
Claim of Worthington & Co.

it on its dividends for the first half of the year 1851 (and which went directly into the state treasury) notwithstanding it was afterwards required to and did pay taxes for the whole of that same year according, to the provisions of the act of March 21, 1851. Whether the sum so paid by it in its dividends directly into the state treasury (and which, in my judgment, it was not legally bound to pay) shall be refunded or not, is a question solely for the consideration of the legislature, which alone is competent to direct restitution. The papers referred do not disclose facts sufficient to warrant the expression of any opinion upon the question whether the auditor of Hamilton County, in entering the taxables of the bank upon the duplicate of that county, for the years 1852 and 1853, exceeded the authority conferred on him by the act of 1852, or in any manner violated its provisions. It may not, however, be improper to add, that, in favor of the acts of public officers, the law will presume all to have been rightly done, unless the circumstances of the case overturn this presumption.

Respectfully submitted,

C. P. WOLCOTT,

Attorney General.

February 17, 1857.

CLAIM OF WORTHINGTON & CO.

Attorney General's Office,

Columbus, February 27, 1857.

DEAR SIR:—The facts disclosed by your note of the 19th instant, and in regard to which you ask my opinion, are briefly as follows:

John Green "had a large lot of plumbing at the Northern Ohio Lunatic Asylum." On the 21st January, 1856, he presented to one of the then trustees and the superintendent

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of the asylum a bill for work done and materials furnished under that "job," which was examined and approved by them, and such approval was indorsed on its face. Green thereupon transferred the account, thus approved, to George Worthington & Co., for value, and, at the same time, wrote thereon and signed on order, directing the auditor of state to pay the above bill to the order of Geo. Worthington & Co." This blank is still unfilled. Since these transactions it has been discovered that Green has been fully paid, and more than paid, for all work done, and materials furnished under his "job;" but Worthington & Co. claim that, notwithstanding this payment in full, they are entitled to payment of the bill thus transferred to them, and have requested the present board of trustees to approve the same.

Upon this state of fact, I am of the opinion :

1. That Green himself would not be entitled to payment of the claim thus made. The approval of the former superintendent and trustees avails nothing against the fact, since discovered, that he has already been fully paid. Independent of this, such approval is of no effect, as by the acts of March 15, 1856, and April 10, 1856 (See 53 Ohio Laws, 22, 221) all claims of this kind must be again examined, though they may once have been approved by the agents of the State.

2. Worthington & Co., have no better right than Green himself. The principle is a very familiar one that the assignee of a claim stands on no different ground than the first holder, and this rule is of universal application, unless the claim be a negotiable instrument, transferred before due, on sufficient consideration, and without notice. But the claim now presented has no single characteristic of commercial or negotiable paper. So far as the State is concerned, it is simply and only an account against the State, audited and, on its face, approved by its agents; and I have yet to learn that an account thus approved by the person against whom it was presented is to be deemed negotiable paper for any purpose whatever, or that an assignee thereof has any other

Indictment for Violation of Liquor Law.

or greater right than the original creditor. That, as against him, the debtor could show any fraud or mistake in the account, in spite of the approval, is too plain for question.

The order written by Green at the foot of the bill, directing the auditor of state "to pay the above bill to (blank)," does not affect the State. As between Worthington & Co. and Green, the order may possibly be deemed legally equivalent to a sight draft, but that is a matter in which the State has no concern. Its rights remain precisely as they were before the order was written.

In any aspect of the case, it seems to me impossible to doubt that Worthington & Co. stand in the shoes of Green, and that the claim in their hands is subject to the same equities and defences as if it were presented by Green himself.

Very respectfully,

C. P. WOLCOTT,

Attorney General.

Joseph Perkins, Esq., Trustee N. O. L. Asylum, Cleveland, Ohio.

INDICTMENT FOR VIOLATION OF LIQUOR LAW.

Attorney General's Office,

Columbus, April 4, 1857.

DEAR SIR:—Your letter of the 19th ult. was duly received, but engagements in court have prevented an earlier reply.

An indictment for the violation of either the first, second, third or fourth sections of the act to "provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," need not negative the proviso contained in the eighth section.

Not only is this proviso embodied in a distinct and subsequent section, but it does not qualify or limit the description of the offences defined by the first four sections. It

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simply exempts from their operation certain cases which would otherwise fall within their general provisions. The rule of pleading is clearly stated in *Hirn vs. The State*, 1 Ohio, State 15, and according to that rule an indictment founded on either of the first four sections is clearly sufficient without the negative averment.

Very respectfully,

C. P. WOLCOTT,
Attorney General.

J. S. Snork, Prosecuting Attorney, Antwerp, Paulding County, Ohio.

REMOVAL OF PATIENTS FROM LUNATIC ASYLUMS; DUTY OF COUNTY AUDITOR.

Attorney General's Office,
Columbus, August 6, 1857.

SIR:—I have examined the questions stated, for my opinion, in your letter of 29th ult., and beg leave to reply.

1. That when a warrant of removal, pursuing substantially the form prescribed by the twenty-seventh section of the "act to provide for the uniform government and better regulation of the lunatic asylums of the State," etc., passed April 7, 1856, issued by the probate judge of any county, has been duly executed and returned by the person to whom it was directed, and the probate judge has duly certified the "proper fees" to which, under the provisions of the fortieth section of the same act such person is entitled for having so executed such warrant, the auditor of the county has no right to withhold his order on the county treasurer for the "proper fees" so certified. Granting—what is by no means certain—that the auditor is not concluded by the certificate of the probate judge, it is nevertheless clear that his power of revision, if he have any such, is limited to the

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simple function of ascertaining whether the fees thus certified have been taxed in conformity with the provisions of the before mentioned fortieth section. Whether the case was or was not one in which a removal warrant ought to have been issued, does not concern him. That is a question over which he has no control, and the law does not allow him to review the action in this respect of either the probate judge or proper authorities of the asylum. If a warrant, regular upon its face, has been issued and duly executed, the county is clearly liable for the "proper fees" certified by the probate judge to be due for its execution, though the warrant may not have been rightfully issued. And if in such case the county auditor shall refuse to draw his order on the county treasurer, the person entitled to the fees has a plain and effectual remedy against him.

2. That in all cases when an order for the removal of a patient from an asylum is made and notified to the probate judge of the proper county, according to the provisions of the twenty-seventh section, it is the imperative duty of such probate judge to issue his warrant of removal, and the county must defray, from its treasury, the costs and expenses of executing such warrant, according to the provisions of the fortieth section.

Very respectfully,

C. P. WOLCOTT,

Attorney General.

R. Hills, Esq., Superintendent C. O. L. Asylum, Columbus, Ohio.

Mode of Enforcing Removal of Patients From Lunatic Asylum—Title to the Lands for the Reform School.

MODE OF ENFORCING REMOVAL OF PATIENTS
FROM LUNATIC ASYLUM.

Attorney General's Office,
Columbus, August 24, 1857.

SIR:—In answer to your note of the 14th instant, I have to say that in my judgment the best, if not indeed the only, mode, of enforcing the removal from the asylum of certain patients, sent there from the courts of Hamilton, but ordered to be discharged, as stated in your letter, will be by application for a writ of *mandamus* to compel the probate judge of Hamilton County to issue his warrant for the removal of such patients. The application may be made either to the District Court of that county, or to the Supreme Court of the State, but it would seem better on every account to make it to the latter tribunal.

Very respectfully,

C. P. WOLCOTT,

Attorney General.

Dr. R. Hills, Superintendent C. O. L. A., Columbus, Ohio.

I take it for granted that the proper preliminary steps have been taken to cast upon the probate judge the duty of issuing his removal warrant.

TITLE TO THE LANDS FOR THE REFORM
SCHOOL.

Akron, Ohio, August 28, 1857.

MY DEAR SIR:—I have just concluded a thorough examination of the amended abstracts of title to the lands proposed to be sold to the State, as a site for the Reform

Title to the Lands for the Reform School.

School; but the result is not entirely satisfactory, and may be briefly stated thus:

Of the nine parcels offered by Henry Miers, the title to the first seven seems unobjectionable. As to the last two parcels, embracing 160 acres, further information (for which I have written to Brazie) is necessary before I can form any opinion in relation thereto.

The title to the 40 acres offered by Emerick is good—and I will approve of that to the 160 acres offered by Beck upon certain conditions which I presume he can readily comply with.

But the title to the lands offered by Martin, Smith and Borchert, as presented by the abstracts, is not satisfactory. It seems quite probable, however, that most of the objections which occur to me may be removed by fuller information than that furnished by the present abstracts.

Much "circumlocution" can be avoided by a personal interview, and as I shall be obliged by other business to be at Columbus next Tuesday, I propose that you and Mr. Brazie meet me there, at my office, on that day.

In writing to Mr. Brazie yesterday, I suggested to him the propriety of our meeting at the time and place above stated, but I think it would be well for you also to urge his attendance at the time.

Very respectfully yours,

C. P. WOLCOTT,

Attorney General.

Chas. Reemelin, Esq., Cincinnati, Ohio.

POWER OF THE GOVERNOR TO APPOINT
NOTARIES.

Attorney General's Office,

Columbus, September 7, 1857.

SIR:—In accordance with your request, I have carefully examined the "act concerning notaries public and commis-

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sioners," and though the subject is not without difficulty, I am upon the whole, of the opinion that the limitation on the number of notaries to be appointed, presented by the last proviso of the first section of that act, applies only to appointments made after the passage of the act, and by virtue of its provisions. It follows that the governor may rightfully appoint the whole number therein authorized without taking into the account those in office when the act took effect, and who, by its very terms, are to be continued in office "as if this act had not been passed."

Very respectfully,

C. P. WOLCOTT,

Attorney General.

To His Excellency, The Governor of Ohio.

ON VACANCIES IN JUDICIAL OFFICES.

Attorney General's Office,
Columbus, September 12, 1857.

SIR:—On the —— day of August last, the Honorable James Clark, then and now one of the judges of the Court of Common Pleas of the second Common Pleas District of the State, placed in your hands his written resignation of that office, to take effect in its terms on the ——.

Judge Clark is still discharging the duties of his office, and, it is expected, will so continue to discharge them until the day thus named for the taking effect of such resignation. The regular term for which he was elected, and which he is now filling, will not expire until the second Monday of February, 1862.

Upon this state of fact, question has been made whether a successor to Judge Clark can be elected or appointed before the day on which his resignation is to take effect.

The subject matter of this inquiry has been regulated

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by the constitution, which in the thirteenth section of its fourth article has ordained that,

“In case the office of any judge shall become vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened.”

There is no other enactment, constitutional or legislative, affecting the question, and its solution therefore depends wholly on the effect of the foregoing provision.

The constitution has prescribed for the office of judge, fixed terms, which begin and end at uniformly recurring periods, and the duration of which is not affected by any intermediate vacancy in the office. The judge elected for one of these regular terms may die, resign, or be removed from office, yet the term still runs on, and the next incumbent holds only for its then unexpired remainder. And it is the sole purpose of the constitutional provision above recited to provide for vacancies in the judicial office before the expiration of these regular terms.

The exercise of the power conferred by this section is plainly limited to cases in which these two conditions shall co-exist. 1. The office of judge must be vacant, and 2d, Such vacancy must have happened before the end of a regular term. In the case under consideration, the inquiry may be limited to the single point whether the office in question be now vacant or not; since, if it be so, the vacancy undeniably happened before the end of a regular term.

It is essential to the right undertaking and solution of this question, constantly to bear in mind that Judge Clark is still discharging all the duties of the office, and will, but for the happening in the meantime of some unexpected event, continue to discharge them until the day, yet comparatively

On Vacancies in Judicial Offices.

distant, in which his resignation is to take effect. He is now holding and filling the office, and until that day will continue to hold and fill it as thoroughly, effectually and rightfully as if no such resignation had been made. He is still *de facto, et de jure*, judge. The question then is, is the office, now so actually and rightfully filled by Judge Clark, and of which he is now discharging the entire duties, also now vacant? Thus stated, and the accuracy of the statement cannot be denied, the question furnishes its own conclusive answer. The office is not vacant. It seems, nay, it is not only contrary to well speaking, but to true speaking, to assert that an office is vacant, which, at the very moment of the assertion, is rightfully filled by a duly elected and qualified incumbent. The phrase "vacant" is so clear, significant and sharply definite in its import, that it is quite impossible to doubt its meaning or force. Primarily it signifies empty space—mere vacuity—and this original sense adheres to it in all its applications and derivations. Applied to a place, or office, it signifies its destitution of an incumbent officer. But the office in question has a lawful incumbent in the person of Judge Clark, and consequently is not "vacant."

It has been said, however, that Judge Clark's resignation, being irrevocable, will certainly take effect on the day named therein for that purpose, and hence that there is a present vacancy in the residue of his term beyond that day.

This position, both in its premises and conclusion, is open to grave, if not, indeed, unanswerable objections. Happily, however, it is not necessary now even to state them, since the position, whether accurate or inaccurate, is altogether beside the real question.

The utmost effect which this view of the case assigns to Judge Clark's resignation, is that it creates absolutely and beyond recall a present vacancy in that part of the regular term lying beyond the day on which his resignation is to take effect. The "office" itself, however, is not thereby presently vacated, nor can it thereby become vacant before the day on which the resignation is to have operative effect. But

Relative to Indictment for Administering Poison.

the question here is as to a vacancy in the office, for the constitution does not authorize a vacancy in a yet unexpired *term*, as distinguished from a vacancy in the office, to be filled by any mode. That instrument expressly limits the power to fill vacancies occurring during a yet unexpired term, to vacancies in the office itself, and (independent of the conclusive result drawn from the unmistakable significance of the word "vacant," as used in connection with the office) by an implication absolutely irresistible forbids the exercise of the power until the "vacancy" in the "office" shall actually "happen."

I am, sir,

Very respectfully yours,

C. P. WOLCOTT.

To His Excellency, The Governor.

RELATIVE TO INDICTMENT FOR ADMINISTERING POISON.

Attorney General's Office,
Columbus, October 31, 1857.

DEAR SIR:—Your letter of 26th instant did not reach me until night before last.

I have considered, with all the care which other official engagements of a most pressing nature would permit, the question submitted by you, and, upon the facts set forth in your letter, am of the opinion that, in contemplation of law, the poison was "administered" in Marion County, and consequently that, in accordance with an express statutory provision (Swan's Rev. Stat. 275), the prisoner should be tried in that county.

I am at present so much engrossed by the engagements above mentioned, that I am not now able to state at length (as under other circumstances I should) the considerations on which this conclusion is founded.

Relative to Claim of Daniel F. Goodhue.

You will permit me to add that, in a case of singular atrocity, the public will not, and ought not, excuse any mistake in the prosecuting officer, which shall result in the acquittal of the perpetrator. You should, therefore, carefully examine the law books and reports, which can hardly fail to furnish you, if not with cases in point, with principles and analogies entirely decisive of this question.

While you are entitled to my "advice," the law has thrown upon you the entire control of the case, in behalf of the State, and with that control, the entire responsibility of its proper mode of prosecution. On that sole responsibility, you must see to it that no error intervene, in the mere course and manner of its prosecution, which shall prevent a full trial of the merits of the charge brought against the accused, or, if he be guilty, his just condemnation and punishment.

Yours respectfully,

C. P. WOLCOTT.

Jas. H. Anderson, Esq., Prosecuting Attorney, Marion, Ohio.

RELATIVE TO CLAIM OF DANIEL F. GOODHUE.

Office of the Attorney General,
Columbus, November 19, 1857.

SIR:—Upon a careful examination of Mr. Daniel F. Goodhue's application, I am of the opinion that no power has been conferred upon you, or any other executive officer, to correct the error of which he therein complains. He must go to the legislature for relief. I come to this conclusion with regret, but really see no other alternative.

Just now I am so pressed with business of importance, that I have not time to state at length the reasons upon which this conclusion is predicated, but will do so at an early day.

Very respectfully,

C. P. WOLCOTT,

To the Governor.

Attorney General.

Relative to the Sale of Stock by the State, in the "Turnpike Companies of the State" Relative to Terms of Office of County Treasurers Elected and Appointed.

RELATIVE TO THE SALE OF STOCK BY THE STATE, IN THE "TURNPIKE COMPANIES OF THE STATE."

Office of the Attorney General,
Columbus, November 20, 1857.

SIR:—I have carefully examined all the proposals made to the commissioners of the sinking fund, for the sale, under their notice dated July 17, 1857, "of the shares of stock held by the State" in the various "turnpike companies of the State," and have to say that, in my judgment, the "interest of the State" will not only *not* be "promoted," but greatly prejudiced by the acceptance of any of these proposals. As to them all, therefore, my "advice" is against their acceptance, and upon each of them I vote *no*, reserving to myself, in case a majority of the board shall accept any of the proposals, the right hereafter to place upon the records a formal protest against such acceptance, with a statement of the reasons which govern my action in this respect.

Very respectfully,

C. P. WOLCOTT,

Attorney General.

F. M. Wright, Esq., Acting Commissioner of Sinking Fund, Present.

RELATIVE TO TERMS OF OFFICE OF COUNTY TREASURERS ELECTED AND APPOINTED.

Office of the Attorney General,
Columbus, November 20, 1857.

SIR:—I have carefully examined the questions stated in the letter of the auditor of Shelby County to you, under date

Requisites of an Indictment for "Removing a Body from Its Grave."

of 13th instant, which you have submitted to me, and upon the facts therein set forth, I am of the opinion:

1. That the treasurer appointed in August last by the commissioners of Shelby County in August last to fill the vacancy happening by the death of a regularly elected incumbent, whose term would have expired on the first Monday of June, 1858, was entitled to the office only until the then next annual election (which occurred in October last) and for such time beyond the day of that election as might intervene before the treasurer then elected should "qualify" by giving the requisite bond and taking the prescribed oath of office.

2. That the treasurer elect, having given the bond and taken the oath required by law, is now the rightful treasurer of the county, and should at once enter upon the discharge of the duties of that office.

The seeming urgency of the case requires an immediate reply, but I am so pressed with business that I cannot find time to state fully the reasoning which has led me to the above conclusions. The subject, however, is so important, that I will take an early occasion to present my views thereon at length.

Very respectfully,

C. P. WOLCOTT.

To the Auditor of State.

N. B. This opinion has been overruled. See — p. opinion to W. S. Invin, Auditor of Monowles, and 7 Ohio State Rep. 125.

REQUISITES OF AN INDICTMENT FOR "REMOVING A BODY FROM ITS GRAVE"

Attorney General's Office,
Columbus, February 25, 1858.

DEAR SIR:—Your letter of 31st December never came to my notice until last evening, when I discovered it unopened