the day following the argument the unanimous court held that the approval of the President was not necessary.

This case has been uniformly followed so far as I have been able to ascertain.

See also case of *Warfield, Governor of Maryland, v. Vaidiver*, 101 Md. Rep. 78, where the Maryland Court of Appeals, dealing with constitutional provisions practically the same as the provisions of the Virginia Constitution, held that a bill proposing amendments to the Constitution formulated by the General Assembly in the manner prescribed by the Maryland Constitution, does not require the approval of the Governor before it can be voted on by the people, and that the Governor has no authority to veto such a bill. This case seems to have been exhaustively argued by counsel, and well considered by the court, and the authorities cited in support of the court's ruling, so far as I have been able to examine them in the limited time at my command, fully sustain the conclusions reached by the court in its opinion.

See page 113, where the court holds that a proposal to amend the Constitution is not legislation, and that it never becomes a law, though adopted by the legislature, but if adopted or ratified by the people it thereafter is incorporated in, and becomes a part of, the Constitution, and the distinction between this constitutional provision for amendment and legislation in its proper sense is clearly drawn. See also page 115, where the court lays down the rule, "A bill proposing an amendment to the Constitution and nothing more, would not become a *law* if signed by the Governor nor would it become a *law* if passed by three-fifths vote over his veto; because it is required to be submitted to the people for their adoption or rejection; and not until it shall appear that a majority of the votes cast at the polls on such proposed amendment are in favor thereof can the Governor proclaim that it has been 'adopted by the people of Maryland as part of the Constitution.'"

The case further holds that the Senate and House of Delegates in acting on this question of amendments to the Constitution is nothing more than an agency chosen by the people to express their views in regard to amendments to the organic law, and that the executive has no right to step in between the agency and the people and say that without *his* approval they shall not be permitted to express their views on measures amendatory of the organic law.

And after mature consideration of the question the court concludes as follows:

"In every jurisdiction, where the right of the President of the United States and of the Governor of a State to sign or to veto a proposed constitutional amendment has been drawn in question, the courts have, without a single exception, denied the existence of such a right."

If the rule were otherwise, then instead of the people having the right to vote on amendments to the Constitution where a majority of the two houses of the legislature is willing to submit the amendments to the people as is provided in section 196 of our Constitution, if the Governor had the power to veto the legislative action, then it would require under other sections of the Constitution a two-thirds vote of each house of the General Assembly to submit the proposed amendments to the people for ratification or rejection. This result would be in the very teeth of the very Constitution which alone deals with the subject. See section 196.

The Supreme Court of the State of Nebraska has laid down the same rule in regard to amendments to the Constitution under provisions of its State Constitution practically similar to the provisions of the Virginia Constitution. See *in re* Senate File No. 31, Supreme Court of Nebraska, reported in 41 S. W. Rep., 981, and cases cited.

In this case (see page 984) the court says that considerable stress was laid on the fact that the legislature used the formula, "Be it enacted" in passing the measure in question. The court fully disposes of this objection by saying that there seemed to be nothing in it. That all that was necessary was substantial legislative compliance with the constitutional provisions relative to submitting to the people amendments to the Constitution, and it was not material in what form it was done.

In the case of *State v. Mason*, 9 So. Rep., p. 795, the court there held under constitutional provisions of the State of Louisiana practically similar to the constitutional provisions of Virginia bearing on the question, that the fact that the Governor of the State vetoed the legislative action submitting the amendments to the Constitution to the people, did not at all affect the question, the court saying in conclusion on this point as follows: "Our conclusion is that the signature of the Governor to the proposition for the amendment to the Constitution under discussion is not required by the Constitution, and that his disapproval of it did not affect its validity." *Ib.* p. 796.

In Jameson on Constitutional Conventions, section 556 to 565, inclusive, the text and authorities cited fully sustain the position that the approval of the Governor is not necessary to the validity of the action of the legislature in submitting the amendments to the Constitution to the people. A strong illustration to the contrary is there given in a resolution offered in the Senate of the United States by Senator Trumbull, of Illinois, the chairman of the judiciary committee of that body, to the effect that an amendment to the Constitution of the United States having been inadvertently presented to the President for his approval, it was declared by this resolution that his approval was unnecessary to give effect to the action of Congress in proposing said amendments. See section 559.

Having arrived at the conclusion, both upon reason and authority, that section 196 of the Constitution is both exclusive of all other provisions of the Constitution, and conclusive on all questions relative to the submission of amendments to the Constitution to the people for ratification or rejection, and in the language of the Pennsylvania court, that said section is "a complete system in itself," and that legislative action thereunder is entirely independent of the approval or disapproval of the Governor, I beg leave to respond to the question submitted by your excellency as follows:

First. You ask, whether in my opinion the so-called act is an act at all? In reply, I am of opinion that although the legislative action in question may have originated in the form of a bill, and progressed through the legislature in all of its stages as a bill, and may have reached your Excellency in the shape of an act, yet in fact it is in substance but a legislative compliance with section 196 of the Constitution, and not a bill within the meaning of either section 50 or section 76 of the Constitution, and is in no way controlled by the provisions of either of said sections.

And replying directly to the question submitted by your Excellency as to "whether the Governor has anything to do with the proceedings of the legislature for amendments to the Constitution of the State of Virginia," I am of opinion that he has not.

And being of this opinion, I presume that your Excellency does not desire that I should at this time consider the further question suggested in the communication of your Excellency as to whether the so-called act is or is not constitutional. This is a matter, in my judgment, which can only be properly determined by the courts.

I have the honor to be,

Yours most respectfully,

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

RICHMOND, VIRGINIA, *March 1, 1912.*

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

DEAR SIR:

I have your favor of the 29th of February, which is as follows:

MY DEAR SIR:

I note in the appropriation bill pending before the General Assembly, that the salaries of three officers have been increased, and I think properly. The officers to which I allude are Commissioner of Labor and Statistics, Superintendent of Public Printing, and Commissioner of Agriculture. Section 83 of the Constitution provides:

"The salary of each officer of the executive department, except in those cases where the salary is determined by this Constitution, shall be fixed by law; and the salary of no such officer shall be increased or diminished during the term for which he shall have been elected or appointed."

The only question, therefore, is whether these offices are constitutional and executive.

I will be glad for you to give me your opinion as Attorney-General as to how section 83 operates upon the offices I have named in this letter.

I beg leave to reply as follows:

First. As to the Commissioner of Labor and Statistics. I find that this office was created by act passed on March 3, 1898, and whose term of office was for two years. I find no change as to the manner of the appointment or the term of office. The Constitution, in section 86, provides as follows: "The General Assembly shall have power to establish and maintain a Bureau of Labor and Statistics under such regulations as may be prescribed by law."

The legislature clearly had the power to create this bureau independent of this constitutional provision, and it is to be noted that the Constitution says nothing about the Commissioner of Labor and Statistics except in section 11 of the schedule to the Constitution, and it is provided amongst other things that the Commissioner of Labor and Statistics should continue in office until March 1, 1904. Taking this as the period of the beginning of his term under the new Constitution, a new term will begin on the 1st day of March, 1912, and will continue for two years, and the legislature being now in session I do not think it would be a reasonable construction of section 83 of the Constitution to hold that although this officer might clearly come within the meaning of an officer of the "executive department," that the legislature in session when his term begins could not prescribe the amount of his salary, for he has no salary, certainly no appropriation for any salary, until it is fixed by the legislature. It cannot be held to be raising or lowering his salary during his term of office, but fixing his salary, which is clearly within the power of the legislature to do.

Second. As to the Superintendent of Public Printing. I can find nothing in the Constitution in regard to this officer except in section 11 of the schedule which provides that this officer shall continue in office until the 1st of March, 1904, and the statute, section 223, prescribes that he shall be elected every four years by the joint vote of the two houses of the General Assembly. This would make his term, for which he has been elected by the legislature, now in session, commence on the 1st day of March, 1912, and the same reasoning applied above to the office of Commissioner of Labor Statistics would apply to this officer.

Third. Commissioner of Agriculture and Immigration.—The Constitution, article X, provides for the creation of a Department of Agriculture and Immigration, and section 143 of this article provides for the election by the people of a Commissioner of Agriculture and Immigration whose term of office shall be four years, and under the law the term of office of the present commissioner commenced on the 1st day of February, 1910, for the term of four years.

This is clearly a constitutional office, and the only question is whether he shall be classed as "an officer of the executive department," within the meaning of section 83 of the Constitution.

The definition of an "executive officer" seems to be much broader than the terms "an officer of the executive department," as mentioned in said section of the Constitution, the books seeming to hold that all officers charged with any duty in connection with the enforcement of the laws is an executive officer, there being little or no difficulty in determining which is a legislative or judicial officer. In view of the uncertainty or doubt existing as to whether the language "an officer of the executive department" as used in section 83 of the Constitution only applies to the officers mentioned in article V of the Constitution under the head of "executive department," or whether it applied to all executive officers, I take the liberty of suggesting that the following course be pursued, namely, that the legislature shall appropriate the sum of \$2,800.00 to pay the salary of the Commissioner of Agriculture and Immigration, as now provided by law, for the years 1912 and 1913, and then let the appropriation bill provide for an additional sum of \$700.00 a year for 1912 and 1913 as an increase of his salary, and if the matter is submitted to the courts and it is held that the increase of the salary is unconstitutional and consequently invalid, then the appropriation of \$2,800.00 annually would remain in full force, but if the appropriation is

in a lump sum of \$3,500.00, and the courts should hold it unconstitutional, then a serious doubt might arise as to whether the commissioner could receive the salary of \$2,800.00 under the law in that shape, and for this reason I suggest the course above indicated in order to remove any possible doubt on the subject.

I have the honor to be,

Very truly yours,

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

RICHMOND, VIRGINIA, March 12, 1912.

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

MY DEAR SIR:

I have the honor to acknowledge receipt of your communication of the 11th inst., addressed to me, and which is as follows:

DEAR SIR:

I am considering House Bill No. 175, "In relation to the assessment for local taxation of the rolling stock of railroad corporations," and this evening I heard the arguments of attorneys who contended that the act was unconstitutional; certainly, so much of it as provides for the local taxation of the rolling stock of Virginia railroad corporations.

First. Is the act constitutional in-so-far as it provides for the assessment of the rolling stock of Virginia railroad corporations for local taxation?

Second. Is it constitutional in-so-far as it provides for the assessment of the rolling stock of foreign railroad corporations for local taxation?

Third. Is it constitutional in-so-far as it provides for the assessment of the rolling stock of electric railroad companies?

Fourth. If some of the provisions are constitutional and others not, are the constitutional provisions of such a character that they will be upheld and enforced by the courts?

Fifth. What is my duty in reference to the act in question if some of the provisions are constitutional and able to stand by themselves, and others are not?

As I must act on this bill on Tuesday, I will thank you to let me have a reply at your earliest convenience.

Very truly yours,

WM. HODGES MANN,
Governor.

From an examination of the act it will be seen that it provides for three distinct methods of local taxation.

The first is on the rolling stock of the Virginia railroad corporations which will be hereinafter considered; second, foreign corporations doing business in this State are assessed for local taxation on the average amount of rolling stock habitually used by them in this State. This assessment is made by the Corporation Commission and the commission is required to make an apportionment of such taxes for local purposes among the various counties, cities, towns and

school districts in and through which such companies respectively operate and pass, and provides that the foreign railroad corporations shall pay these taxes to the treasurers of the respective counties and the collectors of the respective cities; and the third provision of the act relates to electric railway companies and gives to certain cities the right of local taxation of electric railways as in said act provided.

I have heard of no objection being urged against the constitutionality of the last two named provisions of this act, and in my opinion both of these provisions, namely, the provision as to taxing foreign railroad companies on the basis named in the act and distributing the taxes in the manner mentioned therein, is clearly constitutional and within the power of the legislature to enact, and I think the same is true of that provision of the act in regard to electric railways, and if the act is clearly within the legislative authority as to both, or either, of the provisions, then I respectfully submit that the bill should be approved by the Governor, leaving the courts to deal with the other provision of the act, as to which it is contended that the law is unconstitutional.

I need not cite authorities to sustain the well-settled proposition that an act may be constitutional in part and unconstitutional in another part, and where this is true, although the courts may declare a part of the act unconstitutional, this does not in any way impair the validity of that part of the act which is constitutional.

In considering the first provision of the act which taxes the rolling stock of domestic railroad corporations at the place where the principal office of such railroad is located in this State, I beg to say that from a careful investigation of the laws in force relating to the taxation of the rolling stock of domestic railroad corporations prior to the passage of the act now under consideration, it will be seen that there is no constitutional provision or statute which in express terms fixes the situs or place for taxing the rolling stock of railroads for local purposes, and it is upon general principles of law, or it may be said upon common law rules, that the situs is placed or fixed in the city or town where the railroad corporation has its principal office, and this is done by analogy to the rule applicable to natural persons, namely, that the situs or place for the taxation of personal property is the place of residence of the person owning the personal property liable to taxation.

In the case of *State v. Severance*, 55 Mo., 378, 388, the Supreme Court of Missouri, speaking of the situs of personal property belonging to railroads for the purposes of taxation, says:

“This notion of the situs of personal property following the personal residence of the corporation, is a legal fiction, but is not an unbending and uncontrollable principle of law. It may be modified by the legislature. The rolling stock of a corporation is in a constant state of transition, and has no more real local existence in one county than another.”

From which it follows that there is no constitutional or statutory rule which gives to the localities in which the office of the railroad company is situated any fixed or vested right to the benefit of the taxation arising from this class of property belonging to domestic corporations, and the act in question leaves the methods or means of assessment of this class of property, and the rates of local taxation thereon, exactly where it existed prior to the passage of this act, and if any inequality in the method or rates of taxation exist, it is only such

inequality as arises from the necessity of the case and from the movable, transitory and unstable character of the property which is the subject of taxation, and follows a method which has prevailed in this State without serious question or objection ever since the adoption of the present Constitution.

It is argued that this act is objectionable because it fails to provide proper means for the collection of this tax, to which there are two answers: First, that the general machinery provided by the statutes of this State for the collection of taxes will apply and be effective for the collection of this tax; and secondly, the general principles of law will apply. The Missouri Supreme Court, in the case of *State v. Severance*, *supra*, meeting a similar objection, says:

“But this is not an insuperable objection. The well-known rule is, that where a statute creates a right and gives no remedy, the party may resort to the usual remedy applicable to such a case.”

An argument against the constitutionality of the act is sought to be based upon the ground that the rate of taxation is different in the different localities; that is, the different cities in which the principal offices of the different Virginia railroad corporations are situated. If this is an element important to be considered by your Excellency in passing on the question as to the constitutionality of this act, it is submitted that there is no way known to the law by which this fact can be brought to the attention of your Excellency, for whilst on a question of general policy which enters into the passage of a law it may be that the Governor can hear testimony bearing on the act under consideration, yet I submit that on a question of the constitutionality of the bill, based upon the existence of extrinsic facts, the Governor cannot hear or consider outside evidence, for the law presumes that the legislature has duly considered all questions of this character and that the legislature has arrived at just and proper conclusions, and that its acts are constitutional.

Another principle equally sound can be invoked in support of the acts of the legislature, and that is the rule laid down in *Henry's case*, 110 Va., 879, where it is said that:

“The power of the legislature of the State is supreme, except so far as it is restrained by the State or Federal Constitution, and even in case of doubt as to the power, all doubts are to be resolved in favor of the existence of the power. The courts have no power to declare an act unconstitutional, unless it is so clearly and plainly so that there can be no doubt on the subject.”

It is submitted that the rule is even stronger as applied to the action of the executive, who should approve the action of the legislature and leave to the courts the final determination of the question as to the constitutionality of the law about which the executive may entertain the most serious doubt as to its constitutionality, for it is only in cases of plain and manifest repugnancy of the law to the Constitution that the executive should interpose his veto of the legislative action.

If the act under consideration had not been passed, under the existing laws exactly the same method of assessment and collection of taxes on the rolling stock of domestic railroad corporations would prevail as will prevail under the act under consideration if it becomes a law, the only difference being that

without the act under consideration the cities or towns in which the principal offices of the railroads are situated would receive the benefit of the whole of these taxes, whilst under the act in question, if it becomes a law, such cities and towns would receive only part of the taxes, and the balance would be distributed in the mode designated in the act.

To argue that any tax is unjust or burdensome does not meet the question of constitutionality, for it is well-settled that where the power to tax exists it carries with it the power to destroy, and in all of these cases it is not a question for the executive or for the courts to determine whether the particular tax in question is unjust or burdensome, but it is a question of power in the legislature which levies the tax.

See *McCray v. United States*, 195 U. S., 27, 56, and cases there cited.

In a well-considered line of decisions the Supreme Court of the United States has laid down and frequently approved the rule to be found in *Patton v. Brady*, 184 U. S., 608, 620, which is as follows:

"The legislature must therefore determine all questions of State necessity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made."

See also *Thomas v. Gay*, 169 U. S., 264, 283, *McCray v. United States*, 195 U. S., 27, 58.

After as careful investigation of the matter as I have been able to give in the short time at my command, I conclude that there is no provision of the State Constitution which prohibited the legislature from passing said act; that in passing the act the legislature acted within its powers, and it follows that in my opinion the said act is therefore not unconstitutional in whole or in part.

I therefore have the honor to answer in the affirmative the first four questions submitted in the letter of your Excellency, and as to the fifth question, in my opinion, if some of the provisions of the act are constitutional and able to stand by themselves, and others not, then it would be the duty of the executive to approve the bill, leaving the courts to finally determine the question as to the constitutionality of that part of the bill about which the executive might entertain some doubt.

Respectfully submitted,

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

RICHMOND, VA., March 15, 1912.

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

DEAR SIR:

Replying to yours of this date as to whether or not the act entitled "An act to invest in boards of supervisors of counties having a population greater than 300 inhabitants per square mile, as shown by the United States census, the same powers and authority now vested or hereafter conferred upon common councils of cities and towns," is constitutional, I beg to say that the Attorney-General is not now in the city, but before the passage of this bill he was requested by Mr. Robinson Moncure to give him a statement as to his personal

views upon the constitutionality of the proposed act, a copy of which letter I herewith enclose. At the time this letter was written, however, the Attorney-General assures me he had no idea that it would be used in any way to affect the passage or defeat the bill, and understood he gave his opinion to Mr. Moncure as a personal matter. But the Attorney-General, however, is still of the opinion expressed in that letter.

The Constitution itself provides for the classification of the various subdivisions of the State, to-wit, counties, cities and towns, and divides the cities into first and second class. Having made this division, it would seem that where the same Constitution authorized the legislature to give special powers of legislation to the governing boards of either the counties, cities or towns by general laws, it means by the words "general laws" laws that apply to each one of the sub-divisions and classifications so made by the Constitution itself, and if this be the true construction, it is perfectly apparent that the law now under consideration is not a general law, because it applies only to such counties as have a population exceeding 300 to the square mile; and I am informed that there is but one county, to-wit, the county of Alexandria, in the State of Virginia, which has a population equal to that designated in the act, so that the act could not now operate in any county except Alexandria county.

If the legislature, however, under this provision, has the power to make a further classification and to confer the power of legislation upon the boards of supervisors in the counties by general laws which will apply equally to all of the classes so made, instead of to the general class of counties as made by the Constitution itself, the proposed act may not be liable to constitutional objection on that ground.

In a somewhat similar case which arose in New Jersey, the provisions of the statute were made to authorize the township committee in any township in the State not containing an incorporated city or borough wholly or in part within limits, to pave or macadamize any street or streets, roads, etc., in the said township, and it was objected that the law was unconstitutional because it was not a general law and that such provision under the Constitution could not be made except by general law, and the court, in passing upon this contention, says:

"The classification on which this act rests is a classification setting apart townships not having an incorporated city or borough within the township bounds from the other townships in this State. * * * * * There is no quality which distinguishes the townships so circumstanced from the other townships of this State, or the roads in such localities from other highways in this State. A classification of this character is plainly insufficient to answer the essentials of a general law."

State v. Township Committee of Northampton (N. J.). 14 Atl. Rep., 587.

In a note to the case of *State v. Ellet* (Ohio), 21 Am. St. Rep., 780, it is stated as follows:

"The authorities are agreed that a law general in form, but special in its operation, violated a constitutional inhibition of special legislation as much as though special in form; and they are also agreed that, for the purpose of applying different rules to different subjects, the legislature

cannot adopt a mere arbitrary classification. To permit that would open the door to a complete evasion of the Constitution. Thus in *Commonwealth v. Patton*, 88 Pa. St. 258, the law was general in form, but in fact it could apply to only one county in the State, and never, whatever changes might come, could apply to any other. It was held to be special legislation. In *Devine v. Commissioners*, 84 Ill. 590, the law, by its terms, applied to all counties in the State having more than a specified population. As there was but one county in the State having that population, the court held it to be a mere device to evade the constitutional provision prohibiting special legislation."

In the limited time I have had it has been impossible for me to get at any very accurate conception of the extent to which the legislature may class subjects under similar provisions, but it has appeared to me that the Constitution intended to fix the counties of the State as one class, and when it allowed the legislature to give the boards of supervisors special powers, by general laws, it meant by laws that were applicable to all counties.

The further objection to this bill is that, although the constitutional provision allowed the legislature to give special powers of legislation to the boards of supervisors, the bill in this case does not give to the boards of supervisors of the counties which are mentioned the power to legislate, but simply the power to suggest to the judge of the circuit court legislation which in their judgment will be beneficial to the county, and makes the judge of the circuit court in the last resort the power or authority for establishing such laws. This provision seems to me palpably contrary to the Constitution, which requires the legislative, executive and judicial branches of the government to be kept separate.

By the terms of the bill legislative powers are proposed to be given to the boards of supervisors, and these legislative powers are by the same bill submitted to the final decision of the judge of the court, which seems to me to be in contravention of the provisions of the Constitution, and since the power of the legislature in the matter of giving these special legislative powers to the boards of supervisors are to be by general laws, which are not in conflict with the other provisions of the Constitution, it seems to me the proposed act is in violation of these other provisions, and it is therefore unconstitutional.

To summarize the whole matter up, it seems to me that it is at least questionable whether or not the proposed act is not unconstitutional on the ground that it is not a general law within the meaning of the Constitution, and further, that even although it may not be obnoxious to the constitutional objection on that ground, it is liable to the constitutional objection that it does not give the power of legislation to the board of supervisors, but gives it to the judge of the circuit court, which is not within the authority granted the legislature, and is contrary to the whole spirit and tenor of the Constitution.

In reference to your inquiry as to the constitutionality of the act entitled "An act to relieve J. L. Addington, J. B. Wells, Morgan Bolling, and W. R. Collier, late members of the board of supervisors of Wise county, from refunding certain moneys received by them for services rendered in connection with the building of macadam roads in Wise county," the bill states on its face that it is passed because members of the board of supervisors have been paid on account of their salary an amount greater than the amount allowed by law, and the

object of the bill is to relieve them from the obligation of refunding the amount of the money so paid in excess of the amount to which they are entitled by law. In the case of *Johnson et als. v. Black et als.*, 103 Va., p. 478, the question arose as to whether or not members of the board of supervisors could be allowed compensation above the amount allowed by law, and the supreme court held that it could not be allowed, and that the county was entitled to the recovery from the supervisors of any amount of money which had been paid to them in excess of the amount allowed by law, and the decision of the court, as stated in the syllabus of the case, is as follows:

"The only compensation provided by law for supervisors of a county is the per diem and mileage fixed by section 848 of the Code (1904). No extra charge can be made by them for attendance on committees, or for other supposed beneficial services. If the compensation is inadequate, they can resign. To take more than is allowed by law is a fraud in law upon the rights of the tax-payers of the county, and restitution may be compelled."

There can be no question that under this decision the parties mentioned in the bill are liable to the county for the amount of money which they have received in excess of the compensation allowed by law, and this bill is expressly intended to relieve them from that liability.

The bill is therefore in conflict with section 63, of clause 8, of the Constitution, which is as follows:

"The General Assembly shall not enact any local, special, or private law in the following cases: * * *

"8. Remitting, releasing, postponing, or diminishing any obligation or liability of any person, corporation, or association, to the State or to any political subdivision thereof."

For these reasons it seems to me that the act is clearly unconstitutional.

In reference to your inquiry as to the constitutionality of the act entitled "An act to release certain tax judgments against the land of J. R. Caldwell, in Culpeper county, Va.," I am of opinion that the same is unconstitutional. It appears from the bill that there are certain judgments of the Commonwealth against W. A. Robertson which are docketed in Culpeper county, and constitute a lien against the land of J. R. Caldwell, as set out on the face of the bill, and the purpose of the bill, as declared on its face, is to cancel and annul the said judgments and to authorize the clerk of the circuit court of Culpeper county to mark the same satisfied and released on the margin of the book where the judgment is docketed.

This act releases the claim of the Commonwealth under the judgment referred to as against the judgment debtor, W. A. Robertson, and also releases the lien on such judgment against certain lands, and is in my judgment clearly in conflict with clause 8, section 63, of the Constitution, just above quoted, and is therefore unconstitutional.

In reference to your inquiry as to the constitutionality of the act entitled "An act to provide a trial justice in all counties having a population in excess of 300 persons per square mile as shown by United States census, to prescribe

his jurisdiction in both civil and criminal matters, and to fix his compensation," I beg to say that this act required to be established, by the appointment by the judge of the circuit court in each county coming within the description of the caption, a new judicial officer to be known as a trial justice, whose jurisdiction is made concurrent with that of justice of the peace, and whose salary is to be paid as the salaries of the judges of the circuit court. It seems to me that this is contrary to the Constitution, which provides a general plan for the judiciary of the State, and states in section 87 thereof that it shall consist of "A Supreme Court of Appeals, circuit courts, city courts, and such other courts as are hereinafter authorized."

So far as I have been able to find there are no other judicial officers or judges authorized by the Constitution, except a special court of appeals provided for by section 88 of the Constitution, additional courts in cities of 30,000 inhabitants or more provided for in section 98 of the Constitution, and courts of land registration provided for by section 100 of the Constitution.

These courts so constituted and provided for in the Constitution, constitute the judicial department according to the plan of the Constitution, and the appointment of a trial justice in counties as provided for in this act is an addition to all of the judges and judicial officers provided for by the Constitution, and if put into effect will cause the judicial department of the State to consist of courts other than those mentioned in the Constitution or therein provided for, and for that reason it seems to me that it is in violation of the spirit and letter of the Constitution, and cannot be legally enacted.

Respectfully yours,

RICHARD B. DAVIS,
Assistant Attorney-General.

RICHMOND, VIRGINIA, *March 19, 1912.*

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

DEAR SIR:

Your favor of March 14th, addressed to Hon. Samuel W. Williams, Attorney-General of Virginia, and enclosing letter from Hon. Huntington Wilson, Acting Secretary of State, together with a copy of a letter from the Imperial German Ambassador at Washington, and submitting the question whether or not you as Governor have authority to exempt from the payment of automobile taxes the members of the Embassy's staff to hand, I beg to say that the Attorney-General, being necessarily absent from the city, has requested me to reply to the inquiry.

Under the act of March 17, 1910, which is still in force, it is provided,

"That it shall be unlawful for any person, or persons, except in accordance with the provisions of this act, to run, drive, or operate any automobile, locomobile, motor cycle, motor bicycle, or any vehicle of any kind the motive power of which shall be electricity, steam, gas, gasoline or any other motive power except animal power, and which said vehicles shall hereafter be called machines in this act, on or along, or across any public road, street, alley, highway, avenue or turnpike of any county, city, town or village in the State of Virginia, except and until such person shall comply with the provisions of this act."

By section 10 of the said act it is provided as follows:

"Any owner or operator, not a resident of this State, who shall have complied with the laws of the State in which he resides, requiring the registration of motor vehicles, or licensing of operators thereof, and the display of identification or registration numbers on such vehicles, and who shall cause the identification * * * * * may use such highways not exceeding two periods of seven consecutive days in each calendar year, without complying with the provisions of section 2, 3-a and 3-b; * * * * * and the Governor of this State is hereby authorized and empowered to confer and advise with the proper officers and legislative bodies of other States of the Union, and enter into reciprocal agreements under which the registration of motor vehicles owned by residents of this State will be recognized by such other States, and he is further authorized and empowered, from time to time, to grant residents of other States the privilege of using the roads of this State, as in this section provided, in return for similar privileges granted residents of this State by such other States."

This is the only provision in the statute authorizing the Governor to make any change in the statute, and so far as applicable to the question submitted, the Governor would have the power to relieve the citizens of the District of Columbia from the payment of taxes under the statute, provided the District of Columbia entered into similar arrangements exempting from the taxes the citizens of the State of Virginia; but without such arrangement with the proper authorities of the District of Columbia, it does not seem to me that the Governor has any power to grant the relief asked for, and then only in exchange for similar privileges to the citizens of the State of Virginia within the District of Columbia.

Under the decisions of the supreme court in the cases of *Lewis v. Whittle*, 77 Va., 414, and *Wolfe v. McCaul*, 76 Va., 876, it is held that the Governor of the Commonwealth has, and can lawfully exercise, no power except such as may be bestowed upon him by the Constitution and laws.

Neither in the Constitution, section 73 and following, defining the powers and duties of the Governor, nor in any statute of the State, do I find any authority whatever for the Governor to relieve any person upon any grounds whatsoever from the payment of the license tax prescribed by the statute above referred to, except as above set out.

For these reasons, I am reluctantly forced to the conclusion that there is no authority, either in the Constitution or statutes of the State, for the Governor to grant the relief asked for.

Yours truly,

RICHARD B. DAVIS,
Assistant Attorney-General.

RICHMOND, VIRGINIA, May 15, 1912.

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

DEAR SIR:

Replying to your communication of the 14th instant in regard to the case of Samuel M. Lindsay, who was convicted in the circuit court of Rockbridge

county, Virginia, of a felony, and sentenced to the penitentiary as a member of the State road force for one year, and whose sentence was afterwards commuted by you as Governor to six months' imprisonment in the county jail, I am of opinion that under the Constitution and laws of this State, when viewed in the light of the decisions both of the Virginia Court of Appeals and of the Supreme Court of the United States, the executive warrant commuting this sentence (provided it was accepted by the prisoner, which I assume to be a fact) constitutes a conditional pardon and takes the place of the former judgment rendered by the court, which the executive warrant commutes, and the terms imposed by the conditional pardon, which were accepted by the prisoner, constitute the full measure of the duty or punishment which can thereafter be required of, or imposed upon, the prisoner, and I am therefore of opinion that the judge of the circuit court of Rockbridge county was without jurisdiction or authority to enter the order to which you refer, directing that the said Samuel M. Lindsay shall be a member of the State road force for the balance of the commuted time as set forth in the order of the court, a copy of which is submitted with your letter.

I have the honor to be,

Very truly yours,

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

RICHMOND, VIRGINIA, July 25, 1912.

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

DEAR SIR:

Your favor of the 12th instant, enclosing a letter addressed to you by Mr. H. G. Buchanan, with reference to the validity of an act approved March 13, 1912 (Acts of 1912, p. 462), in regard to slot machines and their use, etc., is duly to hand.

The authorities quoted by Mr. Buchanan seem to sustain the position taken by him; and if these were all of the authorities on that subject, there would be no doubt of the correctness of his conclusions; but, unfortunately for his contention, as it seems to me, the weight of authority is not in accordance with the law as laid down in the cases cited by Mr. Buchanan. I am very sorry, therefore, that I have not been able to get myself to the point of concluding that the act is unconstitutional as pointed out by him.

To say the least of it, there is conflict in the various decisions, and it seems to me from an investigation of the authorities, that the weight of authority is opposed to the conclusion reached by Mr. Buchanan.

The act complained of purports to amend section 139 of the act approved April 16, 1903, which was entitled as follows:

"Chapter 148.—An act to raise revenue for support of the government and public free schools, and to pay the interest on the public debt, and to provide a special tax for pensions as authorized by section 189 of the Constitution"—

and was the general tax bill which has been continued in force, subject to certain amendments, since April, 1903.

The particular section, 139, of that act had been previously amended by the acts of 1904, and also by the act approved March 16, 1906, but no reference is made in the title of the act now complained of to either one of these amendments; but I think it may be conceded that under the decisions the provisions of the amendment of 1906 will be construed as having been substituted in the place and stead of the provisions of the original act, and constituted the real section 139 of that original bill at the time the amendment of 1912, which is now complained of, was enacted.

As said above, the weight of authority seems to me to be distinctly adverse to the conclusion reached in the cases cited by Mr. Buchanan.

The rule as laid down in the original edition of Sutherland Statutory Construction, which was referred to in the cases above-mentioned, was that an amendment of a repealed statute was invalid; but in the revised edition of this book by John Lewis, published in 1904, as section 233, the law is laid down as follows:

“Section 233. Amendment of Repealed or Void Act or Section.— There is a conflict of authority as to whether a section which has been repealed can be amended. The question usually arises where a section of an act is amended ‘to read as follows’ and is then again amended in the same manner and by the same description, ignoring the first amendment. Most of the older and some of the more recent cases hold that such an amendatory act, or the amendment of a repealed section, is a nullity. A repeal by implication is said to stand upon the same footing in this respect as a direct or express repeal. ‘While there is some conflict of opinion on the subject,’ says the United States Court of Appeals, ‘the decided weight of authority and the better opinion is that an amendatory statute is not invalid, though it purport to amend a statute which had previously been amended or for any reason been held invalid.’ This view, we believe, is sustained by the decisions.”

The same rule is laid down in 36 Cyc., at page 1055, as follows:

“In many cases it is held that an amendment to be valid must not relate to a statute which has been repealed or declared unconstitutional, and that where an entire act is void there is nothing to amend; and thus it is held that an amendatory statute which attempts to amend a section which has already been amended and repealed by implication is void. But in the absence of constitutional prohibition the better rule has been held to be that an amendatory statute will be upheld, although it purports to amend a statute already amended or which for any reason has been declared invalid; and that a statute amended and not repealed may be amended; and a statute amending a statute which has already been superseded by an amendatory statute is valid, where it was the intention of the legislature to amend the amendatory statute, and not the amended statute, and a statute purporting to amend a repealed or void statute is valid where the provisions of the new statute are independent and complete in themselves. Where a statute has been amended, a later statute, declaring the original act, with no express reference to the amendment, to be applicable, makes it applicable as amended and not in its original form.”

In the case of *People v. Canrassers*, 143 N. Y., pp. 84, 89, the rule is laid down as follows:

"The enactment of this law is put into the form of an amendment of a law which was standing upon the statute books, and whether that earlier law, by force of subsequent legislation, had become inoperative is wholly immaterial. The only question is, has the legislature in the enactment complained of expressed its purpose intelligibly and provided fully upon the subject. If it has, then its act is valid and must be upheld.

"That is the case here. The act of 1883 contains all that is provided for in the particular section of the act of 1856 and gives full power to the boards of supervisors, with respect to the formation of school commissioners' districts. A law thus explicit and complete may not be disregarded, or invalidated, because of a possible mistake of the legislature with respect to the existence of the statute, in amendment of which the act is passed. It is an enactment of a law, in any view."

The same doctrine is announced and the above case is cited with approval in the case of *Reynolds v. Board of Education*, decided by the Supreme Court of Kansas in 1903, and reported in 72 Pac. Rep. at page 274, and the court uses this language:

"It is contended that, since the law of 1879 purports to amend a statute already repealed by implication, it is void, and authorities are cited to that effect. * * * * * In this State the Constitution contemplates that repealed acts may be revived if only the new enactment contain all the revived matter, and do not merely make reference to it. * * * * * The requirement that acts amendatory of sections shall include the entire section or sections amended is designed to prevent amendments by mere reference and amendments by merely inserting or striking out; but there is no constitutional inhibition upon the legislature adopting a repealed law as the basis of a new enactment, and, if it should choose to employ such a method of registering its purpose, that fact alone ought not to defeat its will. Statutes are not to be so lightly nullified. Although they were no longer operative as laws, sections 75 and 76 remained upon the records in the office of the Secretary of State, and continued to be cognizable from the statute books in which they had been printed. Their subject-matter continued to be open fields of legislation. It is perfectly manifest the legislature intended to re-enact their provisions with such modifications as were necessary to meet the requirements of the inhabitants of cities of the first-class, and intended the law upon those subjects thereafter to be as disclosed by sections 1 and 2 of the act of 1879. This intention must, therefore, be given full effect. There is no doubt that this may be done whenever the amended section retains its place in the original act."

The point was distinctly raised and decided in favor of the validity of the statute in the case of *Fletcher v. Prather*, 102 Cal., p. 413, in the head-note of which (which correctly states the decision) it is said that the act "was properly amended a second time by the act of 1893, so as to allow the construc-

tion of sewers, 'also for drainage purposes over or through any right of way obtained or granted for such purposes, with necessary and proper outlet or outlets to the same,' although the amendments of 1893 referred to the original section 24 of the Vrooman act, and did not refer to it as having been amended by the act of 1889."

This decision is directly in point, and in the opinion the court uses this language:

"Section 24 of the act in question, as amended in 1889, took the place of the original section 24 in the act of 1885, and though the reference to it in the act of 1893 would have been more specific if it had added 'as amended by the act of 1889,' the intention of the legislature is evident, and the effect is to amend the amended section."

In this opinion the court cites with approval the cases *Commonwealth v. Kenneson*, 143 Minn., 418; *State v. Brewster*, 39 Ohio St. 653; *Ohio v. State*, 37 Ohio St. 494; *State v. Warford*, 84 Ala. 15; *Blake v. Brackett*, 47 Me. 28, and various other cases.

In the case of *Nebraska v. City of Wahoo*, 62 Neb., p. 40, such an amendment was held to be valid, and the court says:

"It is insisted that the act of March 10, 1885 (Session Laws, 1885, ch. 20), is void because it purports to be 'an act to amend section 69 of an act entitled "An act to provide for the organization, government and powers of cities and villages," approved March 1, 1879.' By chapter 23 of the Session Laws of 1881 this act was amended, and section 69, among others, changed and repealed 'as then existing.' It is insisted that this rendered it forever impossible to amend section 69 of the act of 1879, because it was thereafter repealed, and so non-existent. It would seem to us much more reasonable to hold that it was changed, rather than abolished. By the amendment a new section, 69, had been substituted and the old one repealed, in accordance with the requirements of the Constitution. The cases are numerous enough that a repealed and abolished act cannot be amended.

"* * * That an amended act cannot thereafter be further amended under its original title, we find no authority holding, and it seems to us that this objection is overruled as to this very act in *State v. City of Kearney*, 49 Neb., 325, 332. * * * We see no reason to change the ruling in *State v. Kearney*, as to this act."

The court of Massachusetts in a similar case held that such an amendment was valid, and uses this language:

"The defendant contends that the statute of 1886, chapter 318, section 2, is inoperative because it purports to be an amendment of the public statutes, chapter 57, sections 5 and 9, and he says that said section 9 was repealed by the statute of 1885, chapter 352, section 6. The argument is that an amendment of a repealed statute is a nullity. By the statute of 1885, chapter 362, section 6, 'section 9, of chapter 57, of the public statutes is hereby amended so as to read as follows,' etc.; and by the statute of 1886, chapter 318, section 2, 'section 9 of chapter 57 of the

public statutes is hereby amended so as to read as follows,' etc.; and in each case there follows a sentence which covers the whole subject of the original section and may well be held to have impliedly repealed the preceding provisions. The intention of the legislature is plain that, after the statute of 1885, chapter 352, took effect, instead of the public statute, chapter 57, section 9, the sixth section of the statute of 1885, chapter 352, should be in force; and that, after the statute of 1886, chapter 318, took effect, section 2 of this statute should be in force, instead of section 6 of the statute of 1885, chapter 352. The sections in each statute are complete in themselves, and, being substitutes for each other, stand like independent enactments. The only defect in the statute is that the statute of 1886, chapter 318, section 2, refers to the public statutes, chapter 57, section 9, and not to this section as amended; but the intention is evident."

Commonwealth v. Kenneson, 143 Mass., p. 419.

In the case of *Wilkinson v. Ketler*, 59 Ala., p. 306, such an amendment was held to be valid, and the court in that case says:

"The act approved March 18, 1875, Pamph. Acts, 254-5, after reciting section 2961 of the Revised Code, as it stood originally, without noticing the amendment made by the act of March 8, 1871, declares that said section 'be so amended as to read.' * * * "

The objection was that the act was unconstitutional because it undertook to amend the original provision which had itself been amended by subsequent act not referred to, and the court says:

"We hold that each of the statutes above copied was constitutionally enacted, and that the reference and repealing clause in the act of 1875, to section 2961 of the Revised Code, must be referred to that section, as amended by the act of March 8, 1871; and the result is a repeal of the last named act."

To the same effect is *Harper v. State*, 109 Ala., p. 28, where it is held:

"But, it is clearly settled in this State that the legislature may amend an original act which has been amended and repealed, and disregard the intervening amendatory and repealing act. * * * No question can arise, therefore, in this case, from the fact that the act of 1891, amended by the act of 1895, was repealed by the act of 1892-3."

In the case of *Columbia Wire Company v. Boyce*, 44 C. C. A., p. 588, the Circuit Court of Appeals of the Seventh District on an appeal from the Southern District of Illinois, decided in the same way, and held that a statute purporting to amend a statute that had already been amended was valid, and quotes a statement made by Judge Cooley in the case of *Jones v. Commissioner*, 21 Mich. 236, which supported the same construction, and commenting upon the reasoning in support of the view that such a repealed statute could not be amended by reference thereto, says:

"This reasoning seems to us too refined for practical value. Under our Constitution, the mode of amending a section of a statute is by enact-

ing that the section in question 'shall read as fololws.' The position of the section in the original statute is not changed, and there is no reason why subsequent amendments of the same section should not be made by reference to its number in the original statutes."

Language could not be better chosen to express the exact condition of things that we are considering and give the weight of Judge Cooley's opinion to this construction of the effect of such amendment.

There is appended to this case in 44 C. C. A. a very valuable note citing a number of cases in various States where this same construction is put upon similar statutes in other States.

In the case of *Heath v. Johnson*, 36 W. Va., 782, the statute in question was entitled "An act to amend an act to amend and re-enact section 58 of chapter 45 of the Code of West Virginia," and it was claimed that this act was in violation of the constitutional provision, that every bill should have but one object, which should be expressed in its title, but the court, overruling the objection, says:

"We do not think this objection to the law is sound. The provision cited seems to refer rather to original acts than to those which are only amendatory; but, supposing it to apply to the latter, when the amendment in its title points not only to the chapter which is to be amended, but to the very section, it seems to us to amount to a sufficient expression of the object of the law to prevent any of the evils which the constitutional provision was intended to remedy."

The line of argument and the principles referred to by the cases above cited, in which it was held that an amendment of a statute, or clause of a statute, which had been previously amended, was valid, although no reference was made in the title to the various amendments, seem to have been adopted by our own court in the case of *Bertram v. Commonwealth*, 108 Va., 902, where it was held that the title of an act amending the Code of 1887 (which was itself a repeal of all former statutes on the same subject) is sufficient if it refers to the chapter and sections to be amended, and the body of the amendatory act is within its title if it is germane to the subject of the chapter referred to in the title; and also in the case of *Iverson Brown v. Commonwealth*, 91 Va., 762, where the court, referring to the constitutional provision, says:

"It was not to amendments of general statutes thus consolidated into a Code that section 15 of article V of the Constitution was intended to apply, but it was aimed at the separate acts in their original enactment, when the opportunity existed for the evils and the mischief to be done, which the constitutional provision was designed to prevent or defeat. It is not necessary, therefore, to do more, if so much, in amending and re-enacting or repealing any part of the Code or adding thereto, than refer to the proper chapter and section thereof to be amended or repealed or added to, and adopt and express in the title of the amendatory act the number and subject of such chapter, if the provision of such amendment by re-enacting or by additional section or sections is germane to the subject of the chapter."

If that be true with reference to the amendment of the Code of 1887, it

would seem to follow that the same reasoning would apply when the statute complained of purports to be an amendment of the general tax bill of the State, which has been continued in force from 1903 down to the present time.

From these authorities I am very reluctantly forced to the conclusion that by the weight of authority, as well as by reason, an amendment of a previously existing statute which has itself been amended, is valid, although in the title thereof it refers only to the original act and fails to make any reference to the amendments that had been made by subsequent legislation; and that therefore the statute herein referred to, approved March 13, 1912, amending section 139 of the general tax bill, has been validly passed and is operative.

Very truly yours,

RICHARD B. DAVIS,
Assistant Attorney-General.

RICHMOND, VIRGINIA, *September 25, 1912.*

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

DEAR SIR:

Your inquiry submitted to the Attorney-General on the 23d, as to what court should try Roy Sullivan, the convict, who killed one of the guards of the road force in which he was working at or near Chatham, in Pittsylvania county, is duly to hand, and in the temporary absence of the Attorney-General I beg to reply as follows:

The facts, as I understand them, are substantially that the convict was working on the road force created by the statute, on the public roads in Pittsylvania, when he killed one of the guards. The grand jury of the circuit court of Pittsylvania has found an indictment against the convict, which is now pending, but the prisoner has not been arraigned, nor has he pleaded to the indictment, nor offered any plea of any kind; and the question is whether the man shall be tried in the circuit court of Pittsylvania, or the circuit court of the city of Richmond.

The statute, section 4179 of Pollard's Code, gives jurisdiction to both of these courts to try the case, and is in these words:

"All criminal proceedings against convicts in the penitentiary shall be in the circuit court of the city of Richmond; provided, that when convicts are employed upon any work of public or private improvement in any county in the State the criminal proceedings against them may be in the circuit court of the county in which the convict is so employed or in the circuit court of the city of Richmond."

The circuit court of Pittsylvania having assumed jurisdiction given by the statute, and caused an indictment to be found, it would seem that there would be no question that it should proceed with the trial, unless there are some peculiar circumstances which render it improper for it to retain the jurisdiction it has assumed, and proceed with the trial.

If there are reasons making it improper for the case to be tried in Pittsylvania county, or by the judge of that court, full provision is made by sections 4036 of Pollard's Code, Vol. 2. for a change of venue to any other circuit court (including the circuit court of Richmond, which is given jurisdiction by the statute above-quoted) for the trial of the case.

What are the real facts in the case are not sufficiently set out in the paper referred to the Attorney-General to enable me to form a definite conclusion as to their sufficiency to sustain a motion for a change of venue; but all the facts are, no doubt, well-known to the judge of the court and the attorney for the Commonwealth, who have charge of the prosecution, and they are, by statute, authorized to take such action as is justified by the facts.

The circuit court of Pittsylvania being given jurisdiction of the case by statute, and having assumed that jurisdiction and commenced a prosecution for the offense charged, that court must proceed with the case to a final judgment, unless the court shall relieve itself of the duty in some mode prescribed by the statute.

The circumstances alleged to exist in the county by the letter of the attorney for the Commonwealth, even if proven to exist, would not, in my judgment, furnish a sufficient ground to sustain a motion for a change of venue; but however that may be, it seems to me plain that the case must be finally heard and determined in the circuit court of Pittsylvania, unless a change of venue is granted by that court.

The circuit court of Richmond undoubtedly has jurisdiction of cases of this kind; but the circuit court of Pittsylvania has also concurrent jurisdiction of this particular case; and that court having assumed jurisdiction and commenced the prosecution, I take it that the circuit court of Richmond, under the rules of comity, would decline to assert its jurisdiction while the case was pending in another court having concurrent jurisdiction with it.

As requested, I am returning herewith the letter of Mr. H. Dillard, Commonwealth's Attorney.

Very respectfully,

RICHARD B. DAVIS,
Assistant Attorney-General.

RICHMOND, VIRGINIA, *October 10, 1912*

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

DEAR SIR:

Your favor, addressed to the Attorney-General, inquiring whether or not any State officer can be appointed to the office of notary public is duly to hand, and as the Attorney-General is necessarily absent from the office, I beg to reply that I have looked into the matter to some extent and find the law about as follows:

The office of notary public is recognized by the statute in sections 923 and 3912 of Pollard's Code, in which notaries are made conservators of the peace.

In *Royall's case*, 69 Va. (28 Gratt.), p. 130, it was held that a notary might be removed from his office for violation of the anti-dueling law.

The Constitution, section 32, provides that every person who is qualified to vote may hold an office, and section 113 of the Constitution provides that no person shall hold more than one *county* office.

By section 69 of the Constitution, the Governor is made ineligible to any other office during his term; and by section 105 of the Constitution, which is re-enacted in section 3130 of the Code, judges are not allowed to hold other offices.

In section 1020 of the Code, it is provided that a justice of the peace accepting the office of clerk of the court, sheriff, sergeant, constable, or coroner, or deputy of any such officer, or any office incompatible with that of justice of the peace, shall forfeit his office; and in section 1459 of the Code, it is provided that no federal officer, except fourth-class postmasters, and no supervisor or State officer, except a notary public, etc., shall be elected to school trustee.

There is no special provision of law, either in the Constitution or statute, which, so far as I have been able to find, expressly prohibits a State officer from holding the office of notary public, except in the instances above cited; but under the provision of section 105 of the Constitution prohibiting the judges from holding any other office, it might be held that a notary public as a conservator of the peace, was invested with judicial powers, and might possibly come under the definition "Judge" under the Constitution, and if so the constitutional inhibition against his holding any other office would be manifest.

It does not seem to me, however, entirely clear that the Constitution meant to embrace such minor office as a notary public under the term "Judges," as it seems to have been the opinion of the legislature that a justice of the peace, who undoubtedly exercises judicial functions, might accept a separate office unless prohibited from so doing, as is provided in section 1020 of the Code.

There is a general rule of common law that no person can hold incompatible offices, but the question as to what constitutes an incompatible office is by no means definitely settled, and there have been various decisions in reference to special cases laid down by the various courts.

In Throop on Public Officers, section 33, it is said:

"The question, whether two offices are or are not incompatible, is often difficult of solution, and the principles upon which its solution depends cannot always be stated with perfect exactness. The general questions concerning incompatibility of offices are a large field indeed; and in many instances each case must be judged by its own peculiar circumstances. A learned American judge, discussing this question, has forcibly said that it has been erroneously supposed from the remarks of Lord Tenterden in *Rex v. Jones* (1 B. & Adol. 677), that in order to render two offices incompatible, there must be some such relation between them as that of master and servant—that one must have 'controlment' of the other; or that one must be charged with the duty of auditing or supervising the accounts of the other; or that one must be chosen by, or have the power of removal of the other. But these are only instances of incompatible offices, not definitions; and therefore it does not follow that these are all the instances in which offices are incompatible. Thus a judicial office and a ministerial office are incompatible. And in *Rex v. Tizzard* (9 B. & C., 418), Bayley, J., gave another instance of incompatibility, when he said 'I think that the two offices are incompatible when the holder cannot in every instance discharge the duties of each.'"

This seems to be the general doctrine, and it would seem to be there stated that judicial and ministerial offices are incompatible, and that seems to be carried out by the Constitution and Bill of Rights stating that the judicial and executive branches of the government must be kept separate and distinct.

On this ground it might be fairly contended that no ministerial officer of the government could be appointed to the office of notary public because in the exercise of his duties as conservator of the peace the notary public might be called on to exercise judicial functions; but I confess that I have not been able to find any case holding that there is such incompatibility between such minor office as a conservator of the peace and a ministerial office as to render it improper that the same person should hold the two offices.

It seems to me on general principles that a notary being a conservator of the peace and charged with the exercise of certain judicial functions in the trial of small cases, etc., no executive officer of the State ought to be appointed to the office of notary public; and that no judicial officer of the State, even although he would not be embraced under the term "Judges," who are prohibited by the Constitution from holding any other office, ought to be appointed to such position.

Some of the cases hold that a justice of the peace may be also a justice of some other court which must pass in review upon his decisions as a justice of the peace, but I have found no case in which it has been held that two offices, one of which is ministerial and the other judicial in its character, can be held by the same person at the same time.

As stated above, however, the question in any particular case would depend upon whether or not the office held by the State officer was incompatible with the office of notary public, and I feel great hesitancy in undertaking to give an opinion covering such a multitude of cases, as I do not know any fixed rule by which the general question can be settled in any concrete case, further than the principle that I have indicated above, that any office requiring the exercise of a judicial function ought not to be held by the same person who is occupying a ministerial office under the government.

The question you submit is a very broad one, and I have given the matter some consideration, as above indicated, but do not feel prepared to state that no other State officer can hold the office of notary public, as each particular case would depend upon the facts and circumstances attending it, and be governed, in my judgment, to a great extent by a comparison of the duties to be discharged in the several offices by the same individual, and whether or not, in the opinion of the court passing thereon, those duties were inconsistent and incompatible.

If you desire me to look further into the matter as to any special officer, I shall be very glad to render any assistance that I can in that direction.

Yours very truly,

RICHARD B. DAVIS,
Assistant Attorney-General.

To the Auditor of Public Accounts.

RICHMOND, VIRGINIA. *November 3, 1911.*

Hon. S. R. DONAHOE,

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

I am returning letter to you from Mr. J. C. Thornton, of Schoolfield, Va., in reference to which I am of opinion that the merchant referred to in this letter who conducts his mercantile business in the same house or room with

his restaurant has no more right to sell goods on Sunday under his merchant's license than any other merchant would have to sell similar goods, and no merchant under the laws of Virginia is permitted to keep his place open and sell goods on Sunday, except as is stated in section 3800 of the Code. I am,

Yours very truly,

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

RICHMOND, VIRGINIA, *November 21, 1911.*

Hon. S. R. DONAHOE,

Auditor of Public Accounts,

Richmond, Virginia.

DEAR SIR:

You have referred to me a letter addressed to you by Mr. George H. Rucker, clerk of Alexandria county, which is dated November 18, 1911, in which he asks you to advise him as to the proper tax or fees to be charged for recordation of a certain lease made by the Southern Railway Company to the Washington and Old Dominion Railway Company, and which copy of said lease is submitted with said letter; and you ask me to advise you as to the proper reply to be made by you to Mr. Rucker. I have examined the lease referred to and I am of opinion that section 13 of the Tax Laws (see Tax Laws of 1910, p. 7) requires that the clerk shall collect on this lease the tax therein provided for; that is to say, treating this lease as a contract within the meaning of said law, and estimating the amount of the tax on the consideration of the lease, that the tax must be estimated upon the aggregate consideration agreed to be paid, to-wit: the sum of \$1,200,000.00. The same result would follow if the recording tax is estimated on the value of the property contracted for. The parties themselves have fixed the consideration for this lease, and they have themselves fixed the value of the property contracted for, and I am of opinion that the tax must be estimated and collected on the value thus fixed by the parties.

I herewith return the letter and lease referred to. I am,

Yours truly,

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

RICHMOND, VIRGINIA, *December 21, 1911.*

Hon. S. R. DONAHOE,

Auditor of Public Accounts,

Richmond, Virginia.

MY DEAR SIR:

I have duly considered your letter of December 16, 1911, and whilst the case presented is somewhat novel in this, that a change in the number of commissioners of the revenue in Fairfax county was brought about by an act of the last session of the General Assembly, yet it occurs to me that the case is covered by section 453 of the Code, and as it seems to be impossible for the new commissioners of the revenue in Fairfax county to get the necessary books and papers from their predecessor to enable them to discharge their duty, it seems to me that you have the authority under the section quoted above to authorize those commissioners to procure substitutes for such books and papers, and that you are authorized to pay to the clerk for furnishing same such fees as he

might by law charge an individual for similar services, this to be paid out of the general appropriation of \$123,000.00 referred to in your letter.

I have the honor to be,

Very truly yours,

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

RICHMOND, VIRGINIA. April 2, 1912.

Hon. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

You have referred to me for my opinion a letter addressed to the Auditor of Public Accounts by Mr. Edward Nichols, of date January 29, 1912. After due consideration of this matter, I have arrived at the conclusion that the act approved March 14, 1910 (see Tax Laws of Virginia of 1910, p. 38, section 44), is the only law governing the subject as to the assessment and collection of collateral inheritance taxes. Clause (e) of this law is clear and explicit that this collateral inheritance tax must be assessed by the court or clerk before whom the will is probated or administration is granted, the language being that such court or clerk "shall determine the collateral inheritance tax, if any, to be paid on the estate passing by will or administration, and shall enter of record in the order book of the court or clerk, as the case may be, by whom such tax shall be paid and the amount to be paid." The court or clerk must then certify the same to the treasurer for collection, and also to the Auditor of Public Accounts. To say that this law is impracticable of execution, I think, is not well warranted by the facts. The law can be executed and like all laws of similar character, the officer charged with the duty of executing the law must exercise reasonable diligence and good business prudence and judgment. I am informed that the other clerks in the State are having little or no difficulty in complying with this law, and I can see no reason why the clerk of the circuit court of Loudoun county should not be required to make these assessments and report them to the treasurer and auditor in accordance with this statute in every case which has come before the clerk or before his court since the act of March 14, 1910, went into effect, and I think you should demand that he comply therewith.

Your truly,

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

RICHMOND, VIRGINIA. April 6, 1912.

Hon. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

Referring to the letter of Mr. J. W. Holler, Commissioner of the Revenue, to you, and which you have submitted to me, I am of opinion that in the case stated in the letter the property must be taxed as a whole. The Court of Appeals, in passing on this question, has held that:

"Undoubtedly where the buildings erected on the land are themselves the subject of taxation, the State will take no notice of private contracts which sever the ownership of the land from that of the buildings, and will hold the owner of the land responsible for taxes on both." *Ordway & Green v. Auditor*, 28 Gratt., p. 128.

I return Mr. Holler's letter.

Yours truly,

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

RICHMOND, VIRGINIA, June 14, 1912.

Hon. C. LEE MOORE.

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

Referring to the matter of the tax bill against the Blue Ridge Light and Power Company, which is now before me, together with the correspondence between yourself and Mr. Arista Hoge, treasurer of Staunton, Va., the statute in regard to the duties of the treasurer seems to be clear. See section 144, pp. 109-110 of the Tax Laws of Virginia for 1912, which provides that the Auditor of Public Accounts shall deliver the bill for said taxes and registration fee, or both, and penalty, to the treasurer of any county or city in which the company or corporation may have any property belonging to it, and said bill shall have the force and effect of an execution in favor of the Commonwealth, and the treasurer is given the power to distrain or levy upon and sell any real or personal property of such company or corporation.

The method of procedure under an execution in favor of the Commonwealth is found in the Code, sections 687 to 695, inclusive, and it is the duty of the treasurer to levy for this tax bill on any property belonging to the Blue Ridge Light and Power Company found in his bailiwick and proceed to sell the same in the mode prescribed by law referred to above.

I return herewith the said tax bill and papers submitted therewith.

Yours truly,

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

RICHMOND, VIRGINIA, June 18, 1912.

Hon. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

Replying to your letter in which you ask my construction of that provision in the appropriation bill passed by the last legislature, which is as follows: "Betterments, Catawba Sanatorium, fifty thousand dollars (\$50,000.00)."

I am of opinion that the word "betterments" as here used is to be construed in its proper legal sense, namely, improvements in the sense of additions or betterments to the property already in existence at the time of the enactment of said law, and it cannot be held to authorize the expenditure of this appropria-

tion in the purchase or creation of new plants or a new sanatorium. The betterments must be an adjunct or addition to the property owned and used as the Catawba Sanatorium at the time of the passage of said act, and must be of a permanent character so as to become permanent additions to the property.

Yours truly,

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

RICHMOND, VIRGINIA, *July 3, 1912.*

Hon. C. LEE MOORE,

Auditor of Public Accounts
Richmond, Virginia.

DEAR SIR:

Under date of May 9, 1912, you submitted to me a communication in which you asked my opinion as to whether you, as Auditor of Public Accounts, are authorized under the Constitution and laws of this State to pay the salary of the police justice of the city of Norfolk out of the public treasury; and in this connection you call my attention to the legislation on the subject, and also to section 134 of the Constitution. I have given this matter my most careful consideration.

The first act of the legislature providing for the payment of the salary of the police justice of the city of Norfolk is found in the act approved February 18, 1896 (Acts of 1895-6, p. 399), which provides as follows:

"1. Be it enacted by the General Assembly of Virginia, That the police justice of the city of Norfolk shall be paid a salary of two thousand dollars per annum, payable in monthly payments of one hundred and sixty-six dollars and sixty-six cents, payable out of the State treasury upon the warrants of the Auditor of Public Accounts out of the moneys collected and paid over by said police justice to the clerk of the corporation court of the city of Norfolk; but the salary herein provided for is not to be a charge on the State treasury except so far as it relates to the revenue covered into the said treasury as provided in the next section.

This act was amended and re-enacted by the act approved March 3, 1896 (Acts 1895-6, p. 718), the provision in regard to the payment of the salary being as follows:

"That the police justice of the city of Norfolk shall be paid a salary of twenty-five hundred dollars per annum, payable in monthly instalments out of the treasury of the State upon the warrant of the Auditor of Public Accounts out of the moneys collected and paid over by said police justice as hereinafter required; but the salary herein provided for is not to be a charge on the State treasury, except so far as it relates to the revenue covered into said treasury by said police justice, and shall be in lieu of all other compensation to the said police justice for his services, whether rendered under State laws or the ordinances of the city of Norfolk."

By the act approved February 7, 1901 (Acts of 1901, p. 34), the act relating

to the payment of the salary of the police justice of the city of Norfolk was again amended and re-enacted, but the provision of the act above quoted remained practically the same.

Section 1 of said act above quoted was again amended and re-enacted by the act approved March 13, 1912 (Acts 1912, p. 506), but the language of said section 1 is substantially the same as it was before amendment, except that the salary was increased from \$2,500.00 to \$3,500.00 per annum.

Now the question you submit in your letter for my opinion is (quoting your letter) as follows:

"Kindly advise me if, in your opinion, these acts are unconstitutional for the reason they require the payment of the salary of the police justice of the city of Norfolk out of fines which, by provisions of section 134 of the Constitution, are devoted to the Literary Fund, and therefore, not the subject of appropriation by acts of the General Assembly, and whether, in your opinion, I am authorized to make payment out of the treasury from the fines and costs paid into the treasury under the acts referred to above."

Section 134 of the Constitution, referred to by you, contains the following language:

"Section 134. The General Assembly shall set apart as a permanent and perpetual Literary Fund, the present Literary Fund of the State; the proceeds of all public lands donated by Congress for public free school purposes; of all escheated property; of all waste and unappropriated lands; of all property accruing to the State by forfeiture; and all fines collected for offences committed against the State, and such other sums as the General Assembly may appropriate."

The above-quoted language of the Constitution of 1902 is substantially the same language as that contained in the former Constitution (Constitution of 1869, Article VIII, section 7) on the same subject; and by reference to section 743-a of the Code of 1904 it will be seen that the legislature carried into effect this provision of the Constitution of 1869, the language of said section being as follows:

"743-a. The proceeds of all fines collected for offences against the State * * * shall be paid into the treasury to the credit of the Literary Fund, and shall be used for no other purpose whatsoever."

In this connection I would also call your attention to section 1505 of the Code of 1904.

Section 135 of the Constitution provides that the "General Assembly shall apply the annual interest on the Literary Fund * * * to the schools of the primary and grammar grades," etc.

It will be seen from the language of sections 134 and 135 of the Constitution above-quoted that the framers thereof intended to do two things:

First. To set apart a permanent and perpetual Literary Fund, a part of which fund is "*all fines* collected for offences committed against the State;" and

Second. That the *principal* of this permanent and perpetual Literary Fund

should not be used for *any* purpose, but that the "*annual interest* on the Literary Fund" should be used exclusively for the primary and grammar schools of the State.

Being firmly of the opinion that it was the intention of the framers of the Constitution that all fines collected for offences against the State should be applied to the Literary Fund, and that the *principal* of that fund should not be used for any purpose, but that the "*annual interest*" thereon should be used only for school purposes, I am of opinion that the act approved March 13, 1912, so far as it provides for the payment of the salary of the police justice of the city of Norfolk out of fines turned into the State, is unconstitutional.

By reference to the act of March 13, 1912, it will be seen that it does not become operative until September 1, 1914. However, the act of February 7, 1901, which is now in force, contains practically the same language as the act approved March 13, 1912, except that the salary is increased from \$2,500.00 to \$3,500.00 per annum, and I am therefore of opinion that the act approved February 7, 1901, is unconstitutional also, and that you are not authorized to draw your warrant on the treasurer of Virginia for the payment of such salary under said act; nor will you, in my opinion, be authorized to draw your warrant on the treasurer to pay such salary under said act of March 13, 1912, when it becomes operative.

It will be noted that the language of said act of March 13, 1912, as well as the said act of February 7, 1901, specifically provides that the salary therein provided for "is not to be a charge on the State treasury, except so far as it relates to the revenue covered into said treasury on account of fines imposed by said police justice." This being true, and this particular provision of the said acts being, in my opinion, unconstitutional, I am further of opinion that you are not warranted in paying this salary out of any fund in the State treasury, as there has been no provision made by the General Assembly for the payment of the said salary out of any other fund, the language of the Constitution on the question of paying money out of the public treasury being as follows: "No money shall be paid out of the State treasury except in pursuance of appropriations made by law."

I have the honor to be,

Very truly yours,

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

RICHMOND, VIRGINIA, July 5, 1912.

Hon. C. LEE MOORE,

Auditor of Public Accounts.

Richmond, Virginia.

DEAR SIR:

I am in receipt of your letter of this instant, which is as follows:

"DEAR SIR:

"I have received, to-day, by mail, without any letter of explanation, the enclosed, of which the following is a copy:

"'Commonwealth of Virginia,

"'To R. Gordon Finney, trial justice of Alexandria county, Va..

"'To salary as trial justice for Alexandria county, Va., from June 17, 1912, to June 30, 1912, 14 days at \$1,000.00 per annum, \$————.'

"I suppose it relates to the provisions of an act approved March 23, 1912, known as chapter 347 of the acts of 1912, the title of which act is 'An act to provide a trial justice in all counties having a population in excess of 300 persons per square mile as shown by United States census, to prescribe his jurisdiction in both civil and criminal matters and to fix his compensation.'

"I desire your opinion as to the constitutionality of that act, and if you hold the same to be constitutional, to refer me to my authority in law for the payment out of the State treasury of the salary proposed by the fifth section of said act to be paid out of the State treasury."

After giving the matter such careful consideration as the time at my command afforded, I am clearly of opinion that the statute referred to contravenes the well-settled constitutional policy of this State, and is in fact unconstitutional; but if the act was constitutional, you would not be authorized to make any payment thereunder from the simple fact that the legislature made no provision for its payment. Simply to say that the salary should be paid in the same manner as the salaries of the circuit court judges of the State are paid, is not in legal effect equivalent to, nor does it amount to, an appropriation for the payment of such salary within the meaning of section 186 of the Constitution; and I therefore advise that you do not pay the same.

I also call your attention to the fact that there is nothing appearing on the face of the account presented to show that such police justice has even been appointed or qualified as such.

Yours very truly,

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

RICHMOND, VIRGINIA, July 5, 1912.

Hon. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

You have referred to me the letter of Messrs. McCormick, Smith & Broun, of date July 3, 1912, and ask my opinion on the point therein suggested, and in reply thereto I am of opinion that the proceeding by petition referred to in the letter, under Code, section 2905, is covered by the language contained in section 14 of the Tax Law, and that the clerk was right in collecting the writ tax thereon, and that the amount of the compromise constitutes the proper basis on which to estimate the amount of the tax.

Yours truly,

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

RICHMOND, VIRGINIA, July 23, 1912.

Hon. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

You have submitted to me a letter addressed to you by Mr. W. L. Maupin, clerk of the circuit court of Albemarle county, Va., submitting therewith deed

dated the 10th day of May, 1912, between John Armstrong Chaloner and the board of visitors of the University of Virginia and the University of North Carolina, and asking my opinion as to the proper amount of tax or recording fees to be collected by the clerk for recording said paper.

After duly considering this paper and the provisions thereof, and the limitations therein contained, the best opinion at which I can arrive is that the clerk can admit this paper to record, charging a nominal recording fee of \$1.00 and the usual registration fees due the clerk. .

I am more readily inclined to this conclusion by reason of the fact that it is clearly evident from reading this paper that the intention of the grantor is a laudable desire on his part to contribute to and advance the cause of university education in Virginia and North Carolina.

Very truly yours,

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

RICHMOND, VIRGINIA, *August 9, 1912.*

Hon. C. LEE MOORE,

*Auditor of Public Accounts,
Richmond, Virginia.*

DEAR SIR:

I have duly considered the case submitted for my opinion in your favor dated August 3, 1912, and am of opinion that the claim presented by Messrs. Hiden & Thurlow, attorneys, Culpeper, Va., on behalf of Louis Nash, cannot be paid by you out of the public treasury. On the face of the account as presented it appears that this fine of \$100.00 was paid in 1910 and was duly covered into the public treasury and became a part of the Literary Fund, and that the Governor afterwards remitted the fine under section 743 of the Code; and the case thus made on the face of the account as presented, in my opinion, does not warrant you in paying this claim, as the Governor's power to remit fines is clearly limited to fines which have not been paid into the public treasury, and the Governor has no power whatever to take any action which will have the effect of entitling any person who has paid a fine, and which in due course of law has passed into and become a part of the Literary Fund, to assert a claim against the Auditor of Public Accounts, or in any other way to have the fine repaid out of the public treasury, or out of the Literary Fund. I do not think that the Circuit Court of the city of Richmond has any authority, power, or jurisdiction to render a judgment for such repayment.

I have examined the records in the Governor's office, and I think it is perfectly clear therefrom that when the Governor entered his executive order purporting to remit this fine, he did not know that it had been paid into the public treasury and had become a part of the Literary Fund. I therefore advise that you do not pay the claim.

Yours truly,

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

RICHMOND, VIRGINIA, *October 18, 1912.*

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

DEAR SIR:

I have carefully gone over the matter referred to me by you as to whether the clerk of Tazewell county, Va., was right in charging a tax of \$143.00 on each of the two documents admitted to record by him, and which have been made the subject of correspondence with you by Mr. C. W. Greever, clerk, and Mr. George W. Woodruff, general counsel for the Pocahontas Consolidated Collieries Company, Inc., which correspondence and documents are now before me, and as to which you request my opinion.

In reply, in the case of *Pocahontas Consolidated Collieries Company, Inc., v. Commonwealth*, decided by the Supreme Court of Appeals on January 18, 1912, it was held that the tax upon the recordation of a deed is not a tax upon property, but upon a civil privilege.

"The power of the legislature to impose a tax upon a license or civil privilege, fix the amount thereof, and to classify the subjects upon which the tax is imposed, is well-nigh unlimited, so long as the classification is reasonable. The only constitutional limitation upon the power of the Legislature to impose the tax is that it shall be uniform upon the subjects of each class."

The legislation upon the subject is to be found in the act approved March 17, 1910, which provides that "On *every* deed which is admitted to record" the tax shall be as stated in the act, and "On *every* contract relating to real or personal property * * * which is admitted to record," the tax shall be as stated in the act.

No question is raised in this case as to the correct amount of the tax, provided the two papers or documents are each legally subject to this tax. In my opinion, there can be no doubt on this subject, for the law quoted above applies to every deed and to every contract relating to real or personal property admitted to record, and it is clear on the face of the papers themselves that both of the said papers, if not deeds, are certainly contracts relating to real and personal property; and that these two documents or contracts are separate and distinct documents plainly appears from the contracts themselves.

"The Contract of Lease" mentioned in the correspondence is clearly an independent contract made between the Pocahontas Consolidated Collieries Company, Inc., party of the first part, and Appalachian Power Company, party of the second part. As an independent proposition, this contract is clearly taxable under the law, and the amount of the tax has been correctly estimated by the clerk.

The paper or document referred to as "Agreement" is also clearly an independent contract, as is shown on the face of it, the language being, "This agreement, made this fourth day of December, A. D. nineteen hundred and eleven (1911), by and between Appalachian Power Company, a corporation organized and existing under the laws of the State of Virginia, party of the first part; Pocahontas Consolidated Collieries Company, Inc., party of the second part;

New River Power Company, party of the third part; Pocahontas Light and Water Company, party of the fourth part, and Viele, Blackwell & Buck, a corporation, party of the fifth part;" from which it will be seen that on the face of the documents the contracting parties in the two papers are entirely different, the contracts are different, each of the contracts having their own independent stipulations and agreements, and are entirely separate one from the other; and the mere fact that in clause 15 of this agreement there is a provision that the Pocahontas Consolidated Collieries Company and the Appalachian Power Company shall enter into the contract of lease referred to does not relieve either of the contracts, or any of the parties thereto, from the payment of the recordation tax. In other words, the parties to the agreement can make no contract between themselves which will either authorize the recordation of the contract of lease, or the exoneration of the lease from the payment of the recordation fees if the paper is presented for record. It was optional with the parties to both of these agreements whether they would or would not present them for record, but if they did present them for record, duly acknowledged, and request their recordation by the clerk, then as a condition precedent to the legal recordation of both, or either, of them, the parties to each of said contracts must first pay the tax prescribed by law.

If the clerk of Tazewell county has not paid the full amount collected on said two papers into the treasury, you should require him to do so at the time, and in the manner, prescribed by law.

It follows, therefore, that I am of opinion that the amount collected by the clerk for the recordation of said two papers is correct, and that none of the parties to said agreement, or either of them, have any right to have the amount paid to the clerk on account of this tax, or any part of it, refunded.

I return herewith the documents and papers you sent me.

Yours truly,

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

To the Superintendent of Public Instruction.

RICHMOND, VIRGINIA, *January 9, 1912.*

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

DEAR SIR:

Replying to your communication of December 30, 1911, in which you transmit a letter from Mr. W. B. Strother, asking me to give you my opinion as to whether he can lawfully hold the position of acting superintendent of schools of Chesterfield county, in view of the fact that he is master of transportation for the Tidewater and Western Railroad Company, and as such has and uses passes over a number of roads, and whether he is thereby disqualified under the Constitution and laws of Virginia from holding this position, I note that Mr. Strother says that these passes are issued to him as an incident to, and part of, the compensation that comes to him from his position as master of transportation. This question has been recently before the court of Appeals of this

State in the case of *Commonwealth v. Gleason et als.*, 111 Va., p. 383, in which the court held that a pass received by an employee of a railroad company as a part of the compensation for his services does not render the employee ineligible to hold office under the Constitution.

Yours truly,

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

RICHMOND, VIRGINIA, *March 5, 1912.*

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

DEAR SIR:

Your favor of the 26th of February, enclosing letter of Mr. E. D. Putney to you, has been considered, and I beg leave to reply that in my opinion that the appropriation referred to cannot be expended in any other way than that prescribed by law, namely, by the State Board of Education with the approval of the president of the V. P. I.

I herewith return Mr. Putney's letter.

Yours truly,

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

RICHMOND, VIRGINIA, *March 5, 1912.*

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

DEAR SIR:

Replying to your letter of the 26th of February, in which you enclose a letter from Mr. W. P. McGlothlin, clerk of the school board, Grundy, Va., I am of opinion that the board has a right to award the contract to whom they please, and that it is their duty to get the best terms they can, and to accept the lowest bid, provided the board is satisfied that the party making this bid is a reliable bidder. The board in cases of this kind should reserve the right to reject any and all bids, but even in the absence of such stipulation I think it is clear that a case like the one stated in this letter, where the lowest bidder failed to file his check as the result of an oversight, that this does not deprive the board of the right to award the contract to him, provided he does comply in a reasonable time. As to Mr. Hurley threatening to sue the board, of course the courts are open to anybody to bring any suit they want, but I do not think under the circumstances that he will be able to recover anything from the board, but if the board has time it might possibly be better just simply to advertise for new bids, provided they feel sure that they can secure a contract at as low figures as offered by the lowest bidder.

Yours very truly,

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

RICHMOND, VIRGINIA, *April 2, 1912.*

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

DEAR SIR:

In a communication addressed to me by you under date of April 1, 1912, you submit to me letter to you from W. G. Edmondson, superintendent of schools for Loudoun county, in which he asks you the question whether the county school board has a legal right to appropriate money for expenses or salary of division superintendent, and in which he says as follows: "Our board had appropriated \$200.00 for the last two years to defray expenses of division superintendent," and says that an ex-trustee of the county is exercising himself to have suit brought against the county board because of this appropriation. You ask me how this letter should be answered.

In reply, the Constitution and laws of this State are clear and explicit in directing how the State, county and district school funds shall be applied, and the regulation of the State Board of Education is clear and explicit. See School Laws for 1911, p. 160, section 73, where the State Board of Education in its regulation has laid down the rule that the "proceeds of State and county school funds must be used exclusively for the payment of teachers, and district funds shall be used for building and maintaining school-houses and defraying the contingent expenses of the schools of the district." The Supreme Court of Appeals of this State has expressly decided that the public school funds are trust funds sacredly dedicated by the Constitution and laws of this State to the purpose of the public free schools of the State, and not one dollar of the public free school funds can be rightfully diverted or applied to any other purpose than the purposes of the public free schools as laid down in the law and in the regulation of the State Board of Education. I find no law or regulation which authorizes the payment of the expenses of the division superintendents of schools. When the division superintendent accepted his office he knew what its fees and emoluments were, and if he is not willing to serve for the compensation prescribed by law, his proper course is to resign the position. "In my opinion proper steps should be taken to require every dollar of the money paid for the expenses of the division superintendent to be paid back into the fund from which it has been illegally diverted. I am.

Yours truly,

SAML. W. WILLIAMS.
Attorney-General of Virginia.

RICHMOND, VIRGINIA, *June 13, 1912.*

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

DEAR SIR:

I am in receipt of your favor of this date, with enclosures, in which you submit for my opinion the question raised in regard to the location of the Heburn High School building by the Greenfield school board in Nelson county, and which location for said school is being opposed by Mr. H. G. Foster upon the ground that the lot selected by the district school trustees is distant less than 400 yards from his mansion house, and in a letter submitted from Mr. C. L. Martin to

Mr. Harris, superintendent of schools for said county, the position is taken that under section 1488 of the Code, Mr. Foster has a right to object to the location of said high school on the lot selected.

The question submitted is not entirely free from difficulty. The section referred to, section 1488 of the Code, also provides for submitting the question as to the title in cases of this kind to the judge of the circuit court, and I desire to call your special attention to an amendment which was made by the last legislature to section 824 of the Code (see Acts 1912, pp. 78-9), which provides that whenever it shall be necessary for the district school trustees to acquire title to real estate for public uses the contract shall be approved by a competent attorney-at-law to be designated by the judge of the circuit court, and which provides for an appeal from the decision of such attorney to the circuit court, or to the judge thereof in vacation. I therefore suggest that as this law will go into effect on to-morrow, June 14th, that this matter be sent back and let the question be settled in the mode provided in said act of the legislature, when both parties can be heard fully and the matter finally determined.

Yours very truly.

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

RICHMOND, VIRGINIA, August 3, 1912.

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

DEAR SIR:

I beg to acknowledge receipt of your communication of August 2, 1912, in which you enclose letter from J. A. C. Chandler, superintendent of schools for the city of Richmond, and asking me to advise how this letter should be answered. Said letter is as follows:

"DEAR SIR:

"Will you kindly secure for me the Attorney-General's opinion of the following point:

"In drawing the plans for the new Bellevue school, the architect has included in his specifications a certain patented window known as the National Adjustable Window. All contractors bidding on the Bellevue school will, of course, have to bid on this window. It so happens that three members of the school board own some stock in this National Adjustable Window Corporation, which is incorporated at \$300,000.00. The total holdings of the members of the board in this company do not exceed \$5,000.00.

"We are very anxious to have this window, and we do not believe it is in any violation of the law.

"I will appreciate it very much if you will let us have this opinion in a few days."

There can be but one correct answer to this letter, and that is found in the law itself. See Code, section 1472, which is clear and explicit and provides as follows:

"First. No member of the State Board of Education, nor any division superintendent of schools, *nor school trustee, nor any other school officer,* nor any teacher of a public free school, shall have any pecuniary interest, *directly or indirectly,* in any contract for building a public free school-house or in *furnishing material to a contractor for building such school-house.*"

From which it will be seen that it is not a question as to how much interest the school trustee may have in the materials furnished, but whether he has *any* interest therein. If so, then the transaction would be illegal.

Yours truly,

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

To the Superintendent of Public Printing.

RICHMOND, VIRGINIA, *December 29. 1911.*

Hon. DAVIS BOTTOM,
Superintendent of Public Printing,
Richmond, Virginia.

DEAR SIR:

In response to your inquiry as to what fund the expense of mailing copies of the report required to be made out by the Tax Commissioner to the members of the legislature is to be paid, that is, whether the cost of mailing is to be paid out of the fund provided in the act itself, or out of the Public Printing Fund, I beg to say that I have looked at the statute and it seems to me that the purpose of the legislature was to limit all costs that were incurred by reason of the making and publishing, and furnishing the said report to members of the legislature, to the particular fund of \$10,000.00 provided for in the act itself.

The legislature seems to have been careful to limit the whole expense of the work to be done and completed under that statute, which I take it includes the delivery of the copies to the members of the General Assembly, as well as the printing of the same, and for that reason it seems to me that the cost of the mailing, as well as the cost of printing the same, should be paid out of this fund of \$10,000.00, and not out of the Public Printing Fund.

Very truly yours,

RICHD. B. DAVIS,
Assistant Attorney-General.

RICHMOND, VIRGINIA, *May 10, 1912.*

Hon. DAVIS BOTTOM,
Superintendent of Public Printing,
Richmond, Virginia.

DEAR SIR:

I have gone carefully over the matter submitted to me by you in your letter of April 18th in regard to the pay for printing done for the State Board of Health, and have arrived at the following conclusions as tentatively outlined in a conference which, at my request, we had on the subject a few days ago:

First. That the old law, section 275 of the Code, does not apply to the State Board of Health, and all printing done for the State Board of Health before the 14th day of June, 1912, the date on which the act of the last legislature in regard to the Health Board goes into effect, must be paid by the Health Board, and that on and after the 1st day of October, 1912, the date on which the new law which codifies the law governing your department goes into effect, the printing for the Board of Health must be done and paid for as provided in that act.

This leaves the question open as to the true construction of sections 23 and 24 of the act of the last session of the legislature, approved March 12, 1912. After giving the matter due consideration the best conclusion that I can arrive at is that these two sections must be read together, and whilst section 23 makes it the duty of the said Superintendent of Public Printing to supply the State Board of Health with the blank forms necessary to the execution of the act, section 24 has limited the outlay for carrying out the provisions of this act to the sum of \$5,000.00, and the expenses incurred by the said Superintendent of Public Printing in furnishing these blanks under said section 23 of said act must be paid for by the Board of Health out of the appropriation of \$5,000.00 referred to in said section 24.

This conclusion, to my mind, is bound to be correct when you take into consideration the fact that prior to the act of March 12, 1912, this printing must have been paid for by the State Board of Health, and after October 1, 1912, the printing must be done and paid for under the act of the last legislature, which defines the powers and duties of the Superintendent of Public Printing, and there is no other law or appropriation governing the period between June 14, 1912, and the 1st of October, 1912, out of which the expense of this printing can be paid except the provisions contained in said sections 23 and 24. Besides this, I think that reading the two sections together, if they stood alone, I could arrive at no other conclusion than that indicated above.

Very truly yours,

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

To the Commissioner of Labor.

RICHMOND, VIRGINIA, May 9, 1912.

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

DEAR SIR:

Replying to your letter of the 6th instant I am of opinion that under the act referred to, chapter 155 of the acts of 1910, approved March 14, 1910, only one fee of \$1.00 can be properly charged under said act.

Very truly yours,

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

RICHMOND, VIRGINIA, *May 21, 1912.*

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

DEAR SIR:

Replying to your letters in regard to the case of W. A. Scott & Co., of North Tazewell, Va., you ask me to answer the direct question "if the employment of children by this firm is contrary to the provisions of the child labor law of this State." The answer to that question can only be answered directly by the courts as to whether the parties are or are not guilty in a particular case, but as I gather from your letter and the letter of Scott & Company to you, the point on which you desire an opinion from this office is whether or not this firm is exempt from the provisions of the child labor law by reason of the fact that the business they are carrying on is in a town of less than two thousand population. I am of opinion that the proviso contained in the law approved March 13, 1908, is restricted to "stores in the country and in towns of less than two thousand population," and that this provision has no reference whatever to factories, workshops, mines, or other places where the law prohibits the working of children. In other words, that you may work children under the ages named in the law in stores in the country and in stores in towns of less than two thousand population.

Hoping that this answers your question, and explaining my delay in answering by the pressure of other official engagements, I am,

Yours truly,

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

RICHMOND, VIRGINIA, *June 28, 1912.*

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

DEAR SIR:

I am in receipt of your communication of date June 27, 1912, which is as follows:

"Section 1067a prescribes fire escapes on all factories, workshops, hotels, school buildings and hospitals in this State of over three stories in height. We have a number of buildings in this State that are three stories to the front, and four or five stories to the rear. Kindly advise if I would be justified in ordering fire escapes on buildings of this character."

The section of the Code to which you refer makes it the duty of the owners of workshops and other buildings of over three stories in height, "to provide for the safe exit of the occupants thereof in case of fire by the erection or construction of fire escapes of the most approved modern design," to be selected in the mode prescribed by law.

The evident object of this legislation was, as expressed on the face of the act itself, "to provide for the safe exit of the occupants" of the buildings referred to in case of fire, and the law provides the means of accomplishing this, namely,

by the erection and construction of fire escapes of the most approved modern design.

The legislative object and intent being to provide for the safety and to protect the lives of the people engaged in workshops, and who are occupants of hotels, school buildings and hospitals, I am of opinion that the act in question should be liberally construed and that any such building of the character mentioned in your letter (which, although such building is only three stories in front, yet such building is four or five stories high in the rear) comes clearly within the spirit and evident intent and meaning of this law; and if there is to be any serious controversy on this point, I am of opinion that the burden should be thrown upon those who contend for a different construction of the law, and let the matter, if necessary, be settled by the courts.

Very truly yours,

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

Miscellaneous.

RICHMOND, VIRGINIA, *September 16, 1912.*

Hon. A. W. HARMAN, JR.,
State Treasurer,
Richmond, Virginia.

DEAR SIR:

Your letter of recent date informing me that you have in your possession checks from Messrs. Robert Turnbull, R. S. Bruxton, Wm. A. Jones, John Lamb, A. J. Montague, Don P. Halsey, T. R. Tillett and Carter Glass, and asking for a written opinion as to what, in my judgment, you should do with the above checks, is to hand, and in reply to your inquiry I beg to say that there does not seem to be any specific provision made in the statute as to what disposition is to be made of these checks.

It was no doubt the intention of the legislature that these fees, paid in by the candidates submitting their names in a primary election, was to be used in payment of the costs of such primary election, but there is no provision in the statute, as far as I can find, directing that to be done.

The only provisions in the statute bearing upon the subject, so far as I have been able to find, are contained in section 11 of the act of Assembly of 1912, entitled "An act to establish and regulate holding of primary elections," which, so far as applicable to the question here raised, are as follows:

"11. Every candidate for any office at any primary, before he files his declaration of candidacy as herein provided, shall pay a fee equal to five per centum of one year's salary attached to the office for which he is a candidate. In the case of a candidate whose compensation is paid in whole or in part by fees, the amount to be paid by such candidate as his contribution for the payment of the expenses of the primary shall be fixed by the proper committee of the respective parties.

"(a) Candidates for United States Senate, for representatives in Congress and for all State officers shall pay said fee to the treasurer of Virginia.

"(b) All other candidates shall pay said fee to the treasurer of the

city or county in which they reside. A receipt for the payment of said fee must accompany and be attached to said declaration of candidacy, otherwise the same shall not be received or filed."

There is no provision in this statute directing the distribution to be made by the treasurer of the fund so paid into his hands, but it is expressly provided by section 21 of the same statute (p. 618) that the necessary expenses incident to the holding and conducting of primaries, such as the payment of the judges and clerks of election, etc., "shall be paid as expenses of elections are paid;" and it is also provided in the same statute that the word "election" in the statute shall be construed to mean a general or municipal election as distinguished from a primary election.

The general law governing the payment of costs in these general elections is fixed by section 122-p of the Code, which is in these words:

"The costs of conducting elections under this chapter shall be paid by the counties and cities, respectively."

It seems to be apparent from this that the money in your hands cannot be paid into the hands of the treasurers of the counties and cities composing the congressional districts, as there is no provision to that effect in the statute; but it can hardly be imagined that the legislature intended that this money, although made payable to the Treasurer of Virginia, was intended to be covered into the State Treasury, because if it was once covered into the State treasury there would be no way of withdrawing it therefrom except by some act of the legislature; and there is no act of the legislature, so far as I have been able to find, authorizing the withdrawal of this money from the State treasury.

It would, therefore, seem to be a fair construction of the law that this money was paid into your hands as an individual, and not strictly as the treasurer of the State; that is to say, that the money was to be paid into the hands of the person who at the time of the payment occupied the office of treasurer of the Commonwealth, but was not intended to be put into the State treasury so as to become a part of the property of the State; as, if that had been the intention, the legislature would most probably have provided in the statute itself some means by which the money so deposited could be withdrawn from the State treasury and devoted to the purposes for which the payment was evidently intended to cover.

There being no direction in the statute as to what you shall do with the money, and it being fairly inferable that it was not intended to be mingled with, and deposited as, money belonging to the State, it would seem that it would be necessary for you simply to hold this money subject to the rights of the **parties who have paid it in**, if they have any, and to such future direction as may be given you by the legislature.

It therefore seems to me that the best course for you to pursue is to deposit each of these checks on an interest bearing certificate with the largest interest you can get, and hold these certificates subject to the future order of the legislature, or of some court of competent jurisdiction.

Very truly yours,

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

RICHMOND, VIRGINIA, *October 7, 1912.*

Hon. GEORGE W. KOINER,
Commissioner of Agriculture,
Richmond, Virginia.

DEAR SIR:

Your favor of the 3d, addressed to the Attorney-General, making inquiries as to the prosecution of persons for violating the pure seed law, is duly to hand, and in the absence of the Attorney-General, who is necessarily away from the city, I am writing to say that it seems to me that the statute intended that the Commissioner of Agriculture, upon ascertaining that there had been a violation of the law, should certify the facts of such violation, together with a copy of the result of the expert analyst furnished under oath, and that such copy, that is, the statement of the facts by the commissioner, together with the ascertainment of the contents of the seed offered for sale, made by the expert analyst declared under oath, should be considered as legal evidence against the parties without the introduction of these parties, and that this could be so used for all purposes of prosecution.

Under this provision it seems to me that the Commonwealth's attorney might proceed by indictment before a grand jury as prescribed in section 532 of the Code, by simply reporting the matter to the commissioner of the revenue of the city, who under that section would be obliged to report it to the next grand jury. You will notice, however, that under the provisions of section 532 the commissioner of the revenue would have to report the infraction of the law, and also give a list of the witnesses by whom it was expected to prove the offence; and it is made the duty of the clerk forthwith to summon the witnesses named in the list, and deliver a copy of the same to the Commonwealth's attorney.

If the proceeding is to be had as suggested by Mr. Tilton, I do not know how the matter can be brought to the attention of the justice of the peace without a complaint made by someone, and unless you have some person in the community who will make the necessary allegation, or the Commonwealth's attorney will furnish such person to make affidavit upon the basis of the report which you have furnished, there is no other way that I know of to get the matter before the court.

The inconvenience which would arise in the administration of the affairs of your office from having the experts go to testify I think was intended to be obviated by the provisions of the statute, and I rather think that a statement made by you, accompanied by a statement from an expert analyst, and verified by his oath, is all the proof that was necessary, and all that was intended to be required, and that the production of this paper by the Commonwealth's attorney would be sufficient to prove the case, unless other evidence was introduced, in which case of course it would be obligatory upon the Commonwealth's attorney to produce such further evidence as he could; but this is a matter that addresses itself to the Commonwealth's attorneys of the counties and cities, and it is a duty put upon them to see that the prosecutions are instituted, and if they come to the conclusion that they will have to proceed in the mode indicated by Mr. Tilton, I do not see how it is possible for you, and certainly it is not competent or proper for this office, to insist upon their proceeding in any different manner.

I would suggest that you call the attention of Mr. Tilton to the provisions of section 532 of the Code, and see whether or not proceedings could be had under that section.

Very truly yours,

RICHARD B. DAVIS,
Assistant Attorney-General.

RICHMOND, VIRGINIA, *March 8, 1912.*

MR. E. L. C. SCOTT,

Pension Clerk, Richmond, Virginia.

DEAR SIR:

In our conversation of to-day you submit to me for my opinion the question as to whether the pension board for the former city of Manchester is still in existence, and whether such board can, under the law, pass on and certify pension applications.

I am of opinion that when the annexation of Manchester to the city of Richmond took place, all the powers of the pension board of Manchester ceased to exist, and consequently there is no such board in existence. Section 12 of the pension law controls this question, and there can be but one pension board for each county and city.

What was formerly Manchester being now incorporated in and a part of the city of Richmond, the pension board of the city of Richmond must pass on all applications for pensions. In other words, there can be but one pension board for the whole city, including Washington ward, which was formerly Manchester.

Yours truly,

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

RICHMOND, VIRGINIA, *November 22, 1911.*

Hon. JAMES D. PATTON,

*President Board of Directors of
Virginia Penitentiary, Richmond, Virginia.*

DEAR SIR:

In reply to the question submitted, I am of opinion that it is the plain duty of your board to proceed to the election of a Superintendent of the Penitentiary and a Superintendent of the State Farm on some day prior to the first day of December preceding the date on which their respective terms of office would expire. The law on this subject is found in section 232 of the Code, and as applied to the duty of your board is as follows: "The said board * * * shall, prior to the first day of December, appoint a Superintendent and Surgeon of the Penitentiary and a Superintendent and Surgeon of the State Farm."

This language of the law is perfectly plain and I know of no reason which will warrant the board in disregarding their plain duty under the plain mandate of this statute.

Very truly yours,

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

RICHMOND, VIRGINIA, *November 25, 1911.*

Hon. J. D. PATTON,
*President Board of Directors of
Virginia Penitentiary, Richmond, Virginia.*

DEAR SIR:

In recent conversations had with you in my office you have submitted to me for my opinion the question as to the construction of the statute relating to the State Farm which is mentioned in a letter to you of October 6, 1911, from Hon. S. R. Donahoe, Auditor of Public Accounts, which letter is now before me, and you ask my construction of this law so far as the right of your board to draw from the State treasury the amounts placed therein "from proceeds of all sales from the State Farm" is concerned.

In reply, after due consideration, I am of opinion that this law appropriates the sum of \$18,000.00, and in addition thereto the proceeds of all sales from the State Farm, when paid into the treasury, as a fund to be used for the purposes mentioned in the law, to-wit, for supplies of food and clothing, ordinary repairs, extra guards, and incidental expenses at the State Farm, and that all of this money can be drawn out in the usual and ordinary way prescribed by law by your board, and as to what does or does not constitute ordinary repairs and incidental expenses on the farm are matters which necessarily must be left to the sound judgment or interpretation of the board, and this office cannot undertake to lay down as a matter of law how you shall exercise your judgment in the premises, except that you should in future, as you have done in the past, exercise your best judgment for the best interests of the institution under your control.

I can very well see how the board, under the circumstances, might be somewhat embarrassed, and I therefore suggest that the matter be called to the attention of the legislature, and all doubt as to the powers of the board be removed by appropriate amendments of the law.

Very truly yours,

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

RICHMOND, VIRGINIA, *February 21, 1912.*

Hon. J. B. WOOD,
*Superintendent Virginia Penitentiary,
Richmond, Virginia.*

DEAR SIR:

Replying to your letter of this date, I am of opinion that the expenses incident to the inquest held by Dr. W. H. Taylor, coroner, over the dead body of William Smith, alias Jennings Young, under the circumstances detailed in your letter, cannot be paid out of the public treasury of the State, as the only law authorizing such payment of the expenses of an inquest in cases of this kind is to be found in section 3946 of the Code, which refers to an inquest "on the body of a convict in the penitentiary."

It seems that this dead man was not a convict in the penitentiary and never had been, but had been sent to the road force of the State by

the judgment of the court, and not to the penitentiary, and having escaped from the road force, and having been shot in an effort to recapture him, and his death resulting therefrom, it seems to me that the expenses of this inquest is so intimately connected with the operation of the road force that they can be held to be expenses incident to the management of the road force, and that you will be warranted in paying it out of the fund under your control applicable to the support and maintenance of the road force.

Very truly yours,

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

RICHMOND, VIRGINIA, *July 22, 1912.*

MR. P. ST. JULIEN WILSON,
State Highway Commissioner,
Richmond, Virginia.

DEAR SIR:

Replying to your inquiry with reference to the question of the supervision of the construction of the road in Mecklenburg county, which you submitted in the conversation we had this morning, I desire to say that as I understand the situation, the county of Mecklenburg, proceeding under the statute allowing the issue of bonds for highway construction, has authorized the construction of the roads in two or more of the districts of the county, and the plans and specifications for the building of the road, bridges, etc., have been made and bids have been invited for the construction of the same; but that in the particular district to which you refer, no satisfactory bid was offered, and the road authorities of the county have not accepted any bid, but the district road authorities of the particular district referred to proposed to construct the road according to the plans and specifications that had been drawn up and deposited in your office, and also in the office of the clerk of the circuit court.

In pursuance of those plans, as I understand it, the local authorities have undertaken the work of constructing the road, contending that they are in absolute authority in all matters so far as the construction of the work is concerned in that district, and are not subject to the supervision or direction of either the engineer in charge, or of the State Highway Commissioner, and upon this question you are at variance with the local authorities in contending that the engineer in charge and yourself are charged with the duty of supervising the construction of the said road. It seems to me that there must be some misapprehension on the part of the local road authorities as to their authority in the matter.

They are acting, as I understand it, not under the special road law applicable to their county, but they are acting in the construction of the road which is being built from the proceeds of bonds issued by the county in pursuance of the special act approved in 1908, and providing for the issuing of county bonds for permanent road or bridge improvement in the magisterial districts of the counties of the State, which does not provide in any way for the local road authorities constructing such roads without the supervision and aid of the engineer in charge and the State Highway Commissioner.

There is a clause in the ninth section of the act which provides as follows: "The local road authorities of the county in which any portion of said road lies may offer bids and be awarded such contracts for or on behalf of such county."

But this provision certainly does not authorize, in my judgment, the district road officers to construct the road. It simply allows such authorities to enter into a contract, such as would be entered into by a private individual, for the construction of the road according to the plans and specifications agreed on, and until such contract setting out the work to be done and the amount to be paid therefor by the county is specifically settled, as it would be in a contract with anyone else, the local road authorities, it seems to me, have no authority whatever under the statute.

It seems to me apparent that the intention of the legislature was that all roads which were constructed under the provisions of this act with money derived from the sale of county bonds should be constructed under the advice and supervision of the State Highway Commissioner and the engineer agreed upon or recommended by him, and did not intend in any such case to leave the matter of construction to the local road authorities; and whether the contract for the construction was made by an individual, or by the local road authorities in pursuance of the provision of the statute above referred to, in either case there must be the same supervision and direction of the State authorities under the provisions of the statute.

As I understand the situation, the local road authorities had made no bid and had been awarded no contract for the construction of the road, and until that is done I do not see how it is possible for those local road authorities to have any part or share in the construction of the road.

I understood you to say, however, that in similar cases where the local authorities had failed to get a satisfactory bid from individuals, the local road authorities have been permitted to go on and construct the road under the supervision of the State Highway Commissioner or the engineer appointed by him, in such way as to give to the public the benefit of the information and experience of the said commissioner and engineer in the purchase of material, etc., and it may be that that would be considered as a substantial compliance with the provisions of the statute, though I do not feel entirely satisfied that even such action would be in accordance with either the spirit or the letter of the law.

The evident intention of the statute is to provide that in any case of this sort the building shall be under the construction and control of the State highway authorities for the purpose of securing to the public the most intelligent and competent authorities for the economical construction of said roads; and it cannot, I think, have been the intention of the legislature that in any case the construction of the road, involving the purchase of different materials, etc., should be left to the discretion of the local road authorities, who are as a rule without adequate information for the successful and economical construction of the roads.

The former action of your department in allowing those roads to be built by the local authorities under the supervision and control of yourself or your department, seems to me to have gone to the extreme limit of the law, and that in no case could the building of the road by the local authorities be consented to by you without having the distinct understanding that all of the work must be done and the road constructed under the supervision and control of yourself or of some competent engineer agreed to by you under the terms of the statute.

This answers the question, as I understand it, as well as I can do it without

a more extended examination of the statute and the authorities, and I trust that you will have no difficulty in making such arrangement with the local authorities in Mecklenburg county as will harmonize the dissenting views and result in an early construction of the desired roads.

Very truly yours,

RICHD. B. DAVIS,
Assistant Attorney-General.

RICHMOND, VIRGINIA, *September 23, 1912.*

FRANK C. STUART, ESQ.,
Clerk Circuit Court,
Montross, Virginia.

DEAR SIR:

Your favor of the 14th instant has been received. After quoting from the acts approved February 23, 1906, you make the following inquiries:

First: "Does this statute mean that in computing the amount required to redeem any such lot that I, as clerk of the county of Westmoreland, shall include the amount of delinquent taxes due and unpaid the municipality of Colonial Beach, of which said municipal taxes we have no record in this office, they are collected and imposed by the municipal authorities of the town of Colonial Beach?"

Answer: This statute does require that the clerk, in making up the list, shall include the municipal taxes for the town of Colonial Beach. The land book on file in the clerk's office, if made out according to law, will show the municipal taxes, and the lots contained in the lists should have been, if the laws were complied with, continued on the land books for each and every year after the Commonwealth purchased the lots (see Code, section 469, page 122 of the Tax Laws), and upon the assessed value of such lots should have been extended State taxes and municipal taxes.

Second: "What does the expression, 'And such additional sums as would have accrued from taxes, levies, and interest, if such real estate had not been purchased by the Commonwealth, etc., mean? Does this mean that where the lot has been purchased by the Commonwealth and unredeemed, that in calculating the amount required to redeem such lot I shall calculate all subsequent taxes thereon from the date of sale to the Commonwealth to four years prior to the date of list, with interest thereon, taking into consideration the change in assessment of each five years and the difference in the rate of taxation each year?"

Answer: My answer to your first question, I think, gives the answer to your second inquiry, *i. e.*, if the lots which you will enter upon list required to be made out by act of February 23, 1906, were kept upon the land book in accordance with the provisions of Code, section 469, you should find upon the land book for each and every year State taxes and municipal taxes extended thereon, and upon these taxes and levies you should calculate the interest and include the same in the list.

You state the provisions of the act of February 23, 1906, have never been complied with with respect to town lots purchased by the Commonwealth in

your county. I am of opinion that it would be within the spirit of the law for you to make out the list so as to include all lots which in 1906 had been purchased by the Commonwealth and not redeemed for four years or more prior to that date, and should include all lots sold for taxes of 1907. All lots sold for taxes of 1908, 1909, and 1910 have not been purchased within four years, and for that reason should not be included in the list.

If the land books on file in your office do not give you the municipal levies upon the lots in Colonial Beach, I think it would be your duty to obtain from the authorities of the town information which would enable you to include in the list municipal taxes due upon lots included in the list with interest thereon. The town authorities should prepare this list for you. They have the data from which to prepare it. You have not.

This letter has been prepared after a full consultation with the Auditor, and I hope that you will find it correct and that it will be of some service.

I take pleasure in giving you my opinion in this matter and will be pleased to be of any further service to you whenever I can, and I wish to thank you most cordially for your offer to be of service to me whenever you can, for which offer I am very grateful. Believe me,

Very cordially yours,

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

Conclusion.

In my last report reference is made to the rules pending against numerous foreign corporations who are doing business in this State by furnishing school books for the public free schools under contracts with the State Board of Education for failure to pay the fees which are required by our laws of foreign corporations doing business in this State. These rules are still pending. A test case has been fully argued, and as soon as the convenience of counsel will admit, will be formally submitted to the State Corporation Commission for its decision.

I do not deem it amiss to state that I have felt it my duty and have at all times responded promptly to the numerous demands which have been made upon me by the Auditor of Public Accounts, the State Treasurer, the Second Auditor, the Superintendent of Public Instruction and all other heads of departments of the State government, and whenever called on have rendered them the best service of which I am capable, to aid them in the proper administration of the affairs of their several departments; and I shall continue as long as I am the incumbent of this office, to pursue this course with proper energy and diligence.

I cannot conclude this annual report without making acknowledgment to my assistant, Hon. Richard B. Davis, and to my secretary, Mr. T. Gray Haddon, for the very valuable, diligent and able services which they have rendered to this office and to the State during the past year, and I repeat here all that I said about these gentlemen in my last annual report.

Respectfully,

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

Statement

*Showing the Current Expenses of the Office of the Attorney-General from
November 1, 1911, to November 1, 1912.*

1911.		
Nov.	1. Balance to credit of contingent fund.....	\$279 48
	4. To expenses of S. W. Williams to New York in connection with American Tobacco Co. case.....	\$73 97
	4. To R. A. Wynne for extra stenographic work.....	5 00
	8. To R. B. Davis, expenses to Norfolk, Va., in connection with Jamestown Jockey Club case.....	10 00
	8. To Mrs. M. A. Jones, for stenographic work.....	2 50
	13. To Western Union Telegraph Co.....	7 57
	13. Southern Telephone Co.....	24 45
	13. Remington Typewriter Co.....	56 00
Dec.	6. To expenses of T. Gray Haddon to Norfolk, Va., in connection with Jamestown Jockey Club case....	7 75
	6. To Samuel W. Williams, Attorney-General, for sundry items	24 00
	6. To Mrs. M. A. Jones for extra stenographic work..	3 00
1912.		
Jan.	8. To Beaufont Lithia Water Co.....	5 00
	23. To John A. Skinner for taking down awnings....	1 50
Feb.	16. To Everett Wadley Co. for sundry items furnished this office	14 20
	28. To Southern Bell Tel. & Tel. Co.....	35 50
	28. To S. W. Williams, Attorney-General, for items paid for by him.....	9 79
	28. Virginia and Tennessee Tel. Co.....	1 25
		<hr/> \$281 48
Mar.	1. Appropriation to defray current expenses to March 1, 1913	\$400 00
Apr.	12. To Western Union Telegraph Co.....	\$ 4 09
	28. To W. S. McNeill, stenographic work.....	7 50
May	1. To Willard C. Williams for two days' stenographic work	5 00
	3. To Miss Nellie Vaden for extra stenographic work	15 00
	6. To R. B. Davis for expenses to New York in connection with claim of State Library v. Lossing estate	50 00
	9. To S. W. Williams, Attorney-General, for sundry items paid for by him.....	13 50
	11. To M. B. Watts for subscription to <i>Virginia Appeals</i> for year	5 00
	6. Western Union Telegraph Company.....	4 13
June	11. To the Michie Company	5 00
	11. To Lawyers' Co-operative Publishing Co.....	24 50
	11. To Remington Typewriter Co.....	7 00
	11. To Southern Bell Telephone Co.....	7 80

REPORT OF THE ATTORNEY GENERAL.

63

June 11.	To Miss Carrie Heberle, extra stenographic work..	\$ 9 00	
	15. To Michie Company, on account of Michie's Digest, Va. and West Va. Reports.....	50 00	
July 8.	To Western Union Tel. Co.....	3 12	
Aug. 26.	To S. W. Williams, Attorney-General, for postage	12 00	
	8. To Michie Co. on account of Va. and West Va. Digest	10 00	
	9. To Western Union Telegraph Co.....	4 28	
Oct. 29.	To Western Union Telegraph Co.....	1 78	
			<hr/> \$238 70
Nov. 1.	Balance to credit of contingent fund.....	\$161 30	
