

---

*As to Disbursement of Soldiers' Relief Fund in Certain Events.*

---

AS TO DISBURSEMENT OF SOLDIERS' RELIEF FUND IN CERTAIN EVENTS.

Attorney General's Office,  
Columbus, January 25, 1864.

*David M. Cochran, Esq., City Solicitor, Springfield, Ohio:*

The question which you submit is as follows: Under the act "for the relief of the families of soldiers and marines in the State and United States service," passed March 21, 1863, can the authorities of the wards, election districts and townships distribute the funds provided by the act to families of soldiers who did not enlist or reside in those wards, etc., and to which such families have removed?"

The second section of the act provides that "it shall be the duty of the assessors in the several wards, election districts and townships in the State, when they are making the assessment of 1863 to take an enumeration by name of all the soldiers and marines who are in the service of the State or United States, from their several wards, townships and election districts being residents therein when entering said service, etc., and make an accurate return under oath, etc., designating those who have families, etc. The fourth section of the act provides for the apportionment of the fund to the counties, and the fifth section for the apportionment of the fund to the wards, etc., *according to the necessities of the families aforesaid.* The tax levied by the first section of the act is apportioned according to the necessities of the families designated as residing where the soldiers resided and enlisted. It was certainly not contemplated by the law that families which change their residence shall be provided for in the ward or township to which they remove for several reasons:

1. Because there is no provision for apportioning the fund to meet that additional necessity.
2. It would take away a portion of the provision intended for those families

---

*The Jurisdiction in Criminal Cases of the Probate Court in  
Mercer County.*

---

who remained where their head resided at the time of enlistment. 3. Some wards and townships might entirely escape the burden imposed on them, and others bear more than the law imposes.

Springfield might have to bear the burden of the whole county without the adequate means of doing so. How, then, the question will arise, are families to be provided for who move into wards or townships or counties where their head did not reside at the time of enlistment? They must not suffer nor come within the provisions of the poor law. The only solution of the question, and, I think, a proper one too, is that families should be sustained by the ward or township where the soldier enlisted and resided wherever they may remove or be. And if this is refused, I have no doubt an action would lie against the township so refusing to recover back the money furnished by another township or ward.

The law should be amended so as to provide that the suit might be brought in the township where the indebtedness is incurred.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

THE JURISDICTION IN CRIMINAL CASES OF THE  
PROBATE COURT IN MERCER COUNTY.

Attorney General's Office,  
Columbus, February 4, 1864.

*T. J. Godfrey, Esq., Prosecuting Attorney, Mercer County,  
Ohio:*

You ask my opinion as to the constitutionality of the act of May 1, 1861, in regard to the jurisdiction of your Probate Court in criminal offenses.

---

*The Jurisdiction in Criminal Cases of the Probate Court in Mercer County.*

---

By the act of March 14, 1853, the Probate Courts received jurisdiction of offenses. By the act of April 9, 1856, that jurisdiction was restored to the Common Pleas Courts except in certain counties named. The Supreme Court held this latter act unconstitutional in the case of Kelly vs. The State, 6 O. S. R., 269. The ground of their decision was that it violated section twenty-one or article two of the constitution.

Section ninety-seven of the act of April 11, 1857, repealed all the foregoing laws and restored the jurisdiction of offenses to the Common Pleas without the exception of any counties. By the act of May 1, 1858, the counties of Cuyahoga and Lake received *concurrent* jurisdiction with the Common Pleas. By the acts of 1858 and March 31, 1859, other counties received concurrent jurisdiction. The latter act included the county of Mercer. By the act of April 4, 1859, the county of Licking was omitted. Other acts extended concurrent jurisdiction to other counties. By the act of May 1, 1861, the act of March 31, 1859, is amended and omits the counties of Mercer, Lawrence and Harrison.

Now, in every county of the State the Common Pleas has jurisdiction either concurrent or exclusive so that the legislation, on this subject, as to the Common Pleas has "a uniform operation." The Probate Courts have concurrent jurisdiction, only, with the Common Pleas.

In the case of Kelley vs. The State, above quoted, the court expressly court:

"The Probate Court may, in some counties, possess a jurisdiction concurrent with the Common Pleas, which is denied to it in others."

This distinction is based upon the difference of the constitutional provisions respectively relating to each of the courts. The same objection would not, therefore, prevail as to the Probate Courts which has been adjudged as to the Common Pleas.

---

*The U. S. License Does not Authorize the Sale of Liquors  
Prohibited by the Laws of the State.*

---

The mode of repeal adopted in the act of May 1, 1861, is not exactly in pursuance of the expressed one in the constitution, but the effect cannot be doubted. It amends and states affirmatively what, thereafter, should be the law. It excludes Mercer County, not by implication, simply, but in fact, for it directly takes away the power, and the right to prosecute and act, from the Probate Court. The idea gathered from the reading of the sixteenth section of article two of the constitution has been very much modified by decisions of the Supreme Court. See 6 O. S. R., 176. The court seem to think the requirements of the above section are directory, merely, and that legislative intent ought to be the question.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

THE U. S. LICENSE DOES NOT AUTHORIZE THE  
SALE OF LIQUORS PROHIBITED BY THE  
LAWS OF THE STATE.

Attorney General's Office,  
Columbus, March 18, 1864.

*John H. Weaver:*

DEAR SIR:—The license which you obtain from the United States authorities to retail liquors, is, simply, to retail liquors which are allowed to be sold by the laws of the State. The act of Congress could not abolish the laws of the State.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

*Officers Get no Pay Under Relief Act—The Relief Act.*

---

## OFFICERS GET NO PAY UNDER RELIEF ACT.

Attorney General's Office,  
Columbus, March 18, 1864.

*S. B. Woolson, Auditor, Licking County, Ohio:*

DEAR SIR:—Section eight of the relief act seems to be very plain, and no doubt the legislature had the right to pass it. An amendatory act has been passed containing the same prohibition as to compensation.

I cannot think that it would be proper, in any respect, to construe the act so as to give officers pay under it as it is worded.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

THE RELIEF ACT.

Attorney General's Office,  
Columbus, March 18, 1864.

*Commissioners of Fulton County, Ohio:*

GENTLEMEN:—The county auditor is not entitled to compensation (additional) under the laws you mention. The act fixing his salary substantially repeals all other fees, and it has been so held in this office.

As to the relief act, the legislature has passed an amendatory one providing that the relief shall be afforded to families "without regard to the locality from where such soldier entered the service." There are other provisions which you will see.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

*As to the Forty-first Section of the School Act; Auditors' Fees—Akron School Election.*

---

AS TO THE FORTY-FIRST SECTION OF THE  
SCHOOL ACT; AUDITORS' FEES.

Attorney General's Office,  
Columbus, March 30, 1864.

*Wm. Greer, County Auditor, Clinton County, Ohio:*

You ask me whether the forty-first section of the school law is in force.

I gave an opinion to the state school commissioner on the 16th of December last that the forty-first section of the school act was inoperative and stood as though repealed. In counties under 13,000 inhabitants auditors get no more than the salary fixed by the act of May 1, 1862.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

AKRON SCHOOL ELECTION.

Attorney General's Office,  
Columbus, April 28, 1864.

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

I have examined the questions which you propose in reference to the election of school directors at Akron, Ohio.

1. Under the "act for the support and better regulation of common schools in the town of Akron," passed February 8, 1847, if the people fail to elect two directors for three years no vacancy occurs, but the old directors hold over until their successors are elected and qualified. In case of such holding over their successors should be elected at the next annual election thereafter to fill the unexpired term.

2. In case a vacancy occurs by death, resignation, or other cause than failure to elect the town council, fill the

---

*Inequality of White and Colored Children in the Schools.*

---

vacancy by appointment to last until the next annual election, when the appointment ceases and directors are elected to fill the unexpired term.

3. At the next annual election after an appointment is made to fill a vacancy, or after failure to elect there should be four directors elected, two for three years under the law, and two for two years to fill the unexpired term.

As to the last question you propose, it would not vitiate an election for two directors for three years that upon the same ticket two directors for two years were voted for. This question, however, is immaterial as in the case in hand there should have been, as I am informed there was, an election held for four directors, two directors for three and two for two years.

Respectfully,  
L. R. CRITCHFIELD,  
Attorney General.

---

INEQUALITY OF WHITE AND COLORED CHILDREN IN THE SCHOOLS.

Attorney General's Office,  
Columbus, April 28, 1864.

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

The question of the admission of colored children into the schools indiscriminately with other children is fully settled in the case of *Van Camp vs. Board of Education of Logan*. 9 O. S. R., 406. That was a case which arose under the act of March 14, 1853, against the board of education upon their refusal to admit two colored children, five-eighths white and three-eighths African blood, into the common schools for white children. Judge Peck who delivers the opinion of a majority of the court fully and ably discusses the subject and decides that the school law is simply one of classification and not exclusion, and that the

---

*Prosecuting Attorney Resigning to Court of Common Pleas in Term Time—Section Forty-one of the School Law Inoperative.*

---

words "white" and "colored" are used in their popular and ordinary signification, and that colored children are not, as of right, entitled to admission in the schools for white children. The report containing this decision is easy of access in every county, and a further reference to the decision is unnecessary.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

PROSECUTING ATTORNEY RESIGNING TO COURT  
OF COMMON PLEAS IN TERM TIME.

Attorney General's Office,  
Columbus, April 28, 1864.

*Isaac Stiers, Esq., Prosecuting Attorney:*

It has been the practice, and I have no doubt the correct one, for prosecuting attorneys to tender their resignations to the Court of Common Pleas in term time.

The law is not explicit, but I think no other construction can well be put upon it considering the provisions which relate to the appointment and removal of prosecuting attorneys.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

SECTION FORTY-ONE OF THE SCHOOL LAW IN-  
OPERATIVE.

Attorney General's Office,  
Columbus, May 10, 1864.

DEAR SIR:—The question you ask me has been passed upon several times by me. The uniform decision is that

---

*Election of School Directors Under Act of February, 1849.*

---

the forty-first section of the school law is inoperative and in effect repealed by the provisions of the act of May 1, 1862.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

J. C. Penniston, Auditor, Pike County.

---

ELECTION OF SCHOOL DIRECTORS UNDER ACT  
OF FEBRUARY, 1849.

Attorney General's Office,

Columbus, May 10, 1864.

DEAR SIR:—I have seen the correspondence between some of your citizens and the state school commissioner, and I have no reason to differ with him in his conclusions.

I had given him an opinion under the Akron school act, which is the same in substance as the act of February, 1849, which I think correct.

And as to the additional question of taking the oath, the act of 1849 does not specify where it shall be done, and I think it sufficient for the four directors to qualify before entering upon the duties of their office. To say there was a vacancy of four directors would not leave enough of the board to fill a vacancy. This would create difficulty and confusion, which is avoided by pursuing the course suggested.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

J. C. Merrill, Esq., Monroe County, Ohio.

---

*Bounty Act of 1864—As to Building Bridges Across the Canals.*

---

BOUNTY ACT OF 1864.

Attorney General's Office,  
Columbus, June 16, 1864.

*J. C. Penniston, Auditor, Pike County:*

I have examined the bounty act of March 28, 1864, and am unable to see how the objects of the act can be carried out without the respective authorities mentioned can levy a tax. The county tax is for *volunteers* at large *only*. What becomes of township and city volunteering and the discharge of obligations heretofore incurred by township and city authorities? Without going into an analysis of the sections of the law, I think the powers conferred in county, township and city authorities are distinct, and the objects to be accomplished are distinct, and that each class of authorities can act under the restrictions of the law.

Respectfully,  
L. R. CRITCHFIELD,  
Attorney General.

---

AS TO BUILDING BRIDGES ACROSS THE CANALS.

Attorney General's Office,  
Columbus, June 16, 1864.

*J. T. Janvier, Esq., Prosecuting Attorney, Miami County:*

The seventh section of the statute S. & C., p. 193, and the fifteenth section, p. 205, would seem to me to indicate pretty strongly that the commissioners are bound to build a bridge over the canal on a State or county road.

The question seems to be whether they are bound to build a bridge across the canal which is intersected by a street in the town. Perhaps the following would be as

---

*Auditor's Compensation, Etc.*

---

good a criterion to go by as any that could be hit upon. If the bridge required to be built is on a street which forms a continuous line of travel on a State or county road the commissioners should build it. If it does not form such continuous line of travel it would be a matter for the village authorities to see to. If the street connects two other streets simply, or runs into a township road the bridge would not be of public utility in the sense that county taxes are a public burden. The street should be of that public interest that attaches to a State or county road and be indispensable to the public at large. If used only for the limited purposes of a cross street and not usually and generally the county money should not be expended in its improvement.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

AUDITOR'S COMPENSATION, ETC.

Attorney General's Office,

Columbus, July 21, 1864.

*M. J. Williams, Esq., Prosecuting Attorney, Fayette County:*

Your letter of the 27th of June did not reach this office prior to my departure for New York to attend to the payment of the interest on the State debt. I returned today.

I have examined the question you submit, and am of the opinion that the act of February 7, 1861, did not change the compensation of county auditors who were in office at the time of the passage of the act, or who were elected or appointed previous to October 1, 1861.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

*As to Requisites of an Indictment for Murder in the First Degree Committed While Attempting to Perpetrate a Burglary.*

---

AS TO REQUISITES OF AN INDICTMENT FOR MURDER IN THE FIRST DEGREE COMMITTED WHILE ATTEMPTING TO PERPETRATE A BURGLARY.

Attorney General's Office,  
Columbus, July 21, 1864.

*Jas. S. Good, Esq., Springfield, Ohio:*

I have just returned from New York and find your letter upon my table.

I have inquired of the reporter about the Marion case, but he thinks there is none such in the forthcoming volume. The report is in the hands of the printer.

In drawing the indictment you speak of the burglary or attempt to commit should be charged as you would burglary alone or an attempt to perpetrate and the killing should be charged with a *purpose to kill*. "The turpitude of the felonious act is made to supply the place of the *deliberate and premeditated malice* requisite in the first class of murder defined. Yet the *purpose to kill* expressed in the statute applies to each of the several classes of murder in the first degree." 8 O. S. R., 131.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

AS TO INTEREST ON MILITARY CLAIMS.

Attorney General's Office,  
Columbus, July 21, 1864.

*J. H. Patterson, Esq., Treasurer, Belmont County:*

I think you are correct in not allowing interest on the claim of Mr. Wright. Such claims are "payable out of

---

*As to Powers of Warden of Ohio Penitentiary.*

---

the proper fund." If the fund is not in the treasury the claims are not payable. I give this clause that interpretation because of the nature of the fund.

Claims arising out of the administration of public affairs, usually, under the act of March 12, 1831, bear interest after presentation for payment, and because, perhaps, of the following presumption. That the money which should be in the treasury is in the hands of the people, and due from them and worth its interest to them. This presumption might be supposed to exist where money is to be raised by certain rules of legislation, as in ordinary cases of taxation for customary and definite purposes with fixed results. But the military fund is not of this character. The mode of raising it is uncertain, and as a consequence it is, generally, insufficient. It is frequently not in the treasury, nor certainly to be there by any reliable process, depending as it does to some extent upon fines and commutation for military duty, etc. No such presumption arises as in ordinary cases.

The seventh and eighth sections of the act of March 12, 1831, do not properly have reference to a fund which is thus contingent, and from its legal source indeterminate, and therefore, presumably, inadequate for the purpose designed.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

AS TO POWERS OF WARDEN OF OHIO PENITENTIARY.

Attorney General's Office,  
Columbus, August 4, 1864.

*Messrs. Sparrow, Parsons and Hough, Directors of Ohio Penitentiary:*

GENTLEMEN:—I have received for consideration the following paper:

---

*As to Powers of Warden of Ohio Penitentiary.*

---

“Resolved, that Wm. E. Ide, contractor in the Ohio penitentiary, be permitted to employ A. D. Huff as foreman or agent of his cooper shop in the penitentiary and that said Huff, if employed, by said Ide, have the privilege of entering the prison during the regular working hours provided he observes all the regulations which govern foremen or other employees of contractors in the Ohio penitentiary.

“Provided also that the above resolution does not conflict with the legal powers of the warden, to be decided by the opinion of the attorney general of the State of Ohio.”

I submit the following answer:

The ninth section of the act of the General Assembly passed March 24, 1863, in relation to the Ohio Penitentiary provides that:

“The warden shall have in charge the whole operation of the institution, shall be its executive and superintending officer.”

Section thirty-five of the aforesaid act provides that

“The directors and warden of the penitentiary shall, from time to time, establish by-laws, rules and regulations for the discipline and government thereof, etc.”

The section further provides that the by-laws, etc., shall not be contrary to law, and that they shall be submitted to the legislature at each session thereof. The general provision of section nine of itself seems to place the question of the admission of all persons into the penitentiary in the discretion of the warden. By the law the warden is charged with a responsibility in reference to the institution, would be held responsible for all bad effects arising from the introduction of improper persons into and among the prisoners, and no construction of the statute possible would justify the taking away of the power to discharge that

---

*As to Powers of Warden of Ohio Penitentiary.*

---

responsibility. So through the directors and the legislature, for on 1st day of November, 1862, by-laws, rules and regulations were established by the directors, reported to the legislature, and by virtue of their being examined and permitted to stand, engrafted upon the statute for the government of the institution. One of those by-laws provides that "no foreman shall be employed by a contractor within the prison without first obtaining the consent of the warden." This by-law or rule is not contrary to law. It is fully in harmony with the statute and doubtless has the additional legal force of long established usage. These by-laws get a character from the mode prescribed for their adoption and approval which is but less binding upon all than acts of the legislature itself. The by-law above mentioned is not ambiguous nor qualified in the power it confers or in the subject matter, and its execution being placed in the warden is much more in accordance with the general powers conferred upon the warden by statute than with any I find in the law conferred upon the directors.

I find another by-law, however, in reference to the duties of the warden which may be claimed to modify the by-law above mentioned. It provides that, "it shall be his duty to obey and carry out all written orders and instructions that he shall from time to time receive from the directors." What is the application of this by-law? Certainly not that the directors can, by an order or resolution, take from the warden the "charge of the whole operation of the institution," and deprive him of the superintending and executive power over the same given him by statute. If so, that by-law would be contrary to law. No more in my judgment can the directors by an order or resolution take away the right given to the warden by a by-law of the institution. The by-law is fixed for the government of the institution, and so long as it remains a by-law the institution must be governed by it. Such is the legal effect of all laws and by-laws which are specific and provide plainly for their own execution. Nor do I think that the

---

*As to Powers of Warden of Ohio Penitentiary.*

---

two by-laws above mentioned conflict with each other. Besides, the fact that they were both passed at the same time and by the same persons, thus indicating an intention of a distinctive application, they are perfectly reconcilable, and apply to different subjects. The one applies to the warden and contractor, in exclusion of the directors, and upon a subject which clearly belongs to the official responsibility of the warden alone. There are a great variety of subjects in regard to which orders may be thought proper about which there is no by-law on account of their number and temporary and incidental character. The presumption is certainly very strong that these are the matters to be regulated by resolution as they arise. The presumption is reversed when a rule has been adopted in reference to a particular subject matter. It would seem to be a contradiction to invest the warden with a power by a by-law without qualification, and by another by-law say, substantially, that the former shall give away when it is to be carried out. But it would be consistent after laying down rules and by-laws upon specific subjects to have a general by-law to cover matters not specifically provided for by reason of their variety and contingent existence. Upon this theory both by-laws may be made to stand. The same rule would apply as in the case of two affirmative statutes. In 10 O. R., 178, the court lay down the rule that,

“Where two affirmative statutes exist one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation. If they admit of being applied to different subjects there is no necessity of supposing an implied repeal.”

In conclusion, these by-laws, rules and regulations are designed to be special rules for the better carrying out of the general powers conferred by statute, and to follow in the line of the general powers and as an interpretation of them. The power given to regulate the appointment of foreman in

---

*As to Collection of Costs Against a Convict.*

---

the penitentiary is clearly in consonance with the "charge of the whole operation of the institution," and the superintending of it as mentioned in the statute in connection with the warden. No such fitness is found between the resolution of the directors and any general power conferred upon them by statute. If an order or resolution is sufficient to govern the institution, why the necessity of submitting rules and by-laws to the legislature? Why the necessity of passing any by-law except the one authorizing the directors to issue orders? A by-law which depends upon a resolution for its force and effect, or which may be rendered void by a resolution, is no by-law at all, it ceases to be in the nature of a rule.

I am of opinion from these considerations that the resolution conflicts with the legal powers of the warden.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

AS TO COLLECTION OF COSTS AGAINST A CONVICT.

Attorney General's Office,

Columbus, August 15, 1864.

*Smith Talbot, Esq., Clerk C. C. P., Miami County:*

The act of March 7, 1835, S. & C., Rev. Stat., 1185, provides for the case you present. The prosecuting attorney collects the costs, pays over the money to the county treasurer. The auditor charges the treasurer in favor of the State, and transmits a true copy of the account against the treasurer to the auditor of state before the annual settlement. The county treasurer pays the money over to the state treasurer, and the auditor of state credits the penitentiary fund with the amount. There is no provision

---

*As to Treasurer's Fees Under Militia Law of March, 1864.*

---

of law for giving the costs to the person formerly convicted. It stands like any other judgment and is collected in the same way by the prosecuting attorney. It bears interest also like any other judgment.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

AS TO TREASURER'S FEES UNDER MILITIA LAW  
OF MARCH, 1864.

Attorney General's Office,  
Columbus, August 15, 1864.

*C. S. Bitzer, Auditor, Pickaway County:*

Treasurers are allowed one per cent. for collecting the commutation money under the militia law passed March 31, 1864.

Under the second section of the act passed April 9, 1861, prescribing the fees of county treasurers, all fines, penalties and forfeitures collected by suit bring the treasurer two per cent., but on any sums otherwise collected one per cent. The commutation collections come under this latter clause.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

*As to Auditor's Fees Under Militia Law of March, 1864.*  
*—As to Commonwealth Payments if Person Becomes*  
*45 Years Old After Enrollment.*

---

AS TO AUDITOR'S FEES UNDER MILITIA LAW  
OF MARCH, 1864.

Attorney General's Office,  
Columbus, August 15, 1864.

*E. M. Green, Esq.:*

DEAR SIR:—Auditors get a per cent. upon the whole amount collected as commutation money whether paid into the treasury before or after the 15th of August.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

Auditor, Sidney, Shelby County, Ohio.

---

AS TO COMMUTATION PAYMENTS IF PERSON  
BECOMES 45 YEARS OLD AFTER ENROLL-  
MENT.

Attorney General's Office,  
Columbus, August 30, 1864.

DEAR SIR:—A person who is 45 years of age is not liable to military duty, and, therefore, need not pay commutation money. Such an one cannot be fined for non-performance of military duty even if a member of a volunteer company. You cannot legally collect the commutation money off of such a one.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

S. W. Pickering, Auditor, Athens County, Ohio.

---

*As to Bounty to Parts of Township Quotas—Treasurer's  
Fees on Commutation Money.*

---

AS TO BOUNTY TO PARTS OF TOWNSHIP  
QUOTAS.

Attorney General's Office,  
Columbus, August 30, 1864.

DEAR SIR:—The act to authorize township trustees, etc., to levy a tax for the payment of bounties to volunteers, etc., passed March 28, 1864, empowers the trustees to levy a tax upon the taxable property within their respective jurisdictions. The whole of Mill Creek Township is your jurisdiction. You cannot exceed one hundred dollars for each volunteer. The tax must be levied upon the taxable property of the whole township and the proceeds must be applied to the whole township. I cannot see what difference it makes how the township may be divided for enrolling and drafting purposes. The tax relieves the whole township.

Respectfully,  
L. R. CRITCHFIELD,  
Attorney General.

Jos. E. Hart, 183 Broadway, Cincinnati, Ohio.

---

TREASURER'S FEES ON COMMUTATION  
MONEY.

Attorney General's Office,  
Columbus, September 7, 1864.

*Joshua Gregg, Treasurer, Guernsey County:*

On the 15th of August after examination I gave an opinion to the auditor of Pickaway County that county treasurers were entitled to but one per cent. under the law

---

*As to Militia Orders of 1863, Etc.*

---

for collecting commutation money. I am unable to find any law allowing them more.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

AS TO MILITIA ORDERS OF 1863, ETC.

Attorney General's Office,  
Columbus, September 16, 1864.

*D. D. Jewett, Esq., Newark, Ohio:*

DEAR SIR:—Mr. Wright has presented me with your letter to him enclosing the opinion of the adjutant general and asking my opinion upon the same subject.

The question presented is, as I take it, whether the legislature has provided for the payment of orders issued for expenses incurred under the militia law of 1863 and not paid.

The law of 1863 made provision for the payment of such expenses by funds arising out of its provisions, and continued in force until it was repealed by the act of 1864. The repeal reserved the organizations of volunteer militia, the collection of all commutations, fines and penalties due and assessed or for which any person might be liable and the non-abatement of suits under the former act. The orders themselves were not disturbed by the repeal of the act, and all moneys in the treasury collected under the act of 1863, and which should arise from suits commenced before the repeal of the act are applicable to the payment of the orders. The legislature made no further provisions in the act of 1864 for the payment of orders issued under the act of 1863.

The act of 1864 provides for a fund to defray expenses incurred under its provisions and says (Sec. 8):

---

*As to Militia Orders of 1863, Etc.*

---

“No money shall be drawn therefrom except for the benefit of the volunteer force of the county etc.”

I take it that the law of 1864 was designed to sustain itself, as was also the law of 1863. The expenses incurred under such act were to be defrayed by the funds arising from the provisions of those acts respectively. Otherwise the legislature may be regarded as designing both to operate defectively. The law of 1864 certainly makes no provision for the payment of those. And yet no contract is violated. The obligation to pay is good, but there is nothing to pay with. Nor do I think this construction makes the law of 1864 an absurdity. That act is consistent in all its provisions. The effect of the repeal is rather a question of fact than construction. The omission to provide for the expenses of 1863 may be a breach of faith on the part of the legislature or an oversight, but in either case a public officer whose duty it is to construe the laws as he finds them, may not make the law as it ought to be, or supply what a legislature has either avoided or neglected or did not contemplate.

I do not think the law of 1864 is retrospective, for it can scarcely be supposed that some things should be reserved in a repealing statute specifically, and other things not so reserved, should be specifically intended. It would be more in accordance with legal construction to suppose that the legislature were not aware that the expenses of 1863 were not paid.

The law of 1864 is prospective in its operations and applies its fund to the benefit of the volunteer organizations which exist by virtue of its provisions, and which were expected to depend upon those funds.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

*Election Returns When Counted, Etc.—As to Ditch Law.*

---

## ELECTION RETURNS WHEN COUNTED, ETC.

Attorney General's Office,  
Columbus, September 30, 1864.

*S. A. Nash, Esq., Prosecuting Attorney, Gallia County:*

I have examined the question presented by you.

The second parenthesis in the twentieth section of the act of March 28, 1864, page 68, doubtless refers to the seventeenth section of the soldier's voting law, page 88, laws of 1864.

All the election returns are governed by the latter act.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

AS TO DITCH LAW.

Attorney General's Office,  
Columbus, October 18, 1864.

*Oscar Ball, Esq., Auditor, Sandusky County:*

I have examined the questions you propose.

Section twelve of the ditch law of 1861 applies to cases where more than one county is interested.

In the case you present where no other county is interested you cannot call in a commissioner of another county.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

*Soldier's Voting Law.*

---

## SOLDIER'S VOTING LAW.

Attorney General's Office,  
Columbus, October 19, 1864.

*D. Walton, Esq.:*

DEAR SIR:—I have examined the election law of last winter and find no provision requiring more than the tally sheets to be sent to clerks of courts. The fourteenth section provides that they shall be sent to the clerk, and the seventeenth section that they shall be opened and counted, etc.

The legislature adopted that plan and I see no other way than to pursue it.

I am not able to see how the clerk can determine from the tally sheet what number of electors voted at a particular poll, whether "ten or more" as provided in the second section of the law or a less number. The poll books and ballots are returned to the board of canvassers of the State. From these and by the State board it may be possible to tell whether the law has been complied with.

At any rate the twenty-second section of the act makes the aggregate vote as found by the State board the controlling vote in the hands of the governor. So that, in fact, it would seem as though the legislature did not mean anything when it required the tally sheets *only* to be sent to the clerk.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

*Superintendents of Lunatic Asylums Must Have the Qualifications of Electors.*

---

SUPERINTENDENTS OF LUNATIC ASYLUMS  
MUST HAVE THE QUALIFICATIONS OF  
ELECTORS.

Attorney General's Office,  
Columbus, October 20, 1864.

*S. H. Pitkin, Esq., Akron, Ohio:*

Upon my return to the city I find a letter from you and also one from W. C. Earl upon the same subject.

The question you present is whether a person not an elector is eligible to the office of superintendent of the Northern Ohio Lunatic Asylum.

The constitution says:

“No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector.”

The Supreme Court of Ohio in relation to what constitutes an office says:

“Authority and power relating to the public interests, conferred by statute, and which may be vested in a board, or individuals by election or the appointing power of the State, creates an office.”

This definition is to be taken as the meaning of the term “office” in the constitution.

The law regulating the lunatic asylums of the State confers an authority and power upon the superintendent which creates an office. “He shall be the chief executive officer of the asylum,” is the language of the law. He has control of the public interests, and that control involves authority and power and is conferred by statute. His authority and power is general and supreme over the institution except as provided in the law, and is inconsistent with any exercise of the same power by others. Hence

---

*Same as Opinion on Preceding Page.*

---

persons about the institution are placed under his control, and what power or authority they exercise is the power of the superintendent distributed by him as "chief executive officer" of the institution. The steward, physician or assistant, and matron are styled in the law "resident officers" in the sense only that they exercise a portion of the power conferred upon the chief officer, and not in the sense of independent agents exercising authority. Entertaining these views to be the law the conclusion follows that the superintendent when appointed must have the qualifications of an elector as it is defined in the constitution.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

Northern O. L. Asylum.

---

SAME AS OPINION ON PRECEDING PAGE.

Attorney General's Office,

Columbus, October 20, 1864.

*W. C. Earl, Esq.:*

DEAR SIR:—I have given an opinion to S. H. Pitkin, one of the directors of the Northern Lunatic Asylum upon the subject which you present, in which I entertain the opinion that the superintendent of the asylum is an office as mentioned in the constitution, and that the superintendent, when appointed, must have the qualifications of an elector. I explain why the same decision does not apply to a matron of the institution. As you are also one of the trustees, Mr. Pitkin will doubtless show you the opinion.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

*Obstructing Navigable River—As to Power of Board of Education.*

---

OBSTRUCTING NAVIGABLE RIVER.

Attorney General's Office,  
Columbus, October 21, 1864.

*Danl. H. Kline, Esq., Prosecuting Attorney, Cuyahoga County:*

Upon page 880, 1 Vol. S. & C. Statutes, second section, "the obstructing or impeding, without legal authority, the passage of any navigable river, harbor, or collection of water" is deemed an offence punishable by indictment, and will probably meet your case.

Respectfully,  
L. R. CRITCHFIED,  
Attorney General.

---

AS TO POWER OF BOARD OF EDUCATION.

Attorney General's Office,  
Columbus, November 1, 1864.

*Louis Schaefer, Esq., Secretary of Board of Education,  
Canton, Ohio:*

The statute gives the board of education the power to determine what studies shall be taught, and to ordain rules and regulations for the government of the schools. It further provides that the board may suspend a scholar during the session for disorderly conduct. These powers are to be exercised in the discretion of the board.

The questions presented in the particular case are, first, whether in prescribing bookkeeping as a study, a proper discretion has been exercised; and, second, whether the suspension of the scholar for refusing to study bookkeeping (bookkeeping) was the exercise of a proper discretion.

The first question seems to me more a question in the

---

*As to Lessees of P. W. and Grant of Canal to Cincinnati.*

---

science of teaching than of law. Bookkeeping is certainly science more useful to every occupation of life than it. I would take it to be a legal proposition that where the board and teachers of experience concur in prescribing a useful study, that it would be deemed by a court the exercise of a sound discretion, and would not be interfered with.

As to the second question: The propriety and legality of having rules and enforcing them is unquestionable; and there are so many and self-evident suggestions in confirmation of the exercise of authority in the case presented, and in all such cases that I refrain from any argument in support of your action in the premises.

I have no doubt that a fair and reasonable discretion has been exercised both in prescribing the study, and in excluding the scholar for insubordination.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

AS TO LESSEES OF P. W. AND GRANT OF CANAL  
TO CINCINNATI.

Attorney General's Office,  
Columbus, November 11, 1864.

*Hon John F. Terrence, President of Board of Public Works:*

DEAR SIR:—I have examined the act of March 24, 1863, giving the use and occupation of a portion of the canals to the city of Cincinnati, and I am not able to see how any other construction can be put upon the second section of the act than that the lessees sustain the same relation to the canal granted, or any part of it, until it is used and occupied by the city in whole or in part, that they did before the grant. This canal and each and every part of

---

*As to Presidential Poll Books—§4 Commutation Money.*

---

it must be under the supervision of the lessees so long as all or any part of it is not in the occupation of the city.

Respectfully,

L. R. CRITCHFIELD,

Attorney General

---

AS TO PRESIDENTIAL POLL BOOKS.

Attorney General's Office,

Columbus, November 15, 1864.

DEAR SIR:—The poll books are returned to the sheriff under the law on pages 529 and 530, S. & C., 1 Vol., and by him to the secretary of state as therein provided. But the army vote poll books are returned to the clerk and by him disposed of as provided in the law of 1864, page 91.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

O. E. Griffith, Clerk, Allen County, Ohio.

---

§4 COMMUTATION MONEY.

Attorney General's Office,

Columbus, December 1, 1864.

*C. H. Johnston, Auditor Coshocton County:*

DEAR SIR:—I am rather of the opinion that though the company commander may neglect to certify the company rolls as required by the seventh section of the militia act, yet a person who is a member of the company and could

---

*Report of Statistics of Crime—As to Fees of Prosecuting Attorneys, Etc.*

---

prove so would be able to defeat the collection of the \$4, under the fourth section.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

REPORT OF STATISTICS OF CRIME.

Attorney General's Office,  
Columbus, December 5, 1864.

*Youngs V. Wood, Prosecuting Attorney, Montgomery County:*

DEAR SIR:—The statute you refer to has been changed and prosecuting attorneys are governed by the sixth section of the act passed April 8, 1856, S. & C. Statutes, page 826.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

AS TO FEES OF PROSECUTING ATTORNEYS,  
ETC.

Attorney General's Office,  
Columbus, December 20, 1864.

*N. W. Runyan, Prosecuting Attorney, Marion County:*

The commissioners of the county make an allowance to prosecuting attorneys for drawing bonds for county officers. S. & C. Stats., Sec., p. 1226. You are entitled to 5 per cent. on all *costs* collected by you. S. & C. Stat.,

---

*Court of C. P. May Sentence Juvenile to State Reform Farm.*

---

Sec. 3, p. 1186. Nothing on recognizance. A man's residence is where his family is.

Respectfully,

L. R. CRITCHFIELD,

Attorney General.

---

COURT OF C. P. MAY SENTENCE JUVENILE TO  
STATE REFORM FARM.

Attorney General's Office,  
Columbus, December 21, 1864.

*Hon. John Brough, Governor:*

The question presented by Messrs. Mower, Miller and Smith, of Springfield, Ohio, is, substantially, whether the Court of Common Pleas can sentence a juvenile to the State reform farm instead of to the penitentiary of the State. The acts in force which affect the question are the act of April 2, 1858, and the amendatory act of March 10, 1860. The act of April 16, 1857, is repealed, but a portion of its provisions are saved in the act of 1858. The tenth section of the act of 1858 (which is the amendment of 1860 inserted) provides that "it shall be lawful for the board of commissioners aforesaid to receive upon said reform farm, and detain there under their control and guardianship, such male youth as may be received and detained in houses of refuge under sections six, seven, eight and nine of the said act" of 1857. Sections six, seven, eight, and nine of the act of 1857 are thereby made applicable to the State reform farm. Such male youth as could be received into houses of refuge by the act of 1857, are by the tenth section of the act of 1858 to be received at the State reform farm. Section six of the act of 1857 provides that "any infant under the age of sixteen years, who shall,

---

*Court of C. P. May Sentence Juvenile to State Reform  
Farm.*

---

under existing laws, or those hereafter enacted, be liable to confinement in the jail of any county, in which a house of refuge may be situated, or in the penitentiary of Ohio, from any such county, may at the discretion of the court, or magistrate giving sentence, be placed in such house of refuge until of legal age," etc. By the tenth section of the act of 1858 this sixth section is extended to the reform farm.

The last clause of the fourteenth section of the act of 1858 is designed to provide for cases where the court imprisons in the penitentiary or jail, or sentences to either place as it may do by the discretion vested in it by the sixth section of the act of 1857.

Respectfully,

L. R. CRITCHFIELD,  
Attorney General.

---

January, 1865. Term of L. R. Critchfield expired. Wm. P. Richardson elected, and resigned February 20, 1865. Same date Chauncey N. Olds appointed to fill vacancy.