
Probate Court; Criminal Jurisdiction.

it took effect, I refer you to that case for an elaborate explanation of my views.

I am, sir,

Very respectfully your obedient servant,
G. E. PUGH

PROBATE COURT; CRIMINAL JURISDICTION.

Office of the Attorney General,
Columbus, February 1, 1854.

SIR:—Your letter of the 17th of January to the late Attorney General, has been before me for some time, and I have carefully considered the questions upon which you desire an opinion.

First—Has the Probate Court criminal jurisdiction in the absence of a former inquiry, transcript and recognizance?

The Probate Court is one of special and limited jurisdiction as to criminal prosecutions. It can only exercise jurisdiction of the cases, and in the mode, as provided by law. The thirty-fourth section of the act defining its jurisdiction and regulating its practice, 51 Ohio Laws, 174, prescribes the mode in which criminal cases are brought before that court, "by filing a recognizance and transcript." No other mode is provided by law and therefore, no other exists. It was certainly not intended to confer upon that court or upon the prosecuting attorney, the inquisitorial power possessed by the grand jury, or it would have been so declared. A prosecuting attorney cannot therefore, "*sua sponte*," file an information in the Probate Court; the recognizance and transcript must necessarily precede any action on his part.

Second—Will the law permit the transfer of indictments for minor offences, found by a grand jury, to the Probate Court for trial?

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The grand jury has no right to inquire, nor the Common Pleas any power to take jurisdiction, for the prosecution of minor offences, the cognizance of which is conferred upon the Probate Courts. The jurisdiction of the latter courts in such cases, is *exclusive*, 51 Ohio Laws 174, S. 29, not only for the trial of the offence but for every step in the prosecution. There is besides no mode provided by statute for certifying such cases from the Common Pleas to the Probate Court, and it is safe to conclude that none exists.

Third—I do not know that I clearly comprehend your inquiry as to the amendment or repeal of prior laws on the subject of criminal procedure.

I do not think that the probate act is, on this ground, obnoxious to any constitutional objection. The thirty-first section repeals two sections of acts therein referred to, and upon examination you will discover that those were the sections which required prosecutions to be by indictment in the Common Pleas. The constitution, act 2, section 16, only requires *revised* or *amended* laws and sections, to be set out entire in the new act, not so as to acts or parts of acts repealed.

I can understand the difficulties you will encounter, upon the interpretation I have given to this act, in prosecutions for violation of the laws against lotteries, betting, etc., but I am well assured that it was the intention of the legislature or of the person who prepared the probate act, to limit and restrain prosecutions in the Probate Court, rather than to provide summary modes for instituting them. I am sir,

Very respectfully,

GEO. W. MCCOOK,

Attorney General.

To John Mackey, Esq., Prosecuting Attorney, Erie County, Sandusky, Ohio.

Probate Court; Procedure.

PROBATE COURT; PROCEDURE.

Office of the Attorney General,
Columbus, February 1, 1854.

SIR:—I have received your letter of the 14th January as to the mode of proceeding in the prosecution of offences in the Probate Court.

The legislature has not provided any mode of inquiring into the minor offences cognizable in that court, to take the place of the former inquisition by a grand jury.

The prosecuting attorney cannot *compel* the attendance of witnesses before the probate judge in order to obtain a warrant for the arrest of the accused in the first instance; nor can a witness *voluntarily* appear and make affidavit to procure a warrant from the judge for the arrest of the offender; nor can the prosecuting attorney *file an information*, except in those cases provided for by the thirty-fourth section of the probate act, 51 Ohio Laws 174, where a "recognizance and transcript" have been previously filed.

For the reasons upon which my opinion proceeds, I beg leave to refer you to an extract from an opinion to the prosecuting attorney of Erie County on the subject of the jurisdiction of, and prosecutions in, the Probate Court, a copy of which I enclose. I am sir,

Very respectfully,

GEO. W. McCOOK,

Attorney General.

To I. C. Daughy, Esq., Prosecuting Attorney, Marysville, Ohio.

Fees of Treasurers on the Common School Fund.

FEES OF TREASURERS ON THE COMMON
SCHOOL FUND.

Office of the Attorney General,
Columbus, January 31, 1854.

SIR:—I have considered the question addressed to you by G. T. Stewart, auditor of Huron County, in his letter of 23d inst., and by you referred to me: Whether a county treasurer, in addition to the per centum allowed for the collection of the duplicate, is entitled to one per centum on the State and Western Reserve School Funds apportioned to Huron County.

This claim arises, I suppose, under the act of 9th of January, 1833, entitled "an act prescribing the duties of county treasurers," which is as follows:

"That the county treasurers of the several counties in this State, shall receive one per centum and no more, for receiving and paying out the money arising from the common school fund, any law to the contrary notwithstanding." Swan's Revised Stat. 1012.

The law fixing the compensation of county treasurers, in force at the time of the passage of the act above recited, is to be found in "an act prescribing the duties of county auditors," passed March 14th, 1831, the twenty-seventh section of which is as follows:

"That the fees to be allowed to the county treasurer, on such settlement with the auditor, *for the collection of taxes*, shall be six per centum on the first two thousand dollars; five per centum on any sum between two and three thousand dollars; four per centum on any sum between three and four thousand dollars; three per centum on any sum between four and five thousand dollars; and two per centum on any sum over five thousand dollars *by him collected* as aforesaid." 3 Chase's Stat. 1810, Sec. 27.

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This section was repealed by the act of March 2, 1837, now in force, which provides for compensation to the treasurer in the same mode as the former act "on the amount by him *collected*," changing only the rate per centum. Swan's Rev. Stat. 1013.

At the time of the passage of the act of 1833, providing the compensation of one per centum to the treasurers for receiving and paying out the money arising from the common school fund, the act of March 2, 1831, to establish a fund for the support of common schools, was in force, the first section of which is in these words:

"That there is hereby constituted and established a fund to be designated by the name of the "*common school fund*" the income of which shall be appropriated to the support of common schools in the State of Ohio, in such manner as shall be pointed out by law."

The subsequent sections declare what shall constitute the fund—namely, moneys arising from the sales of school lands, etc., etc., but no part of it arises from taxes collected by the treasurers, and the act then provides the manner in which the interest arising from the fund shall be paid, namely, to the *county treasurers* entitled thereto, out of the *State treasury* on the order of the county auditor. 3 Chase's Stat. 1873-5.

An entirely different school fund is created by the act of March 14, 1853, "for the reorganization, supervision and maintenance of common schools," which, by its sixty-third section, provides that

"For the purpose of affording the advantages of a free education to all the youth of this State, the state common school fund shall hereafter consist of such sum as will be produced by the annual levy and assessment of two mills upon the dollar valuation, on the grand list of the taxable property of the State, and there is hereby levied and assessed annually, in addition to the revenues required for

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general purposes, the said two mills upon the dollar valuation as aforesaid; and the amount so levied and assessed, shall be collected in the same manner as other State taxes, and when collected, shall be annually distributed to the several counties of the State, in proportion to the enumeration of scholars, and be applied exclusively to the support of common schools." 51 Ohio Law, 449. .

The fund itself is not only different and distinct from that existing in 1833, but it never reaches the treasurer of state, and is not by him paid out to the county treasurers; for the thirty-seventh section of the last named act requires the auditor of state to apportion the common school funds among the different counties, and certify the amount so apportioned, and the sources from which it is derived to the county auditor, which said sum the several county treasurers shall retain in their respective treasuries from the State funds. 51 Ohio Laws, 443.

The construction claimed for the act of 1833(would give to the treasurer of each county, one per centum on the entire levy of two mills for school purposes, although he has already received, or is entitled to receive the per centum allowed by the act of 1837 for the collection of the whole taxes assessed including that for school purposes.

Admitting the rule laid down in *United States vs. Morse*, that "where the words of a statute prescribing compensation to a public officer, are loose and obscure, and admit of two interpretations, they should be construed in favor of the officer," 3 Story's Rep. 57, the construction, in my opinion, would be doubtful upon the letter of the statute, even if it had been enacted since the act of 1853, and would clearly contradict its spirit, when considered with reference to the other laws in force at the time of its passage in 1833. There was no looseness or obscurity in this statute, and no possibility of two interpretations at the time of its enactment.

The law then in force, as I have shown provided the compensation to treasurers "for *the collection* of taxes,"

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by a per centum upon the amount *collected*, and although this law was passed twelve days after the act "to establish a fund for the support of common schools, no compensation is provided for the services required, by that act, to be performed by the treasurer. Two years afterwards, because no compensation had been provided, or more probably, from the phraseology of the statute, because treasurers claimed the per centum allowed by law for *collecting* taxes, the General Assembly declares that they "shall receive one per centum and *no more*, for *receiving* and paying out the *money arising from the common school fund, any law to the contrary notwithstanding.*"

The construction claimed for the act of 1853 would seem that the income arising from the common school fund, as the law then existed, was received by the treasurer of the county, from the treasurer of state, on the order of the county auditor. It was money *arising from a fund* already established, not taxes which had been collected by them; not the fund itself, but the interest upon that fund, the principal of which had been invested, and declared irreducible. The fund from which this money arises, is *the common school fund.* Now, to what *fund* does this act of 1833 relate? This is a question of legislative intention, and the act speaks as of the date of its passage. The answer is not difficult.

I find that a fund designated by the name of "the common school fund," existed by law at that time—that the treasurer was required to perform a service with reference to it, namely, receive the interest accruing upon it, to be by him paid out for school purposes—that neither by the law fixing the fees of the treasurer, nor by that creating the fund itself, was any compensation allowed for this service. Here then is the subject matter upon which this statute operates, and the common school fund of which it speaks. To provide a compensation for this service by the treasurer, and to limit its amount, was the intention of the legislature in passing the act of 1833, and this is as

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clear to my mind as if it had been originally passed as a section of the act to establish the common school fund, or had been declared to be amendatory thereof.

I do not argue, that, for the purpose of compensation to treasurers, this fund is to be considered as remaining the same as it was in 1833; it may be increased in amount from the sources then provided, or from new sources given by subsequent legislation, and it would remain the same fund. But the act of 1833 contemplates a *fund invested* having an *annual income from the investment*, not the product of taxes, and it contemplates no other.

If this conclusion be correct, and I entertain no doubt of it, the treasurer of a county is entitled to one per centum upon any money which may be received from the state treasury, arising from any of the school funds invested, and which money was not by him collected upon the duplicate.

I am of opinion, further, that the treasurer of a county is not entitled to one per centum upon the state common school fund levied under the sixty-third section of the act of March 14, 1853, because:

First—He has already received for collecting the same fund, as a part of the grand levy.

Second—He does not receive it from the treasurer of state, but retains it from the state funds in his hands, under the thirty-seventh section of the last named act.

Third—It is not money arising from the common school fund invested within the contemplation of the act of 1833, but it is declared to be the common school fund itself, annually assessed, collected and distributed.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State.

Warren County Canal.

WARREN COUNTY CANAL.

Office of the Attorney General,
Columbus, February 10, 1854.

SIR:—I acknowledge your note of today, enclosing a copy of your letter of December 20, 1853, to my predecessor, requesting his opinion as to your powers under the act of March 11, 1853, “for the surrender of the Warren County canal.”

I have also examined your reply to the resolution of the Senate on this subject and the documents accompanying it.

You wish to know whether the proviso of the second section—“that by such sale, transfer, or release, the State shall not incur any debt or liability for damage in any way or manner, whatever”—requires you to provide against liability for damages incurred prior to a transfer of the canal, or only to those which may accrue subsequently to the sale?

The language of the proviso seems only to require that the State should not incur any liability by reason of the sale. It is future in its operation; the sale or transfer is yet to take place, and by that sale or transfer the State “shall not incur” any debt or liability.

Whatever damages had been sustained, could not be increased or diminished by a subsequent sale, and as to such damages, the liability was fixed, and had been already incurred by the State.

If it was the intention of the General Assembly to relieve the State from all liability, whether accrued before, or to accrue by the sale, they have failed to express that intention of the act.

This is an answer in the interrogatory in your letter of the 20th of December, but in a personal interview you desired my opinion upon the proposals for the release of the

Warren County Canal.

canal, made to the board, in May last, by Probasco and Campbell and Hendrickson.

That of Probasco, for part of the canal, stipulates for a release of all damages to four mills named, and that he would use his exertions to procure releases from the landholders.

That of Campbell and Hendrickson, for the whole canal, limits carefully the liability which they are to incur.

First—In case they abandon it as a canal, to pay all damages *by reason of the abandonment*.

Second—In case they make improvements, they are to pay all damages arising therefrom. And by expressing these, of course, excluding all liability for damages accruing in any other manner. If there was no other difficulty, you could not accept either of these propositions, for neither complies with the law. One is limited to the damages which may accrue to particular persons, owners of certain mills; the other to damages which may accrue by reason of particular acts, but neither undertake to indemnify the State against "all damage which may in any way or manner" accrue.

And this brings me to a difficulty which will arise when you undertake to make *any* sale or transfer, under this act. You are required so to sell, that the State shall not *incur* any liability for damages, and the best you can do by contract, is to provide for the indemnity of the State against any damage which she *may incur*.

The State being liable in the first instance, and having her remedy over against the persons who buy the canal, or take a release of it. For any damages accruing to land owners or others, who have acquired rights with reference to this canal, the State *incurs* the liability, and she would be compelled to seek her remedy in the courts, for the damages, her faith requires her to pay those injured.

I can well understand the doubt entertained by my predecessor, as to the meaning and effect of this act, which

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induced him in his letter of 26th December, to request you not to contract for the surrender of the canal.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Alex. P. Miller, President Board Public Works.

WILLIAM LUCAS, A CONVICT; TWO SENTENCES
WITHOUT A LIMITATION OF THE SECOND
TO COMMENCE AT EXPIRATION OF FIRST.

Office of the Attorney General,

Columbus, March 4, 1854.

SIR:—I have carefully considered the case of William Lucas, a convict in the penitentiary, submitted by you for my determination.

By the records which you have furnished, it appears that at the January term, 1851, of the Court of Common Pleas for the county of Miami, Lucas was convicted upon two indictments charging the misdemeanor of horse stealing. At the same term of the court, he was in each case sentenced to imprisonment in the penitentiary, for the term of three years. The record is the same in both cases and is in the words following: "The jury having returned a verdict of guilty against the said William Lucas, it is therefore considered by the court that he be imprisoned in the penitentiary of this State and kept at hard labor for the term of three years and that he pay the costs of this prosecution."

Copies of the sentences are made out on the 5th day of

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February, 1851, and are delivered to the warden together, at the time Lucas is received into the penitentiary. Three years having elapsed since the commencement of his imprisonment, Lucas demands his discharge, and you submit to my opinion, whether you shall discharge him, or continue him in confinement for the further period of three years.

The act "making provision for carrying into effect the acts for the punishment of crimes of February 26, 1835, provides that any person sentenced to imprisonment agreeably to the provisions of the acts for the punishment of crimes, shall within thirty days after his or her conviction be transferred to the penitentiary and shall be delivered into the custody of the warden of the penitentiary, together with a copy of the sentence of the court, there to be safely kept," etc. Swan's Rev. Stat. 602.

The law thus requires that the term of imprisonment shall commence within thirty days from the sentence. It was competent, however, for the court to fix the commencement of the imprisonment upon the second conviction at the expiration of the imprisonment upon the first. The courts of this country following a well known English case, have held that this may be lawfully done. In *Connecticut* a prisoner having been convicted upon two indictments was sentenced to confinement in New Gate prison, three years for each offense, and "that the second confinement should commence when the first term should expire." Upon error the Supreme Court sustained this judgment. *Smith vs. The State*, 5 Days Rep. 178. In *Pennsylvania*, Chief Justice Tilghman delivering the opinion of the court, upon a writ of error to reverse a judgment of imprisonment on a second conviction, to commence at the expiration of the sentence on the first, says, "as to imprisonment to commence at a future time, it is warranted by principle, practice and authority." *Rupell vs. The Commonwealth*, 7 Serg. v. R. 490. So in *Virginia*. *Leath vs. The Commonwealth*, 1 Virginia cases 151. The same practice has also prevailed in this

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State. In *Woodford vs. The State*, 1 Ohio State Rep. 427, a sentence upon one count was made to commence at the expiration of a sentence on a preceding count, and although the judgment was reversed on other grounds, this mode of fixing the punishment seemed to have been recognized as lawful and approved by the court.

But in the case under consideration, the court has passed sentence of three years' imprisonment upon each conviction, neither sentence referring to the other and no time being fixed for the commencement of the last sentence.

I am of opinion in such a case that the law fixes the time of the commencement of the imprisonment and that in the absence of a limitation in the judgment as to the time, the period of imprisonment is to be computed from the time the convict is delivered to the warden of the penitentiary, and that it must commence within thirty days from the time of the sentence, except in those cases in which the execution of the sentence is suspended upon the signing of a bill of exceptions on the allowance of a writ of error.

The convict Lucas is therefore, in my opinion, entitled to be discharged. I am aware of the objections which may be urged—that the prisoner has committed two distinct crimes of which he has been convicted; that the *minimum* of the punishment attached by statute to either, is three years' imprisonment in the penitentiary, and that in the duration of the imprisonment, he has in fact suffered but the penalty for one crime.

But his discharge results from the mistake (if it was not intentional) of the court in failing to fix the commencement of the imprisonment under one sentence at the expiration of the term under the other. And who can say as to his present imprisonment, upon which sentence he is confined, or of which he has already suffered the penalty? Such

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uncertainty where personal liberty is involved is not to be tolerated. I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Hon. Asa G. Dimmock, Warden Penitentiary, Columbus, Ohio.

Office of the Attorney General.

Columbus, May 8, 1854.

SIR:—I have received your letter of the 6th inst., submitting to my opinion, whether in view of a recent decision of the Supreme Court, the assessment of taxes for the year 1854 should conform to the tenth section of the act of April 13, 1852, "For the assessment and taxation of all property in this State, and for levying taxes thereon according to its true value in money."

The Supreme Court of this State has decided in the case to which you refer, *The Exchange Bank of Columbus, vs. O. P. Hines*, Treasurer, that the tenth section of the act referred to is in contravention of the constitution of Ohio.

"An unconstitutional law is the same as no law." Thurman, J., in *Loomis vs. Spencer*, 1 Ohio State Rep. 158.

When an act of the General Assembly is drawn in question, the presumption is always in favor of its validity, and only when a clear incompatibility between the constitution and the act appears is a court justified in refusing to execute it. But when such incompatibility does appear, as was well expressed by Ranney, J., in the case of the *Cincinnati W. & Z. Railroad Company vs. Commissioners of Clinton County*, "it is the right and the duty of the judicial tribunals to treat the act as a nullity."

Such decisions are not and cannot be made by a court upon its own motion or desire, but only when in a cause

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pending before it, the suitor appeals from the act of the General Assembly to the constitution of the State, which is above courts and legislatures alike.

Whether the General Assembly did or did not repeal the tenth section, after the decision of the court declaring it unconstitutional, it is needless, so far as the execution of your duties is concerned, to inquire. The section remains on the statute book, and under law; and in the mode provided by law, the question can be again presented to the courts by any person who may feel aggrieved by assessment in disregard of its provisions. But until the question has been so presented, and the decision of the court reversed, it is wholly inoperative, and is a mere nullity.

The decision of the Supreme Court, that an act of the General Assembly is unconstitutional, must be the end of controversy to yourself and all other officers charged with the execution of the laws. I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus, Ohio.

Office of the Attorney General,
Columbus, June 10, 1854.

SIR:—I have not been able at an earlier day to reply to your letter of the 12th May, desiring to know whether the collectors of tolls, and certain other officers connected with the public works, appointed before the passage of the act of May 1, 1854, to "amend the act defining the powers and prescribing the duties of the board of public works." 52 Ohio Laws 113, are to receive the compensation provided by that act, or that to which they were entitled before its passage.

The intention of the framers of the constitution, to

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prevent, on the one hand, an incumbent being driven from his office by a reduction of the salary, and on the other, to take away all inducements for the exercise of the influence of his position, to procure an increase of it, is abundantly manifested in that instrument.

By article 2, section 31, the compensation of the members and officers of the General Assembly is required to be fixed by law, and no change of it shall take effect during their term; article 3, section 19, provides that compensation, to be fixed by law for all the executive officers of State, shall neither be increased nor diminished during the period for which they were elected; and by article 4, section 14, the same limitation is imposed as to the salaries of the judges of the Supreme Court and Court of Common Pleas. As the same reason which induced a limitation in the cases named, extended to all other officers, the constitution applies the same inhibition, and article 2, section 20, declares:

“The General Assembly, in cases not provided for in this constitution, shall fix the *term of office* and the *compensation* of all officers, but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

At its first session after the adoption of the constitution, the General Assembly passed an act defining the powers and prescribing the duties of the board of public works. The sixth section of the act provides:

“That collectors of canal tolls shall be appointed for such term as the board of public works shall deem expedient, not exceeding three years; but any collector shall be subject to be removed at any time during the term for which he shall have been appointed, for malfeasance *in office*, or for neglect of duty.”

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The duties of the collector are also defined, and it is further provided that the "collectors shall receive for such services such percentage on the amount collected as shall be determined by the said board." Swan's Rev. Stat., 761.

The eighteenth section provides for the appointment by the board, of resident engineers for a term not exceeding three years, the fixing "their salaries," and for their removal by the board in the cases of malfeasance or nonfeasance, in office, as in the case of collectors.

By the amendatory act before referred to, the *offices* of collectors of tolls, and resident engineers, if any such existed, are not abolished, for by the fifth and sixth sections, they are so named and a compensation provided for, and duties annexed to each.

If then the collectors of tolls and resident engineers appointed under the act of 28th February, 1852, Swan's Stat. 760, are officers, and if their compensation and term of office be fixed by law, that compensation cannot be changed during their term of office.

The primary sense of the word "*office*," is "a duty, charge or trust conferred by public authority, and for a public purpose," and an "officer" is a person who by commission or authority from government, or those who administer it, undertakes the discharge of such duty, etc. A collector of tolls or a resident engineer, is clearly within the definition—the duties are public, for a public purpose, and are undertaken by authority of those who administer government. Besides, the sixth and eighth sections of the act of 1852, recognize each as an office, by providing a term to the appointment—by expressly declaring that for malfeasance "*in office*," and for neglect of duty they shall be removable, and by the expression of these causes of removal, excluding the exercise of the power to remove arbitrarily or for other causes, thus giving to the person once appointed a right to exercise the duties of the office for the term fixed

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—by prescribing those duties, and requiring the compensation for discharging them to be determined. Again, the amendatory act which changes the manner of appointment, designates these as officers—calls the incumbents officers, and recognizing their right in the office, provides:

“That no appointment shall be made under the provisions of this act, which shall interfere with or annul any commission or appointment now in existence, made by the board of public works, before the expiration thereof, or vacancy happening therein.” S. 6.

I think it clear, then, that the collectors of tolls and resident engineers are officers. But this is not enough—they must be in office for a time, and at a compensation fixed by the General Assembly. It is true, the precise period for which these officers are to serve, is not named, nor is there annexed to that service a stated salary. But the section before quoted requires the appointment to be made by the board of public works—the maximum period for which they may be appointed is fixed, and the board appointing is required to fix the “salaries” of the engineers, and the “compensation” of the collectors. These provisions are mandatory and must be obeyed. No discretion is left to the board clothed by the statute with the appointing power to exercise, or not to exercise it; the discretion conferred is limited to the manner and extent of its exercise—a discretion as to *term* of office within the maximum—as to *amount* of salary or compensation, and in the case of the collector limited again to ascertainment in a particular way, by a per centum upon tolls.

It is also true that the word “*salary*” is usually applied to a sum certain, paid by the year, but its legal definition is “a reward or recompense for services performed, usually applied to the reward paid to a public officer for the per-

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formance of his official duties," Bouvier's Law Dic.; and in the section of the constitution under consideration it seems to be used as synonymous with "compensation."

When the General Assembly has thus imposed on a board, the duty of appointing officers for a period limited, and of fixing their salaries; after the performance of this duty by the board, the term of office and the amount of the salary are, in effect, fixed by the General Assembly. Whether the board has so acted, is a question of fact not properly for my determination, but assuming the fact, that at the time of the passage of the amendatory act of May 1, 1854, collectors and engineers were appointed at salaries fixed in pursuance of law, and for a term unexpired. I am of opinion:

That the collectors and resident engineers are officers—that they are in, at a term and a compensation fixed by the General Assembly—that the act of May 1, 1854, does not abolish the officers, and therefore that they are within article 2, section 20, of the constitution, which prevents any change affecting the salary of the officer during his existing term. The salaries, therefore, of these officers, for the residue of their terms are to be as they were before the passage of the act, and neither increased or diminished.

Your inquiry refers to "collectors of tolls and certain other officers connected with the public works." Except resident engineers, I find no other persons who are within the prohibition of the twentieth section referred to, because:

First—They are not by law declared to be *officers*.

Second—Their term of office and compensation have not been fixed by the General Assembly, nor under any law passed by it.

Third—Their duties, appointment and removal are not regulated or determined by law.

Such "other persons" are therefore, without regard to the nature of their employment, the mere agents and employes of the board of public works, subject to a discharge

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the sentence as to the imprisonment only is recited, omitting the portion which adjudges him to pay the costs of prosecution; the words then are "do hereby grant the said _____ a *general pardon* from the sentence aforesaid, and do by these presents, release him from all further confinement in said penitentiary in consequence thereof."

Now admitting that these words are to receive such construction as will give effect to each one employed, it may be asked, as the clause "release him from all further confinement in said penitentiary in consequence thereof," operates to discharge the convict, what effect is given to the preceding words, a general pardon from the sentence aforesaid. I answer that the words here adopted are necessary to restore the party to citizenship, and are for this purpose inserted in the blank form which has been used.

It is true that a conviction for manslaughter does not render the party infamous, or deprive him of citizenship, and therefore there was no necessity for restoration in this particular case. But manslaughter and offences against the dwelling act, are the only exceptions under our law, and in seeking to ascertain the effect and operation to be given to the words under consideration, I cannot shut my eyes to the fact that they occur in a printed form which has been filled up, and I feel compelled to give to them the same construction which they ought to receive in the pardon of a crime which had rendered the party infamous, for which the form was prepared and adapted.

The words then which release from further imprisonment were intended to operate the discharge of his body; the words "general pardon from the sentence aforesaid," were intended to effect a restoration of the convict to his former civil *status*; and is limited to this for the sentence "*aforesaid*," is only pardoned, and that we have seen, as recited in the pardon, was imprisonment. A pardon of the imprisonment, but not as to the costs, restores the party. *Hoffman vs. Coster*, 2 Wharton's Rep. 453.

Cases Under the Tax Law.

But if this reasoning should be unsatisfactory, I would, nevertheless, following a high authority, be inclined, upon another ground, to hold that the pardon did not remit the costs, or operate to discharge the sentence as to them. In Pennsylvania the power of the executive to pardon is as extensive as that conferred by our constitution; and in that State the general pardon of a convict does not discharge the costs which are held of right to belong to the officers, and are therefore not remitted. By the Supreme Court on habeas corpus. *Ex parte McDonald*, 2 Wharton's Rep. 440.

I am therefore of opinion that Fish is still liable for the costs accruing in his conviction.

GEO. W. MCCOOK,
Attorney General.

CASES UNDER THE TAX LAW.

Henry Reichelderfer, Pickaway County, assessed at \$5,000, penalty added of fifty per centum, \$7,500. Submitted by Auditor of State, on letter from Geo. Hetherington, and copy of a contract between Reichelderfer and John S. Crites.

FACTS.

Reichelderfer sold a farm to Crites—gross sum of purchase not named, but for the consideration following:

First—An annuity of \$80 in money to be paid annually or semi-annually if desired.

Second—The support of Reichelderfer to be provided by Crites for life.

Third—\$5,000 to be paid after decease of Reichelderfer as follows: \$625 in one year, and a like sum annually thereafter, until completed, to the heirs, executors or administrators of Reichelderfer.

The penalty might with propriety be remitted, but Reichelderfer is liable to taxation. The case is not free

Cases Under the Tax Law.

from difficulty. If he be not properly chargeable with the \$5,000 as a credit which he owns, he is nevertheless, as owner of a fund which produces him \$80 yearly in money, in addition to a support for life, subject to taxation.

What is the value of this? It is to be computed with reference to its product, \$80 annually, and the support annually reduced to a money value, and the period for which it may be payable, of which the present age and probable duration of life of the annuitant are elements. Tables for the computation of annuities and their values may be readily obtained, which approximate with sufficient clearness the actual value.

But I do not see any greater hardship in the taxation at \$5,000 in this instance than exists in every case where land has been sold on a credit payable to the vendor himself. Whether it be due, or to *become due*, is immaterial. Suppose a credit so extended as to be beyond the possible duration of human life; rendering interest annually, it would be taxable. And yet the holder of it could not avail himself of the principal, and at his death the law gives it to his personal representative.

And in Reichelderfer's case he has stipulated for a payment to his personal representative, just where the law would cast it, if he died the owner of a note payable one year, or twenty or a hundred years after its date. I do not think the fact that it is not payable until after the death of Reichelderfer, makes it less a credit than if it were payable to him fifty years from date.

To decide otherwise might induce a resort to an arrangement of this nature for the very purpose of escaping taxation.

Defiance Female Seminary, Defiance County, tax on 1,280 acres of land. Submitted by Auditor of State on letter from S. S. Sprague and Finlay Strong.

Cases Under the Tax Law.

FACTS.

The seminary was incorporated in 1850. 48 Ohio Laws 625. Permitted to purchase 1,280 acres of land at price to actual sellers, to be paid in ten annual installments, then deed to be made, .8. Authorized to acquire, possess, sell, convey and dispose of real estate, .1. Special exemption from taxation for land on which seminary stands not exceeding five acres, .9. Funds exclusively for purpose of education, .1.

Two claims to exemption from taxation are made in this case:

First—That the State is the owner in fee until the last payment, and that in the absence of contract stipulation, the vendor, retaining the legal title, is liable to pay the taxes.

Second—That these lands constitute the endowments of the seminary a literary institution, and therefore exempt.

I would have no difficulty in disposing of the first claim to exemption. The lands pass from the State to the possession of the corporation, and should be taxed. Indeed, one of the considerations for such grants is that the lands become at once productive. The analogy as to contracts with individuals and the party liable to the taxes in such cases, does not hold. The rule established there is only from necessity because the party is bound to convey, clear of all incumbrances, and the tax is an incumbrance. Upon this principle the Ohio decision proceeded. *Wilson vs. Tappan*, 6 Ohio Rep. 174. But in this case the corporation obtains the lands by the grace and favor of the State, at the price to which they might be sold to actual settlers. Besides, the charter specifies an exemption, and this, upon a familiar principle of construction, excludes all others.

The other claim to exemption presents difficult and embarrassing questions, arising under the act of March 12, 1853, to amend the third section of the tax law of April 13, 1852. That act provides exemption from taxation for "all colleges, academies, all endowments made for their support;

Cases Under the Tax Law.

all buildings connected with institutions of learning not used with a view to profit." 51 Ohio Laws, 399.

By the charter of this seminary, "its funds, privileges and immunities shall be appropriated exclusively to the purposes of education." It is therefore included within the term "academy" or "institution of learning." An endowment includes any thing which is permanently set apart and appropriated for the support of a college, whether lands or money; and these lands, if permanently appropriated, would constitute what is usually termed an endowment. But they are not so appropriated, but are subject to sale at any time by the directors. The funds arising from the sale must, in accordance with the charter be applied exclusively to the purposes of education; but in the language of the Supreme Court, "the law applies to the property as it finds it in use, and not to what may be done with its accumulations in future." *Cincinnati College vs. Ohio*, 19 Ohio Rep. 115; the statute construed in that case being very nearly like the one I am now considering. It is, however, to say the least, very doubtful, whether the legislature, in the use of the word "endowment," did not employ in it its more limited sense of a fund or money set apart; as in the same sentence they limit the exemption as to lands, to such as are not *used with a view to profit*; and all laws that exempt any of the property "of the citizens from taxation should receive a strict construction." *Cincinnati College vs. The State*, 19 Ohio Rep. 115.

Before any exemption should be permitted, the party claiming it must show himself clearly within the statute, and proceeding upon the rule laid down in the case just cited, that the law must be construed strictly against the claim, I am of opinion that the Defiance Female Seminary, as to the twelve hundred and eighty acres of land is subject to taxation. I do not understand that any tax except upon this land, has been assessed against it.

In the case of the "Literary Society of St. Joseph's," in Perry County, I made a similar decision as to the lands

Cases Under the Tax Law.

of the society, and the question is now pending in the courts. I have purposely avoided the consideration of a question which naturally arises at the outset of this claim to exemption, whether the statute permitting it does not exceed the constitutional limit to exemption.

{The Ohio Mechanics Institute—The tax in this case is assessed upon a lot in the city of Cincinnati, upon which buildings are erected, and which are leased, and the proceeds applied to the very meritorious objects of the institute.

Without considering the question whether this institution is included within the class to which exemptions are permitted, as a literary institution, or are purely a public charity, it is not entitled to exemption. If the buildings or lands are in either case used with a view to profit, there can be no exemption, although the profits arising from the use may be applied exclusively to the uses of this institution, charitable or literary.

Under the tax law of 1848, "all buildings belonging to scientific, literary or benevolent societies, used exclusively for scientific, literary or benevolent purposes together with the land actually occupied by such institution, *not leased or otherwise used with a view to profit,*" were declared to be exempt from taxation.

Under this statute the descriptive words of the property claimed to be exempted being the same as those used in the statute under consideration, the Supreme Court of this State held that where property was leased or used with a view to profit, it was subject to taxation, without any regard to the purposes to which the profits or proceeds were subsequently applied. "The law applies to the property as it finds it in use, and not to what may be done with its accumulations in future." *Cincinnati College vs. Ohio*, 19 Ohio Rep. 115.

Sentence. Suspending Execution.

I feel bound to apply to this statute the construction given to a former act almost in the same words, by the Supreme Court of the State, in a reported decision which was never afterwards brought in question in the courts.

SENTENCE; SUSPENDING EXECUTION.

Office of the Attorney General,
Columbus, September 8, 1854.

SIR:—I have examined the questions submitted for my opinion in your letter of the nineteenth August.

First—Whether the power of suspending the execution of a sentence in a criminal case formerly possessed by the Court of Common Pleas, has been confined upon the Probate Court in the class of cases the jurisdiction of which has been transferred to the latter court? And if the power exists in the Probate Court.

Second—When is it to be exercised, before or after the allowance of a writ of error?

By the act of March 27, 1841, the *Court of Common Pleas* upon conviction in a criminal case, a bill of exceptions, having been sealed was authorized to suspend the execution of the sentence until the next term, etc.—Swan's Rev. Stat. 731, section 1. At this time the Common Pleas had exclusive jurisdiction of all crimes and offences as well as those still retained as the minor offences which by legislation subsequent to the constitution of 1851 have been transferred to the Probate Court; and without relying upon the general words "crimes or offences," the reference to the second section of the same act, it clearly appears that the provisions of the first section were intended to apply to minor offences, for it declares that in offences the punishment of which is less than imprisonment in the penitentiary, the sentence shall not be suspended unless the party shall enter into recognizance to appear and abide the sentence if it should be affirmed. *Ib.* 730.

Sentence. Suspending Execution.

By the act of April 30, 1852, this same provision of the act of 1841 is substantially re-enacted and the power of suspending the execution of the sentence is conferred upon the Common Pleas or *Criminal Court of any county*. Swan's Rev. Stat. 260, section 2. At this period criminal courts had been established in certain counties upon which was conferred the jurisdiction exercised formerly in criminal matters by the Common Pleas, but the General Assembly has not as yet seen fit to provide by law for the exercise of any criminal jurisdiction by the Probate Court. The legislative intention to extend this power of suspending the execution of sentence to any court which exercised criminal jurisdiction is to my mind sufficiently apparent.

There is no reason why it should be confined to the Court of Common Pleas, and we find as the exigencies of the public service require other courts for the administration of criminal law, that this power has been extended to them.

But on the 14th of March, 1853, the General Assembly passed an act "defining the jurisdiction and regulating the practice of Probate Courts," by which the jurisdiction of a great many offences is transferred from the Common Pleas and exclusively vested in the Probate Court.

The punishments to be imposed are fines and imprisonment in the county jail, and, although the penalties are not so great, the consequences of a conviction in some cases, larceny for example, are as fatal to the reputation of the accused as would be a conviction for crimes upon which the law imposes a more serious punishment.

Now I would be loath to conclude that the General Assembly in conferring this jurisdiction upon a court much more likely to commit errors in administering it than the Court of Common Pleas from which it was taken, intended, at the same time to deprive the accused of a means which he possessed in the latter court of obtaining redress from errors before suffering the consequences resulting from them and not from his own crimes. How idle it is to give

Sentence. Suspending Execution.

the remedy by error to a judgment of the Probate Court when the sentence must be executed and the punishment endured, under its swift administration before the errors can be reviewed in the court above.

But without amplifying the powers of this court, which as to criminal matters I concede is one of special, limited and statutory jurisdiction, the power to suspend the execution of a sentence is in my opinion conferred by the fifty-eighth section of the act of March 14, 1853.

“In the exercise of the jurisdiction conferred by this act, the probate judge shall have the same powers, perform the same duties and be governed by the same rules and regulations as are provided by law for the Courts of Common Pleas, and the judges thereof in vacation, so far as the same may be consistent with this and other acts now in force.”
Swan’s Rev. Statutes 753, Sec. 58.

Now the exercise of this power by the probate judge is consistent with all our legislation and this provision renders it harmonious.

Without reference then to any other statute or to an argument drawn from the powers possessed by any other court, I derive the authority of the Probate Court to suspend the execution of sentence from this section, and I give the construction the more willingly as it is evidently *on favorem*.

Upon the other question I think on re-examination you will agree there can be no doubt. Upon the *application* of the person convicted and upon the *signing of the bill of exceptions* the court may suspend the execution of the sentence. It is an independent power possessed by the court which should be exercised immediately, without awaiting the action of any other judge or tribunal.

GEO. W. McCOOK,

Attorney General.

To M. D. Gatch, Esq., Prosecuting Attorney, Xenia, Ohio.

Taxes; Limitation of Time; When Certified.

TAXES; LIMITATION OF TIME; WHEN CERTIFIED.

Office of the Attorney General,
Columbus, September 11, 1854.

SIR:—I have examined the letter submitted to you by Andrew Young, Esq., auditor of Lucas County, whether the city council of Toledo after the second Monday in June, may cause to be certified to the auditor of the county the percentage by them levied on the real and personal property in the corporation for the purpose of having the same placed on the duplicate for collection?

The twenty-sixth section of the act of March 11, 1853, provides:

“That the council of any municipal corporation is hereby authorized and required to cause to be certified to the auditor of the county, on or before the second Monday of June annually, the percentage by them levied on the real and personal property in said corporation, appraised and returned on the grand levy aforesaid; and the said county auditor is hereby authorized and required to place the same on the duplicate of taxes for said county in the same manner as township taxes are now by law placed on said duplicate, etc.”
Swan’s Rev. Statutes 988.

The city council having neglected to cause the certificate to be made to the auditor “on or before the first Monday in June” of the present year now proposes to have it done.

The general rule applicable to questions of this nature is that where a statute directs a thing to be done in a certain time without any negative words restraining the person or officer from doing it afterwards, the naming of the time will be considered as *directory merely* and not as a limitation of authority. In *Pond vs. Negus* and others, 3 Map. Rep. 230, where this rule was given by Chief Justice Parsons, an assessment of tax noted for school purposes made

Taxes; Limitation of Time; When Certified.

by the assessors more than thirty days after the receipt of the certificate of the vote was held to be valid, although the statute of Massachusetts required that it should be made within the thirty days.

The same rule has been adopted in New York in *The People vs. Allen*, 6 Wendall Rep. 486.

By the militia law of that State the commanding officer was required to appoint brigade courts martial *on or before* the first day of June in each year. The court was not appointed until afterwards and fines assessed by it were adjudged legal.

It was in that case that where the statute specifies the time within which an official act is to be performed, regarding the rights and duties of others, it will be considered as directory, unless the nature of the act to be done, or the language used by the legislature, show that the designation of time was intended as a limitation of the power of the officer. And a tax has been held valid in this State although assessed after the expiration of a month from the time of voting it, although the words of the statute required the trustees to assess it and make out the list within one month after the vote. *Gale vs. Mead*, 2 Denio 232 same case 4 Hill 109.

So it has been held in Connecticut that where a city charter required jurors to be designated on the first Monday of July and they were not chosen for a month afterwards nevertheless a jury impaneled from the persons so chosen was legal. *Colt vs. Eves*, 12 Conn. 243.

But in an earlier case in that State, which came under review in the case just cited, upon a statute which required assessors to return the assessment lists on or before the first day of December in each year, an assessment which was not returned until after the period specified in the act was held invalid. *Thames Man Company & Lathrop*, 7 Conn. Rep. 556. The statute in this instance, however, further provided that the lists and assessments when returned should be open to the inspection of the persons assessed and a board of re-

Costs on Commutation of Sentence.

lief was to meet afterwards and determine complaints against the amounts of the assessment and there was proof that the plaintiff after the time fixed by law and before the assessment lists were returned had several times called for the purpose of examining their assessment.

In the case under consideration the statute does not by negative words restrain the council from certifying the percentage after the second Monday in June; nor does it provide a mode for an appeal or subsequent examination by another board or tribunal of the amount of the percentage determined upon; nor does the council fix the amount of the assessment of each tax payer or the basis upon which the tax is to be levied, for that is ascertained by the grand jury levy appraised and returned for other purposes.

I am therefore of opinion that there is nothing in the act itself to be performed, nor in the language employed by the General Assembly which imperatively requires the percentage to be certified to the auditor "on or before the first Monday in June annually," and that those words are directory merely. It will therefore be the duty of the auditor to recognize a certificate of the percentage made subsequently to the day named and enter the same on the duplicate of taxes.

What is meant by "some of the council desiring to take this course," I do not comprehend. Of course he can recognize nothing but the official act of the council as such.

GEO. W. MCCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus.

COSTS ON COMMUTATION OF SENTENCE.

Office of the Attorney General,
Columbus, September 19, 1854.

SIR:—Your letter of the 15th September enclosing the record of a sentence and a copy of the cost bill in the *State*

Costs on Commutation of Sentence.

of *Ohio vs. John Howley*, is acknowledged and I have examined the question which you submit for my determination as to the costs incurred in the case.

At the May term, 1854, of the Court of Common Pleas in Cuyahoga County, Howley was convicted of murder in the first degree and sentenced to death. Prior to the day which was appointed for the execution of the sentence the Governor deemed it proper to interpose and commuted the punishment to imprisonment for life in the penitentiary.

The conditions of the reprieve having been accepted by Howley, he was delivered into the custody of the warden at the penitentiary. Upon the trial costs to the amount of \$112.87 were incurred, and upon this state of facts it is claimed that these costs are to be paid out of the treasury of the State.

This claim for payment is doubtless based upon the act of January 4, 1838, amendatory of certain other acts therein named, Swan's Rev. St. 726, for I know no other legislation applicable to it.

This act contemplates evidently payment in cases of conviction for crimes the *punishment of which* is imprisonment in the penitentiary, and a *sentence* to such imprisonment by *the court*, and no other case whatsoever.

The twenty-sixth section of the "act directing the mode of trial in criminal cases," Swan's Rev. St. 726, requires payment of fees of witnesses out of the treasury of the county in which the crime was committed and has no other operation.

The "act to provide for the safekeeping of persons that may be reprieved by the Governor," contains this provision, "and the expenses of transporting such person to the penitentiary shall be allowed and paid out of the State treasury as in other cases." Swan's Rev. St. 733. Upon a familiar rule of construction the expression of one is the exclusion of the other, and as costs of transportation only are mentioned, all the other costs of trial, etc., are excluded.

This provision would have been entirely unnecessary

Escaped Convict; Sheriff's Mileage.

if the act of January 4, 1838, was intended to apply to a case like the present, for that act distinctly provides the amount to which the officer shall be entitled for transporting and subsisting the convict. Taking my view, however, of the last named act the provision for payment of costs of transportation in cases of reprieve was necessary to prevent injustice to the sheriff. A place and mode of payment for all the other costs of the trial had been already provided by law, and they were doubtless long since paid out of the treasury of the county, but for this service and the expenses attending it the law had made no provision and the necessity for further legislation existed.

I am of opinion therefore:

First—That the costs of transportation from Cleveland to the penitentiary are properly a charge upon the State treasury.

Second—That the other costs in the case are properly a charge upon the county of Cuyahoga and cannot be defrayed by the State.

I am, sir, Respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Samuel Wilson, Esq., Warden, etc., Columbus. Ohio.

ESCAPED CONVICT; SHERIFF'S MILEAGE.

Office of the Attorney General,

Columbus, September 19, 1854.

SIR:—Your letter of the 15th inst. submitting to my opinion the claim made by the sheriff of Belmont County for mileage for the capture and return of an escaped convict, is acknowledged.

The capture of the convict was made by the sheriff of the county and upon the delivery of the prisoner he received the reward of fifty dollars which had been offered by you for the arrest and return of the convict.

Escaped Convict; Sheriff's Mileage.

By the sixteenth section of the act of February 26, 1835, "it is made the duty of all sheriffs, coroners and constables to arrest any and every convict and him, her, or them forthwith convey to the said penitentiary and deliver to the warden thereof." Swan's Rev. Stat. 605.

The compensation to which under such circumstances the officer shall be entitled is provided in the next section of the same act, "That any sheriff, constable or other person who shall retake and convey to the penitentiary any convict who may have escaped therefrom, shall be allowed eight cents per mile going to and returning from the penitentiary and such additional compensation as the warden may deem reasonable for the *necessary expense incurred.*" Ib. 605.

It is therefore by this act the duty of a sheriff to make the arrest of an escaped convict. For performing this duty he cannot lawfully either claim or receive any compensation except that provided by law which is the mileage and such additional compensation as in the opinion of the warden shall be reasonable, and this discretion to increase the compensation is limited to the *necessary expense incurred.*

I am therefore of opinion that the sheriff or any other officer charged by law with the arrest of escaped convicts is not entitled to any "reward" as such. The law does not tolerate a premium to officers for performing acts which are enjoined by statutes as part of their official duties. They perform the duty and receive the fees or compensation annexed to its performance, and if no fee is provided they must act gratuitously. The sheriff or other officer on making these arrests acts officially. When an officer is required by law to perform an act which may be done as well by a private person voluntarily, the performance of this act by the incumbent of the office is presumed to be in the discharge of official duty, and he cannot claim to have acted as a private person, or to receive the reward which is held out to such to induce them to do that which the law does not enjoin upon them.

I am of opinion therefore that the sheriff is entitled to

Canal Bank of Cleveland.

his mileage and such further sum as you may deem reasonable to defray the necessary expenses incurred by him, but that he was not entitled to receive the reward and ought not to be paid the mileage, etc., until the amount of the reward is returned to you.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Samuel Wilson, Esq., Warden, etc., Columbus, Ohio.

CANAL BANK OF CLEVELAND.

Cleveland, November 14, 1854.

DEAR SIR:—I have received your dispatch desiring to use my name as Attorney General in a proceeding in behalf of the State against the Canal Bank of Cleveland to recover eight thousand dollars deposited therein by one of the trustees of the Lunatic Asylum at Newbough.

In reply I feel compelled to say that I cannot permit my name to be used in any such proceeding, as it would be a recognition of the deposit as made in behalf of the State and might operate a discharge of the trustee from his liability to account for the money received.

After a hurried examination of the statutes I have failed to find any provision which would warrant the drawing of money from the treasury in advance of the necessity for its immediate use in defraying the expenses of construction, or any authority to a trustee of the asylum, having so drawn money from the treasury to entrust it to the custody of any other person or to any banking company.

I am of opinion, therefore, without reference to the form of the deposit, that the trustee who made it is responsible to the State for the money—if any loss occurs it

Athens Branch Bank.

must be borne by him, and I am unwilling by any act of mine, to change the relation of the parties to the transaction.

I must decline, therefore, to interfere officially in any way, or to consent to the use of the name of the State, in any proceeding against the bank for the recovery of the money.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

To R. P. Spalding, Esq., Counselor, Cleveland, Ohio.

ATHENS BRANCH BANK.

Office of the Attorney General,

Columbus, January 13, 1854.

SIR:—Your letter of the 2d inst. to the late Attorney General has been handed to me for reply.

The sixty-first section of the act to incorporate the State Bank of Ohio, etc., limits the rate which the Athens branch of that bank may receive as interest. If a bill of exchange is discounted payable at any other place than that at which the bank is located, with the understanding that it is to be met at maturity at the counter of the bank, and the current rate of exchange paid, it is an undoubted forfeiture of the debt. And although it is very doubtful, whether when a specific penalty or forfeiture is annexed to the violation of a particular clause of the charter any other penalty or forfeiture would be held to attach, I am nevertheless willing upon a clear case, ready to commence proceedings against the bank to obtain a judgment of forfeiture of its franchise.

I have not had time to examine with sufficient care all the statutes subsequent to that incorporating the State Bank,

In the Matter of James Thompson, a Fugitive from Justice.

but I have the impression that the sixth section, so far as it limits the paying out of notes of a less denomination of five dollars. In this, however, I am probably mistaken, and if so a prosecution under this section would be relieved of the embarrassment which would attend it under the other.

Please refer this letter to the counsel you name and they will inform you of the facts which it will be necessary for me to have before commencing proceedings.

I will be pleased to hear from them as soon as they have obtained the requisite information.

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Wm. Golden.

IN THE MATTER OF JAMES THOMPSON, A
FUGITIVE FROM JUSTICE.

Office of the Attorney General,

Columbus, January 30, 1854.

SIR:—I have examined the requisition of the governor of Virginia and the documents accompanying the same, requiring the delivery of James Thompson, a white person, as a fugitive from justice.

By the law of Virginia affidavits and depositions are not required to be subscribed by the party making them.

The subscription is convenient for the proof of the identity of the person making the oath on a subsequent prosecution for perjury assigned upon the affidavit or deposition, but for no other purpose.

The affidavit in this case shows, substantially, that a felony has been committed by Thompson, the fugitive, against the laws of Virginia. The governor of Virginia certifies, not only to the authenticity of the papers, but that

John Mapes, a Fugitive from Justice.

they charge a crime to have been committed against the laws of that commonwealth.

I am of opinion, therefore, that the requisition and the documents accompanying it are substantially in compliance with the act of Congress of February 12, 1793, and warrant you in requiring the arrest and surrender of the fugitive to the agent appointed by the governor of Virginia to receive.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

To the Hon. Wm. Medill, Governor of Ohio.

JOHN MAPES, A FUGITIVE FROM JUSTICE.

Office of the Attorney General,

Columbus, January 31, 1854.

SIR:—I have had under consideration your letter of the 20th inst., with the papers accompanying an application to you for a requisition upon the governor of Indiana for the surrender of John Mapes, alleged to be a fugitive from justice.

Whether a requisition ought to be issued for the surrender of a fugitive charged with an offence under the twelfth section of the act of March 8, 1831, Swan's Rev. Stat. 286, is a question of doubt, and upon which conflicting opinions have been given by a former Attorney General of this State. The inclination of my mind, at present, is in favor of the right of the executive to make the demand.

But prosecutions under this statute are made more frequently for the gratification of private malice than to subserve the ends of public justice. The right, then, to make the requisition ought never to be exercised except in a very clear case.

Probate Court; Criminal Jurisdiction.

And, although no suspicion attaches to the present application a rule should be established to which all cases should be required to conform.

I would advise that in addition to the affidavit charging the offence to have been committed, another should be required establishing the fact that the accused had fled to escape punishment for the offence.

The affidavit in this case does not charge the money to have been obtained "with intent to cheat and defraud," etc., and is, therefore, in my opinion, defective. A copy of the affidavit is sent instead of the original which seems to be required by the act of Congress.

I am of the opinion, upon the case as now made, that it is your duty to refuse the requisition.

Should another affidavit be made, I will prepare an opinion as to the right to make the demands in this class of offences, upon which you intimate your doubt.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Hon. Wm. Medill, Governor of Ohio.

PROBATE COURT; CRIMINAL JURISDICTION.

Office of the Attorney General,

Columbus, February 4, 1854.

SIR:—In reply to your letter of the 24th January, as to the criminal jurisdiction of the Probate Court, I beg to call your attention to an extract from my opinion on this subject to the prosecuting attorney of Erie County.

I have no doubt that prosecutions commenced in the Probate Court upon the mere motion of the prosecuting

Stoughton and Another vs. The State.

attorney, resulting in convictions, would be reversed in error in the Common Pleas.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

B. W. Fuller, Esq.; Prosecuting Attorney, Wilmington, Ohio.

STOUGHTON AND ANOTHER VS. THE STATE.

Office of the Attorney General,

Columbus, February 11, 1854.

DEAR SIR:—The record in this case shows an arraignment of the prisoners only on the second count of the indictment.

I have examined the other errors and have no doubt that the conviction on the fourth count could be sustained.

Kirby vs. The State went too far, and the same point is up in *Mackey vs. The State*, a case reserved by Judge Ranney in the District Court of Monroe, where the instrument alleges the bill to be "false, forged and counterfeited."

I am, therefore, anxious to hear from you as to the arraignment. I am satisfied that there is a mistake in the record, for I cannot understand why the second count should be singled out to be pleaded to, especially as I think that count bad. Please let me hear from you.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Wm. F. Evans, Esq., Canton, Ohio.

Canal Lands; Deed to Assignees of Wm. Goldsmith.

CANAL LANDS; DEED TO ASSIGNEES OF WM.
GOLDSMITH.Office of the Attorney General,
Columbus, March 18, 1854.

SIR:—I have examined the papers forwarded to your office by Jacob W. Smith, Esq., as to the claim in behalf of the representatives of Frederick Young, for a deed of certain canal lands originally entered by William Goldsmith.

The papers refer to others, which would be necessary to a full examination of the case, but presuming that they are as represented by the letters accompanying the papers, I suggest that the counsel for the personal representation of Young prepare a deed, reciting:

First—The entry of Goldsmith, etc.

Second—The transfer by Goldsmith to Glusser.

Third—The transfer by Glusser to Kroft.

Fourth—The chancery proceeding in Stark County (it should have been where the lands are situate), by Frederick Young against Glusser and Kroft, and the decree in favor of Young against Glusser and Kroft.

Fifth—The decease of Young, the probate of his last will and testament, with a recital of the power to the executor to dispose of the lands.

Sixth—The sale under this power, to Reynolds, with granting to Reynolds directly.

The deed can then be forwarded for examination and should be accompanied by at least a copy of the decree in the chancery case referred to, and a copy of the will of Frederick Young.

I return, herewith, the original certificate issued to Goldsmith and the other papers which accompanied it.

I am, sir, Very respectfully,

GEO. W. MCCOOK,

Attorney General.

Hon. Wm. D. Morgan, Columbus, Ohio.

School Law—Judgment of Pecuniary Fine in Absence of Defendant.

SCHOOL LAW.

Office of the Attorney General,
Columbus, April 26, 1854.

SIR:—I have received your letter of the 5th April, and beg to enclose, as a reply to your inquiries, a report of the Commissioner of Common Schools to the Senate, published by authority of that body. In the answer to question twenty-nine you will find a reply to the question presented to me.

It is proper that W. Barney, who is charged with the duty of superintending the execution of the school law, should have the opportunity of construing it in the first instance. And without committing myself to an approval of all his opinions, I may add that I have great respect for his judgment, and that I will not interfere with his discharge of the duties of his office unless compelled to do so in the proper discharge of the duties of my own.

I am, sir,

Very respectfully,

GEO. W. McCOOK.

Attorney General.

John F. Simmons, Esq., Coshocton, Ohio.

JUDGMENT OF PECUNIARY FINE IN ABSENCE
OF DEFENDANT.

Office of the Attorney General,
Columbus, May 11, 1854.

DEAR SIR:—Your letter was written inquiring my opinion in this case on the day I left this city for home.

Upon my return and the receipt of your letter I inquired of W. Dean and ascertained that the court had ad-

Dick vs. State; Error.

journed. As there was no immediate necessity for a reply, I delayed in the expectation that a case would be determined at the present term, which would, by analogy, be conclusion of this.

The decision has not yet been made and it is not certain that it will be.

You might have forfeited his recognizance, which would probably have been for a larger amount than the fine to be assessed. But I think you could also have demanded judgment for a fine and that it might be legally pronounced in the absence of the prisoner when he is at large upon his own recognizance, and he is not prevented from being present by imprisonment, or any other improper means. *Lee Rose vs. State*, 20 Ohio Rep. 33, upon the absence of the prisoner at the giving of the verdict.

Should the matter be undisposed of, please inform me when your next term will commence and I will endeavor to examine the question fully, even if no light should be thrown upon it by the anticipated decision from the court at the present term.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

John McSweeney, Esq., Prosecuting Attorney, Wooster, Ohio.

DICK VS. STATE; ERROR.

Office of the Attorney General,

Columbus, June 3, 1854.

DEAR SIR:—Your letters of 15th and 20th of May and 1st June, with reference to this case, are acknowledged.

The argument of yourself and W. Odlin was printed and before the court, and a proof sheet of mine was also obtained by the judges.

Dick vs. State; Error.

Copies are sent to you by express. My absence from the city and the use of my name by persons who knew nothing of our arrangements, will satisfactorily explain what would be otherwise mysterious.

You complain of delay in the decision of the case, and I think do injustice to the court. The case of Parks, on precisely the same point, was also to be decided, and there was certainly no impropriety in waiting until that was fully argued for the prisoner. Besides, delay has resulted not unfavorably to the State, for the first impression of the case in the mind of every lawyer would be against the judgment.

My own opinion is now in favor of sustaining the judgment, and you know when you first presented the point for my consideration it was decidedly the other way. How much the national sympathy of the advocate for the cause which he argues has conduced to this change of opinion, I am unable to tell; perhaps if I had occupied the position of judge my first view of the case would have continued.

The judgment of the court may, and probably will, be against us; if so, it will be because a majority of the judges in the conscientious discharge of duty in a case involving human life have been unable to find in the verdict a compliance with those requisitions of the statute imposed as safeguards in every trial for murder.

A murder committed for the gratification of revenge is bad enough, a murder by a mob is still more deplorable, but the most infamous form of the crime is judicial murder.

I regret very much that the feeling of your community, outraged by a great crime, should continue so excited as to threaten the life of the prisoner by the violence of a mob. Upon this subject I expressed my views very fully in conversation with you. Five minutes after such violence the most insensate man in your county would regret it, but it would be a reproach which the regret of years could not remove.

Those participating in the act would be clearly guilty

Temperance Act of 1854.

of murder, and would find no safety except in flight. The prisoner is, doubtless, guilty, and the law, administered according to the forms prescribed, will be found sufficient for his punishment and its own vindication.

But he is bound and helpless, and let it never be said in Ohio that a prisoner was deprived of his life without the sanction of justice, without the forms of the law, and without an opportunity to give a single blow for his defence against a multitude. If you feel apprehension of such a disastrous event, it will become your duty to make every disposition against it, and I have confidence that you will do it with coolness and success.

You may communicate this to W. Odlin and ask him to write to me as he shares your apprehensions.

It is not certain that the judgment will be reversed, but it may be, and you should be prepared for either event.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

James H. Baggott, Esq., Prosecuting Attorney, Dayton, Ohio.

TEMPERANCE ACT OF 1854.

Office of the Attorney General,

Columbus, June 6, 1854.

DEAR SIR:—I have received your letter of the 27th May, inquiring whether under the "act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," passed May 1, 1854, 52 Ohio Laws 153, it is lawful to sell wine, manufactured of the pure juice of the grape, also beer and cider indiscriminately.

I have to reply that the sale of wine, unless manufactured from the grapes cultivated in this State, is unlaw-

Justices' Election.

ful, and that the *indiscriminate* sale of all the liquors named above is in violation of the provisions of the act referred to.

You will perceive by referring to the act that the proviso of the eighth section excludes from the operation of the first and fourth sections the sale of the wine manufactured from the pure juice of the grape cultivated in this State, and beer, ale and cider, but leaves in operation as to them the remaining provisions of the act.

It is lawful, therefore, to sell those excepted liquors in any quantity, and to be drunk in the place where sold, or elsewhere, without incurring the penalties in the fourth section. But the indiscriminate sale is still unlawful, for by the second section it is unlawful to sell to minors, and by the third section to persons who are in the habit of getting intoxicated, and the liquors named being excluded from the operation of the first and fourth sections are obviously intended to be included within the other sections of the act.

I remain, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

L. R. Mott, Esq., Prosecuting Attorney, Auglaize County, Ohio.

JUSTICES' ELECTION.

Office of the Attorney General,
Columbus, June 6, 1855.

SIR:—I have examined the case of the election for justices of the peace in Union Township, Lawrence County, as fully as I could from the letters of W. Proctor of 29th April and 1st June, and without having the poll book before me, and I confess I can scarcely understand how a return should be so defective as to admit more than one construction.

Ordinances Against Intemperance.

It would be improper to permit an amendment to the poll book or to receive evidence dehors as to the election.

But I think the poll book in this case must furnish sufficient evidence that there were two persons elected.

The poll book is headed "Justices Poll Book of Election," and the number of votes cast is entirely inconsistent with the number of votes counted to each, except on the hypothesis that there were two persons to be elected. In my opinion, therefore, the clerk can properly certify for Lorenzo Forgy as elected.

Very respectfully,

GEO. W. MCCOOK.

Hon. Wm. Trevitt, Secretary of State, Columbus, Ohio.

ORDINANCES AGAINST INTEMPERANCE.

Office of the Attorney General,
Columbus, June 10, 1854.

DEAR SIR:—I have received your letter of the 8th inst., inquiring my opinion as to the effect of May 1, 1854, to provide against the evils resulting from the sale of intoxicating liquors, 52 Ohio Laws 153, upon ordinance previously enacted, by incorporated villages, for the suppression of intemperance. The ordinances to which you refer were passed, I suppose, under the act of 1852, section 34, 50 Ohio Laws 236. If any such ordinance was then inconsistent with any law of this State, it was simply void for want of power in the corporation to pass it; but if consistent with law, at the time of its passage, it is, so long as that consistence with law continues, valid and binding. The ordinance falls, however, the very moment that it becomes inconsistent with any law of the State subsequently enacted, and this without any repeal by the legislature of the section by virtue of which the ordinance was passed. The intention of the leg-

The State vs. James B. Smith.

islature to have the act of May 1, 1854, the only act in force in Ohio on this subject, is sufficiently manifest in the clause which repeals the act of March 12, 1851, and the act of March 12, 1853, saving only prosecutions already commenced. But under our constitution this would go for nothing if any repeal of the section under which the ordinance had been passed, was necessary.

It is needless now to discuss whether an ordinance can be passed, or enforced, if passed imposing any other punishment or providing any other mode of trial than those given by the act, for violation of its provisions; but certain it is that no ordinance is valid which punishes as criminal which is in the proviso of the eighth, and therefore excepted from the operation of the first and fourth sections of the law of May 1, 1854.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

John McSweeney, Esq., Prosecuting Attorney, Wooster, Ohio.

THE STATE VS. JAMES B. SMITH.

Office of the Attorney General,

Columbus, June 14, 1854.

DEAR SIR:—You have doubtless seen the announcement of the decision of the Supreme Court, reversing the judgment below, in this case. The judgment proceeds upon the ground that the evidence, offered by the defense, was competent.

In my own opinion the indictment is good as framed under the seventeenth paragraph of the crimes act, by rejecting as surplusage the words "shoot at" or indeed the whole averment in which they occur. But three of the judges are

Ohio vs. Shattuck; Costs Due State.

of the opinion, that where the assault proved is by *shooting*, no prosecution can be sustained under the seventeenth paragraph, but that the indictment must be under the twenty-fourth paragraph. In this, with all respect to the court, I think they are clearly in error; but certain it is, if a bill of exceptions was taken showing the facts as they appear on the record, now—an assault by shooting only—another conviction would avail nothing, and the judgment would be again reversed.

Permit me, therefore, to suggest to you that another indictment be found under the twenty-fourth section, and that the present prosecution be abandoned.

Judge Corwin is one of the three who entertain this opinion and, as he retires, a different judgment might be rendered by the successor; but I think it better to have the indictment under the other section.

I am, sir,

Very respectfully,

GEO. W. MCCOOK.

S. A. Nash, Esq., Prosecuting Attorney, Gallipolis,
Ohio.

OHIO VS. SHATTUCK; COSTS DUE STATE.

Office of the Attorney General,
Columbus, June 14, 1854.

DEAR SIR:—The Auditor of State has sent to me, for collection, a claim of the State for costs in this case. It seems they were collected by you, as sheriff of Cuyahoga County, and by you paid to Nelson Monroe.

Will you call upon Mr. Monroe and procure the money, to be at once forwarded to me? I will accept the money without interest if it is sent at once, although I think a legal claim for interest exists.

I do not know upon what authority the money was paid

National Road.

to Monroe, and do not suppose there was any which would warrant you in making the payment.

If you should have any difficulty in procuring the money from Monroe, you can submit to him these propositions as to your own liability.

First—The statute of limitations for proceedings against officer (one year) or any other, does not run against the State, even if in the case of collection of money the action accrued before demand was made.

Second—Although, in general, interest cannot be demanded against an officer, yet, if he has invested the money or paid it out improperly, he is liable for interest.

It is not charged only for the reason that in the absence of proof to the contrary, he is presumed to have it at all times awaiting the demand for it.

This matter has escaped attention for some time, but I trust it will be delayed no longer.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

S. A. Abbey, Esq., late Sheriff, Cleveland, Ohio.

NATIONAL ROAD.

Office of the Attorney General,

Columbus, June 14, 1854.

DEAR SIR:—Permit me to call your attention to the act of May 1, 1854, authorizing the board of public works to lease the National Road, and particularly to sections five and seven, which require the performance of certain duties by the commissioners of each county through which said road passes.

A contract has been made and the lessees will at a very early period enter into possession of the road. I have just

National Road.

been informed that in a number of the counties the commissioners have not performed and seem unwilling to perform the duties required.

I need not suggest to you the importance of the survey and examination required to the State at large which has heretofore sustained the burthen of repairing the road, but particularly to your own county.

I trust, therefore, that you will upon the receipt of this, call immediate attention to the subject on the part of your commissioners, or, if your engagements will not permit you to attend to it in person, that you will impress upon the auditor the importance of early action.

The legislation upon this subject is very defective, even when all its provisions are carried out, but if so important a part as the first survey and examination should be neglected the subsequent examinations would be of little use, and the only restraint which the law affords, upon the contractors, could never be successfully exercised.

It has been suggested to me that no provision has been made for compensation to the commissioners for the performance of his duty. Now, there could be nothing in the internal affairs of a county more important to its citizens than the keeping of such a road; and it seems to me the expenses of this examination might properly be advanced by it, but an accurate account of the expenses could be kept so that it might be submitted to the General Assembly hereafter.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK

Prosecuting Attorneys of Belmont, Guernsey, Muskingum, Licking, Franklin, Madison and Clark Counties.

Probate Court; Habeas Corpus—Temperance Act of 1854.

PROBATE COURT; HABEAS CORPUS.

Office of the Attorney General,
Columbus, June 16, 1854.

DEAR SIR:—Your letter of June 12th is acknowledged, and from a hasty examination of the question on which you desire my opinion, I think that your action can be maintained.

Exercising the office of a *judge* the Probate Judge of Richland County was obliged, upon a proper application, to issue a writ of habeas corpus; no matter what was the cause or nature of the detention. Having the prisoner before him he ascertains that it is an offence bailable, and he is bound to admit him to bail, and under the third section of the habeas corpus act. Swan's Rev. Stat 451, he was authorized to take a recognizance, "conditioned for his appearance at the next court, *when the offense is properly cognizable.*"

I desire you therefore to press the case, and in the meantime send me a memorandum of the statutes on which opposing counsel rely.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK.

Alex. Porter, Esq., Ashland, Ohio.

TEMPERANCE ACT OF 1854.

Office of the Attorney General,
Columbus, July 27, 1854.

DEAR SIR:—I acknowledge your letter of the 14th inst., and would have replied to it at an earlier day if I had not supposed that the question of the constitutionality of the act,

Temperance Act of 1854.

to which you refer, would have received a judicial answer at the term of the Supreme Court just closed. I would be very reluctant in advance of the decision of the courts to pronounce any act of the General Assembly unconstitutional, and could only be induced to do so in a very clear case.

It is clearly your duty, and mine, to enforce the acts of the General Assembly until the courts pronounce that they have not the sanction of laws, or are in form and language so defective as to render their enforcement impossible.

I have not examined the journals of either house of the General Assembly, and do not propose to do so for the purpose of pursuing this act through all the successive stages of legislation. For the present it is enough for me that it appears regularly in the volume of laws published by authority.

There are questions in connection with it full of difficulty and embarrassment and I regret that I will have to meet them, but every presumption is in favor of the law.

ADULTERATION OF LIQUORS.

Liquors manufactured in your county are, in my opinion, subject to inspection in the county where manufactured.

This law also is very defective and there is no provision for it for a refusal to permit inspection in the case you put.

The prosecution should be instituted as is suggested by you in your letter.

I am, sir,

Very respectfully,

GEO. W. MCCOOK,

Attorney General.

John Johnston, Esq., Prosecuting Attorney, Batavia,
Ohio.

Act to Provide Against the Sale of Liquors.

ACT TO PROVIDE AGAINST THE SALE OF
LIQUORS.Office of the Attorney General,
Columbus, July 27, 1854.

DEAR SIR:—I acknowledge your letter of the 24th inst. You desire my opinion upon the following question, "Does the Ohio liquor law contemplate as an offense the sale of ale, beer or native wine to a person intoxicated or in the habit of getting so?"

The first four sections of the act to provide against the evils resulting from the sale of intoxicating liquors 52 Ohio Laws 153, are general in their terms and operation. They extend to and include any sale of intoxicating liquors, but by the eighth section of the act it is provided that the provisions of the first and fourth sections shall not extend to the sale of the wine manufactured of the pure juice of the grape cultivated in this State, or beer, ale or cider.

This proviso excludes from the operation of the first and fourth sections a sale of the excepted liquors, but leaves in operation as to them the remaining sections of the act, for by a familiar rule of construction, the expression of one is the exclusion of the other.

It is, by the second section, unlawful to sell to minors; and by the third to persons intoxicated, or who are in the habit of getting intoxicated; and this without any regard to the kind of intoxicating liquors sold, whether "native wine," ale, beer or cider.

I answer your question therefore in the affirmative, and have no doubt at all as to the interpretation of this portion of the act.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,
Attorney General.

Robt. M. Briggs, Esq., Prosecuting Attorney, Wilmington, Ohio.

Temperance Act of 1854.

TEMPERANCE ACT OF 1854.

Office of the Attorney General,
Columbus, July 26, 1854.

DEAR SIR:—Your letter of the 12th of July has been for some time upon my table, and I have delayed replying in the hope that I might in a few days be able to inform you that your first question was *res adjudicata*. But the Supreme Court adjourned, without taking up any case under the law to which you call my attention.

Recognizing *Birney vs. The State of Ohio* 230 as authority in point, I am of opinion that it is *necessary* to aver and prove that the party selling knew that the person, to whom sold, was in the habit of getting intoxicated.

I am aware that this will tend to detract from the efficiency of the act, but I think this will be held to be necessary by the court, and it would be better to have a few escape than after conviction to have all judgments reversed on error.

Upon the other question I have not reflected, but if alcohol enters, as a component part, into wine of the grape grown in this State, ale, beer and cider—each is an alcoholic liquor, and it is within the operation of the act of May 1, 1854, to prevent the adulteration of alcoholic liquors. 52 Ohio Laws 108. The fact that those liquors are excepted from the operation of a part of the clauses of another act will have no effect upon the interpretation of this.

The object of one act is to prevent intoxication and its consequent evils; of the other to prevent the adulteration of alcoholic liquors without any reference to the place of their manufacture, or the ingredients of which they are composed. I am, sir, Very respectfully,

GEORGE W. MCCOOK,

Attorney General.

Mason King, Esq., Prosecuting Attorney, Ashtabula,
Ohio.

Clerk of Court; Term of Office—City Taxes; Certificate of Percentage.

CLERK OF COURT; TERM OF OFFICE.

Office of the Attorney General,
Columbus, July 31, 1854.

DEAR SIR:—In reply to your communication as to the term of office of the clerk of the Common Pleas elected upon a vacancy occurring in that office, I beg to enclose a copy of my opinion as to the office of prosecuting attorney under similar circumstances. I am unable to make any sound discrimination between the cases, and think that a clerk is elected for the full official term and not for the unexpired term of his predecessor.

It would be well, however, to say to your correspondent that Mr. Pugh, in a similar case, came to a different conclusion.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. Trevitt, Secretary of State, Columbus, Ohio.

CITY TAXES; CERTIFICATE OF PERCENTAGE.

Office of the Attorney General,
Columbus, September 11, 1854.

SIR:—I have examined the question submitted to you by Andrew Young, Esq., auditor of Lucas County, "whether the city council of Toledo, after the second Monday in June, may cause to be certified to the auditor of the county, the percentage by them levied on the real and personal property in the corporation for the purpose of having the same placed on the duplicate for collection."

City Taxes; Certificate of Percentage.

The twenty-sixth section of the act of March 11, 1853, provides "That the council of any municipal corporation is hereby authorized and required to cause to be certified to the auditor of the county on or before the second Monday of June, annually, the percentage by them levied on the real and personal property in said corporation, appraised and returned on the grand levy, aforesaid: and the said county auditor is hereby authorized and required to place the same on the duplicate of taxes for said county, in the same manner as township taxes are now by law placed on said duplicate," etc. Swan's Rev. Stat. 988.

The city council having neglected to cause to be made to the "on or before the first Monday in June" of the present year, now propose to have it done.

The general rule applicable to questions of this nature is that where a statute directs a thing to be done within a certain time, without any negative words restraining the person or officer from doing it afterwards, the naming of the time will be considered as *directory merely*, and not as a limitation of authority. In *Pond vs. Negus and others*, 3 Mass. Rep. 230, where this rule was given by Chief Justice Parsons, an assessment of a tax, voted for school purposes, made by the assessors more than thirty days after the receipt of the certificate of the vote was held to be valid, although the statute of Massachusetts required that it should be made within the thirty days.

The same rule has been adopted in New York in the *People vs. Allen*, Wendel's Rep. 486. By the militia law of that State, the commanding officer was required to appoint brigade courts martial on or before the first day of June in each year. The court was not appointed until afterwards, and fines assessed by it were legal. It was, in that case, held that where the statute specifies the time within which an official act is to be performed regarding the rights and duties of others, it will be considered as *directory*, unless the nature of the act to be done or the language used by the legislature show that the designation of time was in-

City Taxes; Certificate of Percentage.

tended as a limitation of the power of the officer. And a tax has been held valid in this State although assessed after the expiration of a month from the time of voting it, although the words of the statute required the trustees to assess it and make out the list within one month after the vote. *Gale vs. Mead*, 2 Demio 232, same case 4 Hill 109.

So it has been held in Connecticut that where a city charter required jurors to be designated on the first Monday of July and they were not chosen for a month afterwards, nevertheless a jury impaneled from the persons so chosen was legal. *Colt vs. Evcs*, 12 Conn 243. But in an earlier case in that State, which came under review in the case just cited, upon a statute which required assessors to return the assessment lists on or before the first day of December in each year, an assessment which was not returned until after the period specified was held invalid. *Thames Man Company vs. Lathrop*, 7 Conn. Rep. 556. The statute, in this instance, however, further provided that the lists and assessments when returned should be open to the inspection of the persons assessed, and a board of relief was to meet afterwards and determine complaints against the amounts of the assessments, and there was proof that the plaintiffs, after the time fixed by law and before the assessment lists were returned, had several times called for the purpose of examining their assessment.

In the case under consideration the statute does not, by negative words, restrain the council from certifying the percentage after the second Monday in June, nor does it provide a mode for an appeal or subsequent examination by another board or tribunal, of the amount of the percentage determined upon; nor does the council fix the amount of the assessment of each tax payer, or the basis upon which the tax is to be levied, for that is ascertained by the grand levy appraised and returned for other purposes.

I am, therefore, of opinion that there is nothing in the act itself to be performed, nor in the language employed by the General Assembly, which imperatively requires the per-

Justices Election; Commission.

centage to be certified to the auditor "on or before the first Monday in June, annually," and that those words are directory, merely.

It will, therefore, be the duty of the auditor to recognize a certificate of the percentage made, subsequently to the day named, and enter the same on the duplicate of taxes.

What is meant by "some of the council desiring to take this cause," I do not comprehend. Of course, he can recognize nothing but the official act of the council as such.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,
Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus,
Ohio.

JUSTICES ELECTION; COMMISSION.

Office of the Attorney General,
Columbus, September 11, 1854.

SIR:—I acknowledge your letter of the 26th August requiring my opinion whether Samuel Linn, elected a justice of the peace for Franklin Township, Richland County, and for whom a commission issued on the 17th day of October, 1853, but which remained in the office of the clerk of the court and was not delivered to him, can now qualify himself and enter upon the discharge of his official duties.

It is the duty of a justice of the peace upon the receipt of a commission from the Governor *forthwith* to take office and in ten days thereafter to give bond.

It does not appear, by the letter of the clerk, that Mr. Linn has yet received his commission and there can be no claim of forfeiture of the office by non-user or failure to comply with the requisitions of the statute until after he has received his commission.

Probate Court; Criminal Practice.

From anything therefore which appears in your letter or the communication of the clerk of the court of Richland County, which accompanies it, I am of opinion that upon the receipt of his commission Mr. Linn may now lawfully qualify himself and enter upon the discharge of his official duties. His term of office, of course, commences with the date of his commission, and not with the day of qualification.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. Trevitt, Secretary of State, Columbus, Ohio.

PROBATE COURT; CRIMINAL PRACTICE.

Office of the Attorney General,
Columbus, September 11, 1854.

SIR:—I have received your letter of the 8th September and proceed to your interrogatories. The law does not provide for this office or I would send you copies of my opinion referred to.

JURISDICTION

can only be taken upon a previous complaint and recognition and the information should be for the offence charged in the original complaint and not for another or different complaint. (Opinion to prosecuting attorney of Erie County.)

INFORMATION.

The information, like an indictment, may contain different counts charging the same offence, but not charging

Naturalization; Probate Court.

distinct substantive offences. This would be bad in an indictment and equally so in an information. You would, however, in such a case, be entitled to elect upon which count you would proceed, dismissing as to the others.

SUSPENSION OF SENTENCE.

The Probate Court has power, upon the application of the party convicted and the signing of a bill of exceptions, to suspend the execution of the sentence. (Opinion to prosecuting attorney of Greene County.)

RECOGNIZANCES

should be forfeited in the Probate Court, but as it has no common law jurisdiction it cannot proceed to collect the amount without special statute authorizing it so to do, and I can find nothing of the kind.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

B. W. Fuller, Esq., Prosecuting Attorney, Wilmington,
Ohio.

NATURALIZATION; PROBATE COURT.

Office of the Attorney General,
Columbus, September 11, 1854.

SIR:—I have examined the questions submitted in your letter of the 6th inst., as to the power of the Probate Court to hear the application of foreigners for naturalization and to grant certificate.

The third section of the act of April 14, 1802, defines what is a district court of a State within the meaning of

Asa G. Demmick, Late Warden.

the naturalization laws. That is, a court having common law jurisdiction, a seal and a clerk. The Probate Court possesses two of these requisites; it has a seal and a clerk, but the other requisite is wanting. It is a court of limited and statutory and not one of common law jurisdiction. I am, therefore, of the opinion that it is not in the provision of the acts of Congress, and cannot act under the naturalization laws.

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Andrew, Sidney, Ohio.

ASA G. DEMMICK, LATE WARDEN.

Office of the Attorney General,

Columbus, September 19, 1854.

SIR:—I acknowledge your letter of the 13th September, furnishing me a copy of a receipt for \$692.50 signed by "A. G. Demmick, Warden," in these words: "This is to certify that there is deposited at the Ohio Penitentiary for Almeda Victor, six hundred and ninety-two dollars and fifty cents, subject to her order." This paper has been endorsed as follows: "Pay to the order of Samuel Wilson, Warden O. P., Almeda Victor," and you desire to know what course should be pursued to collect the amount due.

There was no law by which the warden of the penitentiary was authorized to receive money in this way for convicts or others, and the giving of such a receipt or certificate was illegal and improper. The money then not having been received by Mr. Demmick by virtue of any law, his signature attached as "warden" does not bind the sureties upon his official bond, and they cannot be charged with the payment of the money, nor does the name of the "Ohio Peni-

Stationery for Benevolent Institutions.

tentiary" on the endorsement to you as warden impose any duty upon you, officially, to collect the same.

Mr. Demmick is liable for the payment of the money personally and will doubtless pay it upon application.

But as the matter has no connection with your official duties, I withhold any opinion as to the course to be pursued for the purpose of collecting the money.

I enclose herewith an opinion as to the liability of the State to pay the costs on the conviction of Hawley; and another as to the amount which the sheriff of Belmont County is entitled for the return of an escaped convict.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Samuel Wilson, Esq., Warden, etc., Columbus, Ohio.

STATIONERY FOR BENEVOLENT
INSTITUTIONS.

Office of the Attorney General,
Columbus, September 19, 1854.

SIR:—Some time since I received a communication from you requesting to know whether, as superintendent of the Lunatic Asylum, you were entitled to have stationery furnished to you.

Under the seventh section of the act of March 11, 1853, Swan's Rev. St. 869, the Secretary of State would, in my opinion, be authorized to supply you with all stationery necessary for the proper discharge of the duties of your position and for the use of the asylum.

I am under the impression that I verbally communicated the same opinion to the Secretary of State, but I may be mistaken.

Justices Election; Equal Votes; Divided by Lot.

It would be better for the asylum and cheaper for the State than for to have purchases made in small quantities, as the necessity of the institution might, from time to time, require.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK.

Dr. G. E. Eels, Superintendent, etc.

JUSTICES ELECTION; EQUAL VOTES; DIVIDED
BY LOT.

Office of the Attorney General,
Columbus, September 19, 1854.

SIR:—I have examined the certificate of the clerk of the Court of Common Pleas of Butler County, of the election of Benjamin Vangerven, as justice of the peace.

I regret exceedingly that the judiciary committee of the last General Assembly did not think proper, when the doubt which arises in this case was suggested to them, to remove all difficulty by express legislative provision.

The intention to have the determination by lot in case of the two highest candidates for the same office having an equal number of votes is sufficiently clear to my mind, but it is certain that it has been left to doubtful construction to ascertain it. I advise, however, that in this and all similar instances, the commission should be issued, and I trust the matter may be borne in mind and all further difficulty removed at the meeting of the next General Assembly by legislation which will not be subject to two interpretations.

I have refrained from giving the reason upon which my opinion proceeds, and enclose herewith the certificate of

Inquisition of Lunacy; Probate Court.

election of the clerk and his letter requesting a speedy determination of the question submitted.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Hon. Wm. Trevitt, Secretary of State, Columbus, Ohio.

INQUISITION OF LUNACY; PROBATE COURT.

Office of the Attorney General,

Columbus, September 19, 1854.

SIR:—I have received your letter of the 16th inst., calling my attention to the opinion of my predecessor given on the 15th of November, 1853, as to the exclusive jurisdiction of probate judges to take inquisitions of lunacy, etc., preparatory to the admission of patients into the asylum, and desiring to know my opinion of the questions submitted to

The question is not free from difficulty, but as there has been a general acquiescence over the State in the practice indicated in that opinion, I prefer to express my concurrence with the views of Mr. Pugh.

Will you be good enough to inform me the number of counties in which a contrary practice prevails, and the names of the judges?

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Dr. G. E. Eels, Superintendent, etc.

Prosecuting Attorney; Term of Office.

PROSECUTING ATTORNEY; TERM OF OFFICE.

Office of the Attorney General,
Columbus, October 30, 1854.

DEAR SIR:—Your letter of the 12th inst. was forwarded me at Steubenville when I was on my way here, and was afterward returned.

I do not think there is ground for reasonable doubt upon the question you suggest.

The term of your successor commences on the first Monday of January, 1855. Then, but not till then, he *qualifies*.

You were elected under the act of April 30, 1852, and your term of office is for two years, *and* until your successor is elected and *qualified*.

You continue, therefore, the incumbent of the office until the first Monday of January, 1855. From your letter to the Governor which he has referred to me, it appears that the Secretary of State fixed a term to your office different from that which the statute fixes. I need not say to you that your term of office is not controlled or limited by the mistaken act of the secretary, or his clerks rather, who filled up the commission. You were duly elected, commissioned, and sworn, and are in office of the legal term. No new commission is necessary, notwithstanding the defect in the one issued.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

A. J. Pruden, Esq., Prosecuting Attorney, Cincinnati,
Ohio.

Larceny of Bank Bills—Probate Court; Jurisdiction.

LARCENY OF BANK BILLS.

Office of the Attorney General.
Columbus, October 30, 1854.

DEAR SIR:—I have received your letter inquiring my opinions whether an indictment under the nineteenth paragraph of the crimes act, Swan's Rev. Stat. 271, should contain an averment that the prisoner knew the character of the bank bills stolen.

Turner vs. State was a well considered case, but I should much prefer that the indictment should contain the averment after the earlier cases. I think it might be sustained as it is, but the safer and therefore the better practice is to allege the knowledge.

I am, sir,

Very respectfully, etc.,
GEO. W. MCCOOK,
Attorney General.

Walter M. Sharp, Esq., Prosecuting Attorney, Mansfield.

PROBATE COURT; JURISDICTION.

Office of the Attorney General.
Columbus, October 30, 1854.

SIR:—I acknowledge your letter of the 23d inst., enquiring whether the fifty-second section of the "act for the punishment of certain offences therein named," passed March 8, 1831, Swan's Rev. Stat. 284, is repealed, and jurisdiction to punish those offences vested in the Probate Court.

The General Assembly evidently intended to repeal the section and the only question is whether this intent has been expressed in a manner to render it effectual.

The doubt arises from the fact that the thirty-first section of the "act defining the jurisdiction and regulating the

Probate Court; Jurisdiction.

practice of Probate Courts, in referring to one of the acts repealed thereby, describes it as passed March 18, 1831, instead of March 8, 1831, the true date.

If there was no other description of the act than the date of its passage, and that was erroneously described, I would hesitate, no matter how clear in other respects was the evidence of legislative intention, in coming to a conclusion that the act was repealed. But in this case there is a description of the act by its title, "an act for the punishment of certain offences therein named" as well as an attempted description by the date of its passage. It is a question of identity. We enquire for an act containing at least fifty-two sections and we find it—for an act for the punishment of certain offences therein named—and we find it, but we find no act passed on the 18th of March, 1831, which answers these descriptions, but one passed on the 8th of March, 1831, does answer them.

Where several terms of description are used, or several means of identification are offered, one may be erroneous, and yet the others afford sufficient identification.

Take the case of a deed described by metes and bounds, a tract of land, although one line may be erroneous, it is valid if there were sufficient means of ascertaining it; or if one deed in describing the land refers to it as the same land mentioned in another deed and the last named deed is erroneously stated, it does not vitiate.

I am of opinion clearly that the Probate Court has the jurisdiction and that the fifty-second section is repealed.

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

J. H. Wallace, Esq., New Lisbon, Ohio.

Stationery.—Quartermaster General.

STATIONERY.

Office of the Attorney General,
Columbus, October 30, 1854.

SIR:—I acknowledge your letter of the 9th inst., as to the officers entitled to be furnished with stationery, from your office.

Any person who is charged with the performance of public duties for the State, which require the use of stationery, is, in my opinion, included in the seventh section of the act to which you refer me, as fully as the officers therein named.

I could not be more specific without attempting an enumeration, and I would be very likely to omit a great many if I had the leisure to undertake it.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Hon. Wm. Trevitt, Secretary of State, Columbus,
Ohio.

QUARTERMASTER GENERAL.

Office of the Attorney General,
Columbus, October 30, 1854.

SIR:—In reply to the inquiry contained in your letter of the 9th inst., whether the quartermaster general is entitled to fuel to be furnished by you, I have to say that the fifty-ninth section of the act organizing the militia, Curwen's laws in full, 416, will not warrant you in making, to that officer, any such supply.

Belmont Branch State Bank.

Nor am I aware of the existence of any act which would authorize you to provide it.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. Trevitt, Secretary of State, Columbus,
Ohio.

BELMONT BRANCH STATE BANK.

Office of the Attorney General,
Columbus, November 20, 1854.

DEAR SIR:—Your letter of the 16th inst., has been transmitted to me by the Auditor of State.

The executive officers recognize the decisions of the Supreme Court of this State as binding upon them in the discharge of their official duties. They therefore feel it their duty to insist upon the execution of all the acts of the General Assembly which are not pronounced unconstitutional by that tribunal.

The legality of the assessment of the taxes against the branches of the State bank has been fully recognized by judicial decisions of the court of last resort in Ohio, and until these decisions are reversed the collection of the taxes as assessed will be enforced.

No arrangement for the discontinuing of suits against treasurers for taxes collected by repayment to the banks of the *alleged excess*, can be made.

I am, sir,

Very respectfully, etc..

GEO. W. McCOOK.

Dan. Peck, Esq., St. Clairsville, Ohio.

*Belmont Branch State Bank—Clerk of Common Pleas;
Term of Office.*

CLERK OF COMMON PLEAS; TERM OF OFFICE.

Steubenville, November 25, 1854.

DEAR SIR:—I have received the memorial of Mr. McPherson and the papers accompanying it, and consent that the name of the Attorney General may be used as relator.

A number of cases involving the same question are before me and given me not a little embarrassment.

My own opinion is expressed by you in the suggestion you have furnished, but my predecessor gave a different opinion, and I do not, as you seem to do, consider the case free from doubt. I have had special difficulty with the case of county treasurers, as upon this construction the office would change in the midst of the collection of the revenue.

You may prepare the information and subscribe my name, as I have no fear that either yourself or Mr. Hunter would make an improper use of the authority.

The case, I suppose, will be agreed upon the part of the incumbent.

I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK.

CLERK COMMON PLEAS; OFFICIAL TERM.

Steubenville, November 25, 1854.

DEAR SIR:—The question as to the expiration of the term of a clerk *pro tempore* raised by your letter of the 7th inst., to the Secretary of State, will be decided early at the approaching term of the Supreme Court.

But there need be no embarrassment in your case, as you are your own successor and hold by your appointment

Suits on Bonds to State; How Brought; Parties.

pro tempore until you qualify, and this you may delay until February. At least I find no provision which requires you to qualify within any particular time.

I have today allowed an information to be prosecuted in my name in a case arising in Pickaway County against a clerk *pro tempore* who refuses to surrender the office to his successor.

My own opinion is that the appointment terminates upon the election of the clerk and his immediate qualifica-

I am, sir, Very respectfully, etc.,

GEO. W. McCOOK.

Wm. L. Higgins, Esq., Mansfield, Ohio.

SUITS ON BONDS TO STATE; HOW BROUGHT;
PARTIES.

Steubenville, November 26, 1854.

DEAR SIR:—Suits should be brought in the cases you mention in your letter of the 14th inst. Petition under the code and not by the form of action at common law.

I am of opinion that the suit may be brought in such cases in the name of the obligee of the bond simply without any mention of the party who is to be benefitted by it.

You will have received a circular from me as to the returns of criminal statistics to be made by prosecuting attorneys. I request reports of prosecutions by *information* in the Probate Court, as well as by *indictment* in the Common Pleas.

I do not know of the existence of any act passed February 26, 1842, defining the duties of prosecuting attorney. You would oblige me very much in any future communication by referring to the page of the statute containing the clause upon which the doubt arises.

I am, sir, Very respectfully, etc.,

GEO. W. McCOOK.

D. H. Ware, Esq.

WHEN DO TAXES BECOME A DEBT?

Steubenville, November 29, 1854.

DEAR SIR:—I have received your letter of the 25th inst., inquiring as to the collection of taxes from the assets of bankers who have made assignments after the assessment but before the expiration of the period limited for payment.

After the assessments are made and returned, on the second Monday of May, the tax becomes a *debt*, although not yet *payable* or *due*. Commonwealth vs. Commonwealth Bk. 22 Pick. Rep. 176.

It is then a *present debt* before the insolvency, although payable in future, but it is an open question in Ohio whether the State, or her debt, shall have a preference over the other creditors of the assignors. The preference given to claims of the United States arises, not by common law, but under an act of Congress, and is limited to cases of death or insolvency on the part of the debtor.

In Maryland the preference to the State is given by tature—*Davidson vs. Clayland*, 1 Harr and J. 546.

It is said by one court that the State preference rests in this country upon statute, and the common law gives none over creditors, the *State vs. Harris*, 2 Baileys S. C. Rep. 598. and by another that the prerogative of the sovereign as to priority is equally applicable here as in England, *Hoke vs. Henderson*, 3 Dev. N. C. Rep. 17. In England the crown has preference to the fullest extent. *Giles vs. Grover*, 9 Brigh. Rep. 128.

In my opinion our courts would not go to the length of the English decisions in giving preference to the claim of the State for ordinary debts over other creditors who held claims of like character, but I have no doubt at all that in Ohio the taxes would be held a paramount claim to which all others would be postponed. I refer you to the following cases which you can examine and which I think will be found to sustain the view I have taken, although I regret that

Probate Court; Procedure.

I have not access to the reports referred to or the statute of the State in which the decisions are made.

In Georgia taxes have not only a *preference*, but they are a lien from the day of assessment, *Gledney vs. Deavers*, 8 Georgia 479. In South Carolina, after assessment and before payment, an assignment of the property is not permitted to defeat the claim for taxes. *Kingman vs. Oliver*, 3 Rich R. 27. In Pennsylvania they are a lien from the date of the assessment. Parker's appeal 8 Watts and Serg. 449. But without reference to any decision I am clear that the exigencies of government will require the courts to hold that taxes shall be paid before any other debts.

Notice should be given in all cases to the receiver, assignee or trustee that this claim will be made, so that if he makes any distribution inconsistent with the rights of the State he may be without excuse.

In Hamilton County this has been done already.

I am, sir,

Very respectfully,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus,
Ohio.

PROBATE COURT; PROCEDURE.

Office of the Attorney General,
Columbus, December 14, 1854.

DEAR SIR:—I have received your letter submitting to me certain questions as to the mode of procedure in the Probate Court.

I am of the opinion that a complaint and a proceeding before a justice of the peace are necessary prerequisites to the jurisdiction of the Probate Court; without these that court, which is one of *special*, not *general* jurisdiction, can-

Bailey vs. The State.

not act. It follows, therefore, that the information in that court must be for the same offence charged in the complaint, not another or different one.

I answer your second question in the negative. A prosecutor is not bound to pursue the words of its complaint in preparing the information, but it is his duty to state the offense in technical and legal language. In doing this, however, he must describe the offence which is substantially alleged in the original complaint, and cannot in changing the words which describe the offence change the offence itself and substitute another. It would not, therefore, be competent to prepare an information for larceny against a person who was complained against before the justice for a violation of paragraph thirty-seven of the act of March 8, 1831. Swan's Stat. 289.

For the reasons upon which my opinion proceeds, I beg to refer you to another opinion, a copy of which is enclosed. I am, sir,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

J. H. Tyler, Esq., Prosecuting Attorney, Napoleon, Ohio.

BAILEY VS. THE STATE.

Office of the Attorney General,
Columbus, December 23, 1854.

DEAR SIR:—I reply to your letter after the perusal of your brief and without having seen the record.

There is nothing disclosed by your brief to endanger the judgment.

The indictment is good if there are no other objections to it than that the bills are alleged to be "false, forged and counterfeit." In *Houghton vs. The State* last winter I at-

Delinquent Taxes; Advertisement.

tached the authority of *Kirby vs. The State*, and this case will trouble us no longer. There is no necessity for arguing this point. Neither is there any necessity for arguing the distinction between general verdicts and special verdict.

A general verdict in the sense used in the cases in Ohio to which you refer, is simply a finding of "guilty" which goes to the whole indictment, and if there is one good count it supports a judgment. It is distinguished from a finding upon particular counts of an indictment.

If the verdict is "guilty" and there is any good count, you are safe. The proper and technical distinctions between a general and a special verdict it is unnecessary for us to discuss. Neither is there any error in hearing counter affidavits. The question is, was the juror disqualified by having formed or expressed an opinion before he was impaneled? One person swears he expressed an opinion. Now if this is to be taken as true and not to be contradicted by the affidavit of the juror or others present at the time every conviction may be set aside upon the false oath of some criminal associate or accomplice.

There is no danger of the Supreme Court finding error here. I will, as soon as I can, examine the record, and in accordance with your request I return your argument.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

B. W. Kellogg, Esq., Ashland, Ohio.

DELINQUENT TAXES; ADVERTISEMENT.

Office of the Attorney General,

Columbus, December 25, 1854.

SIR:—I have received your letter of the 11th inst., inquiring whether four entire weeks must intervene between

Delinquent Taxes; Advertisement.

the day of advertisement of lands, delinquent for taxes, and the day of sale, or whether it is sufficient that the advertisement should be made on each of the four weeks immediately preceding the day of sale?

There never has been any decision upon this point in Ohio, although similar language occurs in other statutes requiring advertisements.

My own opinion is that a publication on each of four consecutive weeks is sufficient, without reference to the number of days which intervene; but doubts have always existed at the bar as to the construction which the act would receive, and for the purpose of avoiding difficulty it has been the usual practice to advertise for five weeks.

The courts too, in this State, have always placed a very rigid construction upon the tax laws and have required a very strict and literal compliance with every provision of the statute regulating the sale of delinquent lands. A decision on this point might be influenced, to some extent at least, by the general feeling against such sales, and it would be safer for the auditor to resort in his dilemma, to the provisions of the act of March 25, 1841. Swan's Rev. St. 71.

If, however, the delinquencies are so large as seriously to embarrass the finances of the county, he might proceed to a sale under the present advertisement.

I return herewith the letter of Mr. Strumm enclosed with yours of the 11th inst., and am,

Very respectfully, etc.,

GEO. W. MCCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus,
Ohio.

Refunding Bank Taxes.

REFUNDING BANK TAXES.

Office of the Attorney General,
Columbus, December 26, 1854.

SIR:—Your letter of the 23d inst. to the Auditor of State has been sent to me by that officer for reply.

Your commissioners may rest assured that the State will refuse to recognize as a credit to your county any sum refunded to a bank for taxes already paid or collected.

Suits are pending in many of the counties and the question is to be litigated to the court of last resort.

No money has been or will be returned to a bank with the assent of the State, or that of any officer authorized to represent her. Nor is it believed that any will be restored by the officers of the county except as the result of a collusive arrangement between them and the banks.

Please inform me what is the state of litigation in your county. Should judgments be rendered in the Court of Common Pleas against the treasurer an appeal should be taken at once.

There is no danger of liability to that officer or his sureties on the appeal bond. The mandate from court has not been entered as yet and it remains to be seen whether it will be.

What is the name of the attorney representing the interests of the county? Has the city of Dayton an attorney in the cause?

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Mr. Jacob Zimmer, Auditor, etc., Dayton, Ohio.