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*Families of Drafted Soldiers Not Entitled to Benefits of Act  
"For Relief of Families of Volunteers."*

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FAMILIES OF DRAFTED SOLDIERS NOT EN-  
TITLED TO BENEFITS OF ACT "FOR RELIEF  
OF FAMILIES OF VOLUNTEERS."

Attorney General's Office,  
Columbus, October 11, 1862.

*S. Alex. Leckey, Esq., Auditor Shelby County, Ohio:*

SIR:—The act of May 10, 1861, entitled "an act to afford relief to the families of soldiers mustered into the service of the United States, under the requisition of the president," authorizes the levy of a given amount of tax for the purpose of affording relief to the families of the *Ohio Volunteer Militia* and provides for the distribution of the amount thus raised among the families of such volunteer militia, according to the discretion of the board of county commissioners.

The act is limited in its terms to the families of volunteers. A drafted man is in no sense a volunteer; his service is not freely given—it is not voluntary. On the contrary, it is forced, unwilling and involuntary, and however hard it may be upon the innocent and needy families of such men, so long as they remain drafted soldiers and fail to avail themselves of the opportunity so freely given them to become volunteers, relief cannot be afforded their families, however worthy, innocent or needy they may be, under the provisions of the above cited act of May 10, 1862.

JAMES MURRAY,  
Attorney General of Ohio.

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Attorney General's Office,  
Columbus, January 12, 1863.

*Hon. R. W. Taylor, Auditor of State:*

SIR:—In answer to your note requesting my opinion as to the liability of the State for the tax imposed upon the

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*As to the Thirteenth Section of the Crimes Act.*

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amount of gas furnished by the Columbus Gas, etc., Co., under contract, as to price, I have to state, that in my opinion the State of Ohio is bound for the payment of the tax imposed upon the Columbus Gas, etc., Co., by the United States, for the gas furnished by that company for her use.

The act of Congress expressly so provides, and without going into an extended argument, it is sufficient to say, that as a police regulation—a mere matter of revenue—it is an obligation which the general government has a right to impose.

JAMES MURRAY,  
Attorney General.

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AS TO THE THIRTEENTH SECTION OF THE  
CRIMES ACT.

Attorney General's Office,  
Columbus, March 18, 1863.

DEAR SIR:—You ask me whether “it is necessary in order to convict under the thirteenth section of the crimes act that the proof should show that the fire was in actual contact with the building,” and “What is the meaning of the expression ‘set fire to’ in that section?”

The general rule is that “an attempt is only punishable when the same is manifested by acts which constitute a commencement of execution, and when the consummation is hindered only by circumstances independent of the will of the author.” The twelfth section punishes the burning. The thirteenth section an attempt to burn. The words “set fire, to” describe an act which constitutes “a commencement of execution” and that act must be such that the burning “is hindered only by circumstances independent of the will of the author,” and it is a question of fact for the jury whether the act described by the words “set fire to” would

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*As to Pay of County Auditors.*

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have consummated the thing intended if not prevented by the interference of others. If what was done would, unhindered, have burned the building the attempt is complete and a crime committed under the thirteenth section.

“Actual contact” is too strained a construction to put upon that section. I think the section intends to recognize the ordinary principle of cause and effect. The setting fire to by firing the shavings or paper and the flames reaching the building need not be instantaneous, nor perceived as a present fact, but may be the result of the sure progress of the flame toward the object. I do not think the owner nor the public must wait until the flame reaches the building in order to punish the incendiary. But it should appear, so as to produce a conviction in the mind and beyond reasonable doubt, that the flame which was not in contact with the building would, if undindered, have reached it.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

M. Pavey, Prosecuting Attorney, Fayette, County.

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AS TO PAY OF COUNTY AUDITORS.

Attorney General's Office,

Columbus, March 25, 1863.

DEAR SIR:—The third section of the act of February 7, 1861 (58 Vol. Laws, page 8), reserved to your auditor the benefit of prior acts as to fees.

The third section of the act of May 1, 1862 (59 Vol. Laws, page 105), repealed the whole of the act of February 7, 1861; but by a proviso reserved to your auditor the salary provided in the act of February 7, 1861, and *no more*.

The act of May 1, 1862, was intended, doubtless, to stop the fee system, and while the legislature was particular, in not changing, as to incumbents, the salary in the act of 1861,, it was equally particular to do away with the proviso

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*As to Arresting a Defendant for a Fine.*

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in the third section of that act so as to cut off any claim under the fee bills of prior acts.

This construction is in accordance with the views of the court in the case you refer to. (12 O. S. R., Thompson vs. Phillips.)

Your auditor is entitled to the benefits of the act of February 7, 1861, except the proviso in the last section.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

Hon. O. Bowen, Prosecuting Attorney, Marion County, Ohio.

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AS TO ARRESTING A DEFENDANT FOR A FINE.

Attorney General's Office,

Columbus, March 25, 1863.

DEAR SIR:—It has been my impression for some years that a *capias ad satisfaciendum* could not issue against a defendant for a fine. A judgment for a fine is not different from any other judgment and an execution against the person can issue only, by complying with the four hundred and seventy-ninth section of the code. (S. & C. Stats., 1092.)

In the 11th Ohio Report there are three cases on pages 68, 72 and 76 respectively, which decide that the court cannot order the imprisonment of a defendant until the fine and costs are paid; by a much stronger reason the court could not arrest and imprison for the fine and costs. There must be an express statute to authorize such a proceeding.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

P. DePuy, Prosecuting Attorney, Van Wert County, Ohio.

Note—April 7, 1863, the legislature passed an act providing for arrest of defendants for fine.

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*Opinion, Etc., as to Contract for State House Printing.*

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OPINION, ETC., AS TO CONTRACT FOR STATE  
HOUSE PRINTING.

Attorney General's Office,  
Columbus, April 7, 1863.

*To the General Assembly of the State of Ohio:*

In compliance with Senate joint resolution No. 91, the following is submitted:

The contract between the State and Hamilton Cummings does not seem to be involved in the controversy. The claim of the State for money overdrawn, and the claim of Cummings for money yet due, and the difference of opinion which resulted in a final disagreement grow out of the mode of measurement which is not fixed by the contract.

During the progress of the work estimates were made by the state house architect, the following of which November 15, 1857, \$21,287.92, January 7, 1858, \$947.71, February 27, 1858, \$1,799.20, and March 19, 1861, \$580.15, amounting in all to \$24,614.98 are found on the estimate book pages 25, 29, 38, 48. Other estimates were made, as I am informed, which, together with the above, amount to nearly \$30,000.

During the progress of the work, Cummings drew from the treasury, \$25,024.92, as reported by the Senate committee. The money was drawn upon the estimates and order of the architect.

On the 23d of April, 1859, the architect and Cummings not having been able to agree, a committee consisting of N. Harris, O. Lovell and H. M. Harbaugh were selected to measure the work. The majority of the committee reported the work to be worth \$15,458.34. To this report Mr. Harbaugh excepted. In fact, Cummings and Harbaugh from the beginning of the measurement objected to the mode, and Cummings has always refused to regard it a fair estimate, and claims about \$6,000 as due him from the State.

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*As to Certifying Cost Bills by Warden of O. Penitentiary,  
Etc.*

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From the best information I can obtain, Mr. Harris was not very friendly to Cummings, and Mr. Lovell was not in the habit of making calculations of the kind. Mr. Harbaugh seems to have been the most experienced of the three.

I do not, therefore, and considering the estimates of the architect, regard the report of the committee as conclusive.

The great discrepancy between the estimates of the architect and of the committee renders the whole matter very unsatisfactory, and I doubt whether the true amount of work performed can be ascertained without a measurement.

In pursuance of the resolution, I also made inquiry as to the solvency of Cummings, and believe that he is not solvent.

No action has been commenced.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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AS TO CERTIFYING COST BILLS BY WARDEN OF  
O. PENITENTIARY, ETC.

Millersburg, Holmes Co., Ohio, April 14, 1863.

*To the Warden of the Ohio Penitentiary:*

I was called away, unavoidably, from Columbus without answering the questions in reference to the cost bills left at my office.

As I understand the questions proposed they were: Whether they all ought to be certified to the auditor. What length of time the prisoner should serve.

It is unusual for so many sentences and cost bills

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*As to the Appointment of New Officers in Ohio Penitentiary.*

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against one person, at the same time, and apparently for the same offence. But, I believe, they are all certified to according to law, and with my present information, I do not see how you can avoid certifying them.

If the cases are separate offences the prisoner would be liable to serve the time of the whole of the sentences. I will, however, give this point further reflection.

If I am not correct as to the questions you proposed, please state them in writing directed to me at Columbus.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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AS TO THE APPOINTMENT OF NEW OFFICERS  
IN OHIO PENITENTIARY.

Attorney General's Office,  
Columbus, May 4, 1863.

*To the Directors Ohio Penitentiary:*

The forty-second section of the act of March 24, 1863, providing for the expiration of terms of present incumbents, seems somewhat indefinite, but I am of the opinion that the legislature intended that the terms of present incumbents should expire whenever the directors appoint others and the appointees qualify.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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*As to Persons Not Listing the Full Amount of Notes Not Due and Without Interest.*

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AS TO PERSONS NOT LISTING THE FULL  
AMOUNT OF NOTES NOT DUE AND WITH-  
OUT INTEREST.

Attorney General's Office,  
Columbus, June 4, 1863.

*Hon. O. Cole, Auditor of State:*

You desire an answer to the following statement and questions submitted by W. H. McFadden, of Wayne County, Ohio:

"A holds B's note for \$1,200, due in three years from April 1, 1863, and not bearing interest. Is the assessor to permit a discount of six per cent. per annum until due and return the balance for taxation?"

The construction of a part of the second section of the tax law of April 5, 1859, relative to the definition of "credits" is involved in the question.

What is the "true value in money" of such a "credit" as the above?

Some consideraion of the origin and nature of such credits will, perhaps, throw light upon the question.

The above and similar contracts are agreements between the parties for consideration or value, which generally, by their judgment, is the equivalent of money.

The value of property is represented in various ways in the calculations or designs of the parties contracting. Money, being the standard of value, is the point around which, and from which, estimates of value are made.

Interest is the value of the use of money and is varied in per cent. and in the mode of representation.

Promissory notes are made in various ways—due with interest, not due with interest, and due or not due without interest. Those not due without interest are the most unusual in ordinary business. The form of a note, however, does not always determine the question of interest or value.



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*As to Persons Not Listing the Full Amount of Notes Not Due and Without Interest.*

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Those not due without interest and those due without interest are often made with interest calculated in, and, I apprehend, never without some equivalent of interest connected with the transaction. Notes which run longer than a specific period at which interest is due before maturity, very often, have not any interest calculated in, but interest upon interest as though they were made due with interest payable annually or semi-annually or in a shorter period. And, following the same plan, interest is often paid in advance. In addition to what is interest proper a per cent. is often added for delay and litigation, etc. In still other cases notes showing a gross sum upon their face involve considerations of profit, inconvenience, necessity, expense, and speculation, known, perhaps, alone to the payee or other holder. All considerations of delay and interest, of discount and forbearance to sue, are probably, provided against, so that the obligation may be due in the contemplation of the owner though not upon its face, and its true value be the amount expressed though not bearing interest by express words.

The time a note runs before maturity is not necessarily of value. A forbearance to sue may be given without consideration, or it may be estimated in money. It is usually valued. Some value enters into every contract where a privilege or a right is granted or forbearance to be exercised. When the currency is unsafe an investment for years without interest would be regarded of value. Under other circumstances a variable rate of interest calculated in the gross sum or expressed in the note would be the value of the time for which money would be loaned or property sold. In general, time given for payment, as a gift, being voluntary, is not of value to the public, and if of value is beneficial only to the party and is like any other property which he possesses. It is pretty well understood that men do in one way or another calculate results and provide against loss. The supreme control which men exercise over their own affairs,

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*As to Persons Not Listing the Full Amount of Notes Not Due and Without Interest.*

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which is recognized by the courts, and which is in accordance with the whole theory of the law, raises a presumption, which assumes the character of a general rule, that a contract will not show upon its face and in its terms a loss to the party beneficially interested in making it, whether the loss be supposed to consist in time or per cent. or other cause. As well might the owner of a note bearing two per cent. interest ask a discount of four per cent., as to ask six per cent. discount on a note bearing no interest at all. In either case motives or capacity, good faith and responsibility are ignored. Dealers or contracting parties do not contemplate any other than a voluntary loss, which is, of itself, presumptively, a desired gain—a mode of increasing or reducing valuation to which the public is in no sense a party.

In the nature of things, every person must be presumed to be indemnified against all unfavorable circumstances which are thrown around their own contracts. The act of April 13, 1852, does not contain the words "estimating every such claim or demand at its true value in money" as does the present act, but the courts construed the old act in the sense which is expressed in the new. In *Exchange Bank vs. Hines*, 3 O. S. R., 25, Judge Bartley lays down a general theory for determining the taxable value of credits. "In estimating the taxable value of credits they are not to be taken at their nominal amount, but like the valuation of other property, every circumstance, affecting in any manner, their value, should be taken into consideration." "They (credits) are not to be taken at their nominal amount," but at their "true value in money." The nominal amount may be the "true value in money." The two are most generally identical. In the present case, however, we find the nominal amount (which would be the sum expressed on the face of the note less the interest) not to be the true value in money, as may, frequently, occur in instances of credits made like the one in question. The true value in money is the sum expressed in the note without

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*As to Persons Not Listing the Full Amount of Notes Not Due and Without Interest.*

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deduction of interest, for the owner either gave the interest to the debtor and can't get it back or added the interest in the note, and is the owner of both principal and interest; in which case to assert that the interest is not yet due is claiming it to be improperly in the note. And to claim that he is not paid for the time he has given the debtor is not only saying that he was not capable of doing business and that the contract ought to be changed, but it is saying what we know nothing about.

The nominal amount of credits not due without interest or due without interest is not necessarily different. The owner of a note *past due* without interest might as well claim a deduction for interest which he might have had by inserting a provision in the note to that effect, as to claim a deduction on a note *not due* without interest because that same provision is not inserted. In the one case the money may be demanded, but the right has been suspended voluntarily, and in the other the suspension is by agreement; in either case, perhaps, for value.

The fact of a note being drawn payable after date without interest until maturity is, simply, proof that the parties estimated the consideration at its true value in money, taking the delay, etc., into the calculation, and that if interest had been allowed and expressed in the note, the note would have been for a *greater* sum than the parties regarded the value. By deducting the interest, in similar cases, the sum left would be less than the true value. The estimate of the parties would be changed, the contract thrown aside, and the public, which has, for purposes of taxation, an interest in every such contract, defrauded into a greater burden.

The clause in a note of "three years after date" and the words "without interest" are indicative of care on both sides to approximate as nearly as possible to the money standard. To deduct interest in such a case would be to increase the value of the note and lessen the taxable valu-

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*As to Persons Not Listing the Full Amount of Notes Not Due and Without Interest.*

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ation—increase the burden of taxation upon those who do not deal in credits extensively—pay the owner of a credit more than he ever claimed off of the debtor and when a credit had many years to run and while it would remain as a basis of business extinguish it as a basis of taxation.

If it is attempted to change the value of a credit of this and like kind the difficulty to do so, correctly, furnishes an objection to such a process. The assessor would not except in rare instances get the true value by the ordinary rule of discount applied to the face of the credit. To do it correctly would involve the original transaction in a complication of transactions. The motives and estimates of men would require examination; and the ramifications of business present a maze of entanglement too complex to attempt to inquire into; and after a vain search the contract itself would furnish the only solution. In going through, other taxable property would claim a like attention. The advance on gold, the relative depreciation of paper money and its being a legal tender, the consequent depreciation in the value of every kind of property would require investigation and a uniform rule. Indeed, why not claim a discount on the note in question, on account of the currency with which it is payable, in addition to what is claimed for interest?

No assessor would pretend to act upon such an uncertain state of things—upon circumstances so remote, difficult and unsatisfactory.

And why propose 6 per cent. as the amount of discount? Six per cent. is the lawful interest, but the parties have disclaimed, particularly, the benefits of the statute. And this being the case, how could an officer say what per cent., if any, the nominal amount was above or below the true value? The price for which a note will sell might be, more properly, regarded as its true value in money. Ten, 12, 15 and 20 per cent. is deducted in the sale of notes—the sale and discount depending upon a great variety of interests and circum-

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*As to Taxing Certain "Credits."*

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stance—many of them beyond the reach of an officer and unknown save to the parties dealing.

The same difficulty is in the way of an assessor determining the true per cent. of discount as in arriving at the propriety or justice of discounting at all.

It is not likely that it was ever contemplated that assessors should make discounts just as they saw proper or change contracts without knowing much about them; but "if (in the language of the judge in the above recited case) the debtor be wholly insolvent, the credit is of no value, and, therefore, has no basis for taxation. If the debtor be in doubtful or failing circumstances, if the claim be disputed, contested, or involved in litigation, or if any defense by way of payment, or otherwise, either in whole or in part against the claim be known to exist, it should be considered, and all proper allowances made in estimating its taxable valuation."

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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AS TO TAXING CERTAIN "CREDITS."

Attorney General's Office,

Columbus, June 9, 1863.

*Hon. O. Cole, Auditor of State:*

The letter of the auditor of Hocking County asks an opinion in reference to the following state of facts:

A father sells his farm to his son, for which the son executes and delivers seven promissory notes to the father. The notes are due in one, two, three, etc., years. The father executes a deed, but retains it in his possession until the notes become due and are paid, or if he dies before the notes are all paid, they are to be divided in equal amounts among his children, and the deed is to be delivered to the son.

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*As to Taxing Certain "Credits."*

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Ought the father to list the notes for taxation? Are they credits such as the law taxes?

The execution of the deed on the one side and of the notes on the other, and the delivery of them, constitutes a contract which might be inferred, or the son, upon refusal by the father to deliver the deed might sue to recover back the money paid, or to cancel the notes.

The intention of the transaction gives it character. As it now stands, in intention, the farm is the son's and the notes the father's. The father can hold the notes until, one by one, they are paid off, or if the father die, the day after the assessor calls, the notes go into the hands of the heirs, or if the father do not die the deed may go into the hands of the purchaser the day after the assessor calls. The very uncertainty connected with the notes, if there is any, gives them the character of *capitas*. The case, as the parties say they designed it, is as though a mortgage and notes had been taken to secure the back payments. The deed assumes the character of a mortgage, being retained. The notes can be enforced when due, and in a suit for the collection of the last note a court would likely decree the premises to the son. It is not what the father *may do* with the notes that gives them character, but what he *can do*; and it is not what the father may see fit to do with the deed, but what good faith and equity would compel him to do, that is to be considered. The father assumes bad faith to the son when he says the notes are of no value. Good faith to the son makes the transaction *bona fide* and the notes taxable. The notes are entirely under the control of the father. He may buy another farm with them, may sell them, may do what he pleases with them, whether the son sue for the farm or to recover the money. If the notes are of no value why execute them? For convenience? Or as an evidence of the contract? Or to bind the son? Or the father? So are all credits. Any other idea would open a wide door for evasion of, and fraud upon, the law.

Can the assessor or auditor be asked to look at the trans-

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*As to Taxing Certain "Credits."*

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action in any other light than it presents itself? All that the officer need know is that the person holds "credits" which form their face indicate value, and are made by a solvent person or secured, and not in dispute. As the parties place themselves, so they are taxed. To avoid taxation, persons should avoid creating the subjects of taxation. The motives of the party have nothing to do with the notes. Officers, usually, can't read motives. The transaction may be completed as intended, the notes escape taxation and the balance of the people make it up.

Notes not due are taxed as well as others, without discount, though they bear no interest. The land is taxed, the purchase money is taxed, capital is created by transfers and sales, and the right to do it is coupled with a duty to pay tax; and there is no excuse for the non-performance of the duty while the right is exercised. Credits are the representatives of other values. Bank bills and notes alike have a fictitious basis, but are capital to the holder if the bank or the person is solvent. The same property may be represented many times in the shape of "credits," each transformation furnishing a new basis for speculation or profit. Value consists in what people say of it and agree to accept as such, otherwise a pound of gold would be of little value.

Assessors must take the contracts made by and accepted by the people as of value at that value, and when this is done the people pay taxes upon no other value than they themselves have judged correct, and in this way men mete out to themselves that measure of exact justice which is agreeable to themselves.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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*As to Borrowing Money to Build Infirmary in Mercer  
County, Etc.*

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AS TO BORROWING MONEY TO BUILD INFIRMARY IN MERCER COUNTY, ETC.

Attorney General's Office,  
Columbus, June 9, 1863.

DEAR SIR:—I have examined the sections of the statute bearing upon the questions you ask in reference to the establishment of a county infirmary, and my reply is, that, taking the first section of the act of March 8, 1831, to establish poor houses, and the third section of the act of April 8, 1856, prescribing the duties of county commissioners, and the act of May 1, 1857, providing for the sale of real estate by the commissioners, county commissioners cannot, without first submitting it to a vote, expend more than \$5,000 in establishing an infirmary, including the land, buildings, etc., without transcending the evident intention of the legislature. The eleventh section of the act of March 12, 1853, authorizing contracts to be made for building, etc., is limited by the provisions of the statute before mentioned.

Your commissioners have the power to purchase a site and erect buildings for the purpose mentioned and levy a tax for that express purpose without submitting it to a vote if the whole cost does not exceed \$5,000.

The law of March 8, 1831, above mentioned, provides distinctly how the expense shall be met. It says: "The expense of such purchase and erection shall be defrayed by a tax levied on the objects of county taxation for that express purpose."

The erection of a county infirmary not being a matter of sudden necessity, nor requiring a deviation from the ordinary process of doing such things, it is not likely the legislature would have omitted giving authority to borrow money, as it has omitted to do, if it had intended that money might be



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*As to Money Instead of Two Days' Labor on Roads.*

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borrowed when the levy might be made and delay, though not disastrous, intervene.

The section last referred to, of the statute, says the levy shall be made to defray the expense of purchasing and building—expressly for that purpose—not to pay debts created or interest upon borrowed money. As the commissioners of a county are the agents of the people—agents created by statute—they cannot exceed legitimate authority within the legal scope of their agency.

The safest and best plan is to levy a tax for that “express purpose,” and then when the money is collected establish the infirmary. Until that time the townships, as they are bound to do, furnish temporary or permanent support to the poor; and this can be done as cheaply, perhaps, as it could be done in the infirmary. Respectfully,

L. R. CRITCHFIELD,

Attorney General.

W. E. Baker, Prosecuting Attorney, Mercer County,  
Ohio.

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AS TO MONEY INSTEAD OF TWO DAYS' LABOR  
ON ROADS.

Attorney General's Office,

Columbus, July 11, 1863.

*Mr. A. A. Powers:*

Your prosecuting attorney would, doubtless, have informed you in the matter you ask my opinion about; but as he might ask my opinion, to avoid delay I refer you to the act of April 10, 1863, which, perhaps, is not yet published. That act provides for payment of \$1.50 in lieu of the two days' work and substantially revives the seventh section of the act of February 13, 1863. Respectfully,

L. R. CRITCHFIELD,

Attorney General.

Supervisors, New London, Ohio.

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*Opinion as to an Award and Claim of Stephens Before the  
Military Board.*

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OPINION AS TO AN AWARD AND CLAIM OF  
STEPHENS BEFORE THE MILITARY BOARD.

Attorney General's Office,  
Columbus, July 27, 1863.

*Hons. Geo. B. Wright, O. Cole and G. Volney Dorsey,  
Military Board:*

GENTLEMEN:—Your letter of the 18th instant was received by me today on my return from home, and I hasten to give you an answer.

The large amount of the claim of Mr. Stephens had, very early in the investigation of your board, attracted attention, and I had thought it was a want of funds with which to pay witnesses, etc., rather than the question concerning the award which was the cause of the delay. In conversation with the board I have expressed the opinion that the award of the arbitrators in the case was not binding on the board. The following is a brief view of the matter:

The claim of Mr. Stephens is for the use by the State of the "Cincinnati Trotting Park," and the specific amount claimed (\$11,600) is the result of an arbitration provided for in a written agreement between the military authorities of the State and Mr. Stephens. The "park" was occupied by the State for a camp from April 20, 1861, to June 3, 1861, except the reservation to Mr. Stephens of the main track in the park, which was also taken and used by the State in a very few days after the 20th of April. The park contained eighty acres of land.

It is not claimed by the board nor the attorney general that they know the award to be too much. But the large amount of the award, the short time the premises were occupied and the quantity of land, all taken together, have induced me to suggest the propriety of the board knowing something about it before allowing the claim.

The attorneys of Mr. Stephens claim the award to be a

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*Opinion as to an Award and Claim of Stephens Before the  
Military Board.*

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final determination of the matter unless impeached for causes upon which a court would set it aside.

Mr. Stephens has also procured the affidavits of some eight freeholders as to the fairness of the award—that is, as to the value of the use of the land.

In claiming the award to be final it is necessarily assumed that even though Mr. Stephens has been awarded too much, it cannot be corrected. I think it can and ought to be, and believe the only question in the case is, Is the board satisfied with the testimony adduced by Mr. Stephens as to the value of the use of the land, etc.? If not, the board should get additional proofs.

As I understand the claim comes before the board after having been refused allowance by the governor, by a former board and by the legislature, all of whom have had the award before them.

The legislature created this board by the act of April 13, 1863, and gave you the power and jurisdiction which you can exercise, viz.: to *examine, adjust and allow* certain classes of claims. These provisions of that act do not in my judgment, leave the question of the *mode* of presenting claims, their *regularity*, or the *appropriation of money*, simply, to be decided by the board. Nor do they confine the board to the examination of the causes, alone, for setting aside awards as provided by the act of June 1, 1831. The act creating the board is more binding than any other act or set of general principles, even if the award in the case has been made in strict compliance with the provisions of the act of June 1, 1831.

Contesting the *validity* of a claim or examining, adjusting and allowing a claim means more than finding "legal defects in the award or other proceedings," or "that the award or umpirage was obtained by fraud, corruption or other undue means," or "that said arbitrators or umpire misbehaved." Examining, adjusting and allowing a claim means more than examining the decision of arbitrators upon

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*Opinion as to an Award and Claim of Stephens Before the  
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a claim, and contesting the *validity* of a claim means more than its *legal validity*, it means its justice, fairness and value in fact.

But the award in question is not in accordance with any of the provisions of our statutes. The arbitrators were not sworn, the witnesses were not sworn, the submission of the claim was not made a rule of any court of record, etc. The State had no reason to believe that the claim would not be examined, by the arbitrators, under oath upon sworn information; and, although, good faith might require the board, if the board had made the contract and had participated in the arbitration, to abide by any and all neglect and mistake of its own, yet as it is constituted apparently, to correct the mistakes, neglect or even fraud upon the part of State agents as well as citizens, the question of good faith rests with the particular agents of the State who made the contract, or the legislature who submitted their claims for revision by this board.

The owner of the claim in question has furnished *ex parte* evidence of the fairness of the claim; this, together with the private opinion of the arbitrators (for the award seems nothing more) constitutes the evidence before the board; and, while Mr. Stephens has been, most unfairly, delayed in the payment of his claim, it would seem as though it is the duty of the board and the attorney general to, at least, cross examine the witnesses of the claimant, and, if possible, get others, so as to have, in fact, a fair development of the matter in controversy.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

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*As to Bringing Personal Property Forward on the Duplicate Omitted in a Preceding Year, and With Reference to Taxing Bonds of a Railroad Association in Kentucky, Etc.*

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AS TO BRINGING PERSONAL PROPERTY FORWARD ON THE DUPLICATE OMITTED IN A PRECEDING YEAR, AND WITH REFERENCE TO TAXING BONDS OF A RAILROAD ASSOCIATION IN KENTUCKY, ETC.

Attorney General's Office,  
Columbus, July 29, 1863.

*Hon. O. Cole, Auditor of State:*

The first question of the auditor of Hamilton County resolves itself into this: Can railroad bonds (or the like) which were not listed or taxed in 1862, since discovered, be placed upon the duplicate by the auditor in 1863 for the year 1862?

I have examined the tax law with some care, and I find no provision in the law authorizing such a proceeding. The seventieth section of the tax law provides for bringing real property forward which has been omitted for preceding years, but I can find no inference arising which would apply it to personalty. The whole machinery of the law seems to ignore it. Real estate is permanent and its own evidence, while proofs of personalty after a lapse of one, two or five years would be almost impossible and the production of them would work great hardship on the citizen.

The second question proposed embraces a statement, substantially, as follows:

Mortgage bonds of the Covington & Lexington Railroad were held by R. B. Bowler in January, 1863, and as the auditor claims, in April of that year. In January, 1863, Bowler, who had purchased and owned the railroad, took in partners and made a mercantile firm of it. The bonds had been hypothecated for a loan of money. The mercantile firm or company assumed the payment of the loan, and the

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*As to Bringing Personal Property Forward on the Duplicate Omitted in a Preceding Year, and With Reference to Taxing Bonds of a Railroad Association in Kentucky, Etc.*

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bonds were turned over by Bowler to the firm, they agreeing to remove a mortgage from Bowler's property in Hamilton County, which Bowler had given to the commissioner from whom he had purchased the road as security instead of the bonds which were originally deposited. The firm was a resident of Kentucky, Bowler himself a resident of Hamilton County. Bowler claims that when the road was purchased by him the bonds became his own notes or bonds redeemed.

The auditor claims Bowler held the bonds in Hamilton County and that they are liable to taxation.

The question of fact as to who held the bonds, where and for what purpose being disputed, renders my reply alternative.

The first section of the tax law of April 5, 1859, provides that all property whether real or personal, in this State, all moneys, credits, investments in bonds, stocks, etc., of persons residing therein shall be taxed. The second section provides that the term "investments in bonds," etc., held by persons residing in this State whether for themselves or as guardians, trustees, or agents, shall be held to mean and include all moneys invested in bonds, etc.

If the bonds referred to were held and owned by the company in Kentucky at the time for listing them, they would not be taxable in this State.

If, however, the arrangement spoken of by Bowler is a mere shift or device and Bowler owned the bonds they are taxable in Hamilton County.

Or, if Bowler held the bonds as agent or trustee of the company in Hamilton County—held in the sense meant by the law—they are taxable. A trustee is one to whom property or the management of property or an institution is committed in behalf of others, or of a corporate body. An agent is one who is authorized to act for another—a substitute, a factor, an instrumentality for transacting the bus-

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*As to Bringing Personal Property Forward on the Duplicate Omitted in a Preceding Year, and With Reference to Taxing Bonds of a Railroad Association in Kentucky, Etc.*

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iness of a corporation, etc. If Bowler is in these capacities, or either of them, in Hamilton County for the firm in Kentucky, and holds these bonds for purposes of, or in the business of, the firm they are taxable.

Having the bonds in his possession for the company or as a member of it, simply, would not constitute him an agent or trustee in the meaning of the law.

Bowler's interest in the bonds might be taxed if that interest was determinable. The second section of the tax law further provides that "investments in stocks" when held by a firm or corporation may be taxed in the name of individual members when they are or may be divided into shares which are transferable by each owner without the consent of the others. Otherwise the property of a firm is listed by the firm as provided in the fourth section of the act.

The auditor's question further inquires if the bonds are taxable at all; and if so, should a deduction be made of the amount for which they were hypothecated.

The bonds are claimed by Bowler not to be taxable, in any event, because while he held them the bonds became his own notes or bonds redeemed by the purchase of the road. I can't see it in that light. The purchaser of the road and the holder of bonds are, in law, distinct persons. The bonds remained as an indebtedness of the road, had been deposited by the order of the court as security for the purchase money, had been released by the substitution of a mortgage on real estate of Bowler, were hypothecated for a loan, transferred to the firm on a valuable promise, and if at any time valueless, made valuable again by Bowler's negotiation of them and now held by the company or Bowler and acknowledged by the public as a pledge for a large amount of money. They were never cancelled, and were sent out to do the office of capital. Nor do I think the amount for which they are hypothecated should be deducted. The bonds are mere

*The Line Between the Southern and Northern Districts of Ohio.*

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collateral security for the indebtedness, were not affected in value or amount, were transferred to the company as they appeared, were pledged conditionally only, and possession of them remaining with the debtor to be used by him to liquidate the debt if he should find it necessary. Deductions depending upon circumstances which may or may not transpire are not within the province of an assessor or an auditor.

The tax law operates upon facts and when any one puts himself in a condition that he cannot say the value is different than it appears the assessor or auditor is not expected to say so.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

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THE LINE BETWEEN THE SOUTHERN AND  
NORTHERN DISTRICTS OF OHIO.

Attorney General's Office,  
Columbus, July 29, 1863.

*L. V. Bierce:*

DEAR SIR:—The districts are formed as follows: the counties of Belmont, Guernsey, Muskingum, Licking, Franklin, Madison, Champaign, Shelby and Mercer, together with all that part of the State lying south of the above mentioned counties compose the southern district. The remaining counties compose the northern district.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

Asst. Prov. Marshal.



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*As to Taxing Money Belonging to a Party Non-Resident of the State.*

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AS TO TAXING MONEY BELONGING TO A PARTY  
NON-RESIDENT OF THE STATE.

Attorney General's Office.

Columbus, July 30, 1863.

*Hon. O. Cole, Auditor of State:*

It is submitted by the auditor of Hamilton County that if a party in Pittsburg, Penn., send money to a firm of produce brokers in Cincinnati to purchase produce and the money is unexpended on the day preceding the 2d Monday of April it is a subject of taxation. The sum of about \$2,400 was placed in the hands of M. Bailey & Co., to buy hams and on the Tuesday following the money was appropriated to that purpose.

In 15 O. Reports, 652, is a case of a citizen of Pennsylvania who came to Columbus, Ohio, and purchased, slaughtered and shipped hogs, and he was decided to be a merchant, and the capital invested subject to taxation.

The case presented, however, is not of that kind. It is not claimed that the party in Pittsburg is a merchant here, or carrying on business here. The owner of the capital sought to be subjected to taxation is a non-resident of the State, and therefore, he does not come within the letter or spirit of the first section of the tax law.

Does the case come within the fourth section of the law, which provides that agents having money under their control, or on account of any person or subject to order, etc., shall list it for taxation? It would seem too narrow a construction of this section to include every case, however technical, or apparently, within the letter of the law. To say every case of the kind was within the law would subject Ohio merchants, who pay taxes as merchants in Ohio, to a tax upon money sent to our cities or to the east under similar circumstances. The tax law intends to reach the property of every person which is found in the State, of residents therein, and of non-residents if so fixed in Ohio by themselves

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*As to Taxing Money Belonging to a Party Non-resident of the State.*

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or through agencies as to be property of theirs here. And the reason of this is, doubtless, that a permanent investment or a regular business by a legal fiction for taxable purposes, brings the residence of the owner, where his investment or business is. Aside from this, personal property (such as credits or money) follows the residence of the owner wherever located. A resident of Pennsylvania may have a business here and property here which is taxable here. And so a resident of Ohio may have a business in New York and property there not taxable here. But in either case a mere transient business or temporary deposit of money would not be regarded as separated from the residence of the owner. Temporary or isolated dealings in other States by non-residents of those States do not subject the capital employed to taxation there. The fourth section of our law must be understood in that light. Its design is to uncover all attempts to loan, invest or place under the control of agents, money or property for profits in business in this State and tax such money or property. And this is the case whether it is done by the owner himself or by any other instrumentality whatever. And in such cases the character of the agency is to be determined by a substitution of the principal in the transaction. For what the principal may do, without or with, taxation, the agent may. The transaction in question had no relation to a business of the party in Pittsburg, in Ohio, whatever. The whole transaction relates to a business and residence in Pennsylvania. If the party himself had come to Ohio with money to purchase hams to be shipped home and to return himself, it is hardly to be claimed that his money in his pocket would have been subject to taxation. If, however, a non-resident should engage in any business, to the extent of, or farther, or even, perhaps, more limited than, that of which I have made mention in 15 O. Reports, he would be taxable and it is not difficult to discriminate between a simple purchase and the establishing of a business.

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*As to Taxing Money Belonging to a Party Non-resident of the State.*

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In fact I do not think the fourth section is intended for such cases. Nor any section of the law.

The control exercised by M. Bailey & Co., in the premises, in investing or drawing out the money of the party from the bank had no different relation to the transaction than the control of the party himself. Bailey & Co. might have, by a breach of trust, assumed control and used it as they pleased, but a court would have restored the control to the party, when called on. The agreement and understanding, carried out in good faith, left the funds under the control of the party. So much so, that he would have had the right to have changed the application of the money to an entirely different purpose. The party and Bailey & Co. both carrying out the intention were completing a purchase which, of right, was no evasion of the law.

Suppose the produce was shipped to Pittsburg and the money received there. On the day preceding the 2d Monday of April the assessor would have found the hams, or their representative, in Hamilton County and would not have found the money. All would have been taxed that should have been. And I am not able to see what different character the transaction gets by sending the money here instead of paying it out in Pittsburg, or by paying it out before or after the purchase.

The question may be asked, and has arisen in my own mind, how are these transactions to bear the burden of taxation? And I have thought of it in this way: Merchants in other States ought to be made (to) pay taxes as they do in Ohio; if they do not the people of that State pay less than they ought to; but that is not our affair. A merchant's business in another State bears, including his purchases in Ohio, its burdens at home. Our merchants who purchase large quantities of goods, of every description, by order and deposit of money, in the eastern cities are not taxed there, but here. And thus goes on the system of merchandizing through

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*As to the Application of the act of May 1, 1854 (Swan & Critchfield's Stat. 1320) to Improving the Main Street of a Town or Village.*

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brokers and commission merchants, and other facilities of a varied character.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

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AS TO THE APPLICATION OF THE ACT OF MAY  
1, 1854 (SWAN & CRITCHFIELD'S STAT. 1320)  
TO IMPROVING THE MAIN STREET OF A  
TOWN OR VILLAGE.

Attorney General's Office,  
Columbus, July 30, 1863.

DEAR SIR:—I have delayed answering yours of the 24th instant until now on account of prior engagements during the week.

I have examined the first question you proposed and my impressions of it render it unnecessary to consider the others.

Municipal corporations have charge of their streets, etc., and there are various provisions of law authorizing the improvement which you speak of, and pointing out the mode of paying for it by the corporation alone. I can see a propriety in assessing lots, etc., along the street to be improved as provided in the thirtieth section of the act of May 3, 1852, organizing cities and incorporated villages, but I do not see the propriety of taxing persons out of the corporation on each side of the street for a certain distance. The same idea might apply to a road in the country, but there, on account of the sparseness of the population, it would be sanctioned by most of those who would be taxed, while the town, in the other case, could keep the country

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*On the Habeas Corpus Act.*

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paying tax for three, six, or a greater number of years against their own will.

The language employed in the act throws some light on the subject. The words "road," "lands and property," "township," "line of any such road," etc., are used. While the words "street," "town," "village," "lot," "street commissioner" are used, generally, in the law when speaking of municipal corporations. The manner of executing the act, such as providing for agents to disburse the funds, county commissioners taking charge, etc., would seem to imply that there is to be no conflict with town authorities.

The general tenor of the act seems to indicate a want of application of its provisions to towns or villages.

I find no authorities one way or the other upon the subject, and as these are questions for the courts, in adjusting which my opinion would be of no avail, I offer them to you as suggestions, merely, and might change my opinion upon a more thorough investigation.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

D. H. Pease, Auditor, Huron County, Ohio.

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ON THE HABEAS CORPUS ACT.

Attorney General's Office,

Columbus, July 31, 1863.

*Mr. E. V. Whitmer, Prosecuting Attorney, Darke County:*

DEAR SIR:—About the time your letter was written I had left the city for New York on the business of the State, and I only received it a few days ago.

You ask me the meaning of the sixth section of the habeas corpus act, and whether a criminal discharged on habeas corpus by a probate judge can be rearrested before

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*As to Suits Under Militia Law of April 14, 1863.*

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a justice of the peace with safety to the person doing so, etc.

The first clause of the section is applicable to your case, and its meaning is that a person discharged and set free by the probate judge cannot be again imprisoned for the same offense.

The latter clause of the section applies to cases where a person is discharged on recognizance to appear in another court.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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AS TO SUITS UNDER MILITIA LAW OF APRIL 14,  
1863.

Attorney General's Office,  
Columbus, October 16, 1863.

DEAR SIR:—The prosecuting attorney of your county would be the proper person to make inquiries of, but as he might task my opinion, to avoid delay, I will answer you directly.

Your questions are, Who is to be plaintiff in suits for the collection of fines under the militia law of April 14, 1863, and in what manner are suits to be brought?

From the last clause of the forty-third section of the act I conclude that the State is to be the plaintiff, and the manner of bringing the suit is the issuing of a summons upon the list returned to you by the commissioned officers of the company as provided in the thirty-first section of the act. By the thirty-eighth section the evidence in behalf of the State is provided for.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

Robt. L. Douglass, Troy, Miami County, Ohio.

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*As to Suits and Stay of Execution Under Militia Law—As to Payment of Costs Before Acquittal or Conviction.*

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AS TO SUITS AND STAY OF EXECUTION UNDER  
MILITIA LAW.

Attorney General's Office,  
Columbus, October 16, 1863.

DEAR SIR:—You ask me who is to be made plaintiff in the collection of militia fines and whether there is any stay of execution.

By the latter clause of the forty-third section of the act I conclude that the State is the proper plaintiff, and as the action is a civil action the defendant is entitled to stay of execution or appeal on error, the same as in other civil actions.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

I. P. Bush, Esq., Sandusky, County, Ohio.

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AS TO PAYMENT OF COSTS BEFORE ACQUITTAL  
OR CONVICTION.

Attorney General's Office,  
Columbus, October 16, 1863.

DEAR SIR:—I suppose the question you ask in your letter grows out of the twenty-third section of the act of March 27, 1837, as to criminal jurisdiction of justices, etc.

My reading of the section would seem to indicate that the costs should not be certified to you until *immediately after the trial*. If the State fails in any stage of the prosecution, or if the defendant is recognized or committed and afterwards acquitted, or if he be convicted and is unable to pay the costs, then the costs are to be paid out of the treasury.

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*On Tax Law.*

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Perhaps if you would refer to the particular sections of the law in controversy and to the particular case I could give you a more satisfactory answer.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

A. A. Ruhl, Auditor, Crawford County, Ohio.

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ON TAX LAW.

Attorney General's Office,  
Columbus, November 18, 1863.

*Mr. A. B. Matthews, Akron, Ohio:*

DEAR SIR:—The auditor of state has handed me your receipt of Mr. King, which reads as follows:

“Received of A. B. Matthews one hundred fine woolled sheep, to be kept for the term of three years, for the use of which I agree to give him or order two hundred pounds wool off the same stock of sheep; to be well washed on them; put up in good order, delivered in Akron from the 16th of June each year; and at the end of that time I agree to return him one hundred fine ewes, not with lambs, in good condition, from one to five years old. It is understood that I take the above sheep at my own risk in every respect, etc.

“Signed, THOS. KING.”

And I am requested to decide who is legally taxable on the sheep in the hands of Mr. King.

I have examined the question and have no hesitation in saying that Mr. King becomes the owner of the sheep and is taxable with them.



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*On Army Poll Book—Auditor's Duties Under Militia Act.*

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I do not deem it necessary to give the reasons as it seems to me self-evident.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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ON ARMY POLL BOOK.

Attorney General's Office,  
Columbus, November 18, 1863.

*D. Walton, Clerk, Monroe County, Ohio:*

DEAR SIR:—Your letter of October 30th did not reach me until yesterday morning, the 17th instant, and as the vote was counted, it becomes unnecessary to decide your question. I will, however, say this much that a poll book such as you describe ought not to be used for ascertaining who was elected to an office.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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AUDITORS' DUTIES UNDER MILITIA ACT.

Attorney General's Office,  
Columbus, November 18, 1863.

*Robt. L. Douglass, Auditor, Miami County:*

DEAR SIR:—An answer to your note of the 3d instant has been delayed, unavoidably, until the present time. The auditor of state has decided that the military fund should be paid out of the treasury on the order of the auditor, and I concur with him.

I am satisfied, whatever may be the omission in the militia act as to the auditors' duties, that the general sys-

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*On Capias.*

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tem adopted for paying money in and out of the treasury clearly applies in this case.

No money ought to be paid into the treasury without the warrant of the auditor, and none paid out except upon the order of the auditor. Without this all the experience and legislation of past years to the end of protecting and guarding the treasury and settling and accounting with the treasurer, prove abortive.

It is not necessary, I judge, to cite the law on the subject.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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ON CAPIAS.

Attorney General's Office,  
Columbus, November 18, 1863.

*Mr. P. DePuy, Prosecuting Attorney, Van Wert County:*

DEAR SIR:—You ask me whether the act of last winter authorizing the arrest of a defendant for a fine is applicable to a fine assessed before the passage of the law. I think not. I judge that the act is not retroactive. The defendant's legal liabilities and privileges were fixed before the act of last winter. A fine was assessed, judgment rendered and the defendant made liable to a proceeding under the code. His case rests there forever. The new law applied to new cases, made a different legal liability, and applies to subjects, only, which in legislative intent, could, possibly, be within its purview.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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*As to Power to Release Judgment.*

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## AS TO POWER TO RELEASE JUDGMENT.

Attorney General's Office,  
Columbus, November 19, 1863.

*S. R. Magee, Esq., Sheriff, Harrison County:*

DEAR SIR:—Your letter of November 16th is before me preferring a request for Wm. Hanna that I order the return of the execution issued against him for costs, etc., in a case against him which resulted in his conviction and imprisonment in the penitentiary. He claims to have labored in the penitentiary three years and that he ought not to pay the costs. There is an equity in his request which is worthy of sympathy, but I act by law and cannot do so otherwise. The law provides that upon conviction the court shall render judgment for costs and award execution. And further that the prosecuting attorney shall superintend the collection of costs, etc. I do not think that either the prosecuting attorney or myself have any power to dismiss the case. The prosecuting attorney might, for a lawful purpose order the return of the writ, but neither of us can dispose of money or judgments as Mr. Hanna desires.

I have not been able to find any law authorizing me to interfere in the matter.

Respectfully,  
L. R. CRITCHFIELD,  
Attorney General.

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*As to the Application of Certificates to the Payment of Taxes,  
Etc.*

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AS TO THE APPLICATION OF CERTIFICATES TO  
THE PAYMENT OF TAXES, ETC.

Attorney General's Office,  
Columbus, November 26, 1863.

*Hon. O. Cole, Auditor of State:*

The letter of Hon. W. S. Groesbeck requires a construction of the act of April 7, 1863, as connected with other laws in relation to the duties of county auditors and treasurers.

The second section of the act of April 7, 1863, provides that bonds issued by county commissioners for loans to furnish bounty for soldiers shall be redeemed out of the funds to be raised by levying a tax upon the grand list of taxable property of the respective counties. This tax is payable as other taxes levied, viz.: one half on or before the 20th of December, and the remaining half on or before the 20th of June next ensuing. The section of the act of April 7th, 1863, above referred to, provides that the commissioners shall cancel the bonds, and certify the amount due the holder to the county auditor who shall issue his order upon the treasurer for the payment of the amount.

The clause providing that the treasurer shall receive the certificates themselves directly in payment of taxes, is in conflict with the prior part of the section and contrary to the whole system of the laws directing the disbursing of the public funds. The money must be paid out upon the order of the auditor.

The question presented is, When does the auditor issue his order upon the treasurer for the payment of the certificates?

The redemption of the certificates is based upon the levy and payment of the taxes specially authorized by the act; one-half of the taxes is to be paid in December and one-half in June. How can the auditor issue his order, or, if he

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*As to the Application of Certificates to the Payment of Taxes,  
Etc.*

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does so, how can the treasurer pay the order until the very funds provided for by the act are paid in? "Every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied," is the expression of the constitution. No other funds in the county treasury can be applied to the payment of these certificates, than the special one provided. A mandamus would not lie against the treasurer for refusing to pay out of other funds. So that, unless the whole of the tax is collected the whole amount of the certificates cannot be paid, nor, which is the same, accepted in lieu of taxes. But whatever proportion of the amount of certificates the tax collected will pay ought to be applied. And the only question is how is this to be done. One-half of the tax is presumed to be paid in on or before the 20th of December, and at that time one-half of the amount due citizens who advanced it ought to be paid, the other half in June following. The auditor of the county may give an order for the whole amount of the certificate, but the treasurer cannot pay half the amount, for he is required to keep the whole of the order as a voucher. The auditor cannot grant an order for half the amount of the certificates because he is required to keep the whole of the certificate as a voucher. And the only plan that suggests itself is for the commissioners when the bonds are presented for redemption and cancellation to divide the amount, giving a certificate for one-half the amount payable on or before the 20th of December, and for the other half on or before the 20th of June, and the auditor can issue his orders when the certificates are due, at which times, respectively, the money, specially appropriated for that purpose, will be in the treasury.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

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*As to Auditors' Fees in Certain Circumstances.*

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## AS TO AUDITORS' FEES IN CERTAIN CIRCUMSTANCES.

Attorney General's Office,  
Columbus, November 27, 1863.

*Hon. O. Cole, Auditor of State:*

The auditor of Warren County, Mr. Geo. W. Smith, submits the following statement and question:

He was appointed auditor January 15, 1862, to fill a vacancy. His successor was elected at the October election following, but died before taking the office, and Mr. Smith was reappointed April 13, 1863. Under what law does the auditor receive his compensation?

The act of May 1, 1862, provides that the right of no auditor shall be affected as to compensation, by the repeal of the act of February 7, 1861, who entered upon his duties before the taking effect of the act of May 1, 1862.

Mr. Smith, being appointed, in the first instance, prior to the passage of the act of May 1, 1862, and during the time drawing fees under the act of February 7, 1861, would continue to draw fees under the last mentioned act if his term had been continuous.

It is extremely doubtful whether a reappointment was necessary on the 13th of April, 1863, as the law provides that a vacancy is filled until the next election and until a successor is elected and qualified, and as there was no successor qualified, the appointment would likely have continued until October, 1863. But the acceptance of the reappointment vacates the former appointment, the same as death or resignation, and, therefore, the act of May 1, 1862, being in force when Mr. Smith entered upon his duties April 13, 1863, he will receive his fees as provided in that act.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

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*As to Sheriffs' Fees in Certain Circumstances.*

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## AS TO SHERIFFS' FEES IN CERTAIN CIRCUMSTANCES.

Attorney General's Office,  
Columbus, December 4, 1863.

*Mr. A. A. Ruhl, Auditor, Crawford County:*

DEAR SIR:—The second section of the act of February 25, 1824, defining the duties of sheriffs and coroners in certain cases contemplates an arrest without warrant where a party escapes after a legal complaint has been made against him. When such an arrest and removal is made the person arresting is entitled to certain expenses, etc. An officer with a writ would also be entitled to the same if successful in the removal; if unsuccessful he would be entitled to mileage, etc., as in other cases.

“Disbursements” and “expenses” and “compensation for the time and trouble” in the section are meant such as arise out of the *apprehension* and *removal* and not out of the pursuit. A dozen “constables” and fifty “other persons” besides the sheriff might pursue a criminal and all fail, and it would not certainly be claimed that all were entitled to pay! Besides, the adjustment of their respective labors would be a task of almost an impossible character.

The duty of the auditor does not attach until he has knowledge of the removal.

Respectfully,  
L. R. CRITCHFIELD,  
Attorney General.

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*As to Pay of County Auditors Under School Law.*

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AS TO PAY OF COUNTY AUDITORS UNDER  
SCHOOL LAW.

Attorney General's Office,  
Columbus, December 16, 1863.

*Hon. E. E. White, State School Commissioner:*

DEAR SIR:—In answer to your note of this date, after a careful examination, I am of opinion that the forty-first section of the act "to provide for the organization, etc., of common schools" is inconsistent with the act of May 1, 1862. The latter act provides that county auditors shall receive a salary for their services (first section). In counties having over 13,000 inhabitants county commissioners can increase the pay, but in no others.

In the repeal of the act of February 7, 1861, the legislature was particular to say that county auditors, whose duties commenced at a particular time, should receive the compensation in the act repealed, *and no more*. This positive prohibition as to the act repealed cannot be presumed as not being the intent of the act of May 1, 1862.

I think it was the intention of the legislature to cut off all compensation except as provided for in the last named act. Section forty-one of the school act would, therefore, be inoperative and stand as though actually repealed.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.