

Statutory and Constitutional Prohibitions and Limitations as to Boards of State Institutions; As to Employees of Same.

STATUTORY AND CONSTITUTIONAL PROHIBITIONS AND LIMITATIONS AS TO BOARDS OF STATE INSTITUTIONS; AS TO EMPLOYEES OF SAME.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, January 27, 1892.

Hon. Wm. McKinley, Jr., Governor:

DEAR SIR:—I have the honor to acknowledge the receipt of a recent communication requesting my opinion upon the following points:

"1. What are the statutory and constitutional prohibitions and limitations as to appointments to boards of State institutions; also as to employees in the same?"

"2. Do the above indicated prohibitions and limitations apply to the penitentiary at Columbus and the Ohio reformatory (Intermediate Penitentiary) at Mansfield?"

AS TO THE CONSTITUTION.

Section 20 of article 7 (an article devoted exclusively to State or public institutions) reads:

"The directors of the penitentiary shall be appointed or elected in such manner as the General Assembly may direct, and the trustees of the benevolent and other State institutions now elected, by the General Assembly, and all such other State institutions as may be hereafter created, shall be appointed by the governor by and with the advice and consent of the senate."

Observe the distinction drawn between the penitentiary and other State institutions; the directors (now managers) of the first to be appointed, *or elected*, as the General As-

Statutory and Constitutional Prohibitions and Limitations as to Boards of State Institutions; As to Employees of Same.

sembly may direct, the trustees of the others to be appointed by the governor.

Such is the constitutional power given. The limitations imposed are ;

“Article 2, Section 19. No senator or representative shall during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office in this state which shall be created or the emoluments of which shall be increased, during the term for which he shall have been elected.”

“Article 15, Section 4. No person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector.”

“Article 15, Section 5. No person who shall hereafter fight a duel, assist in the same as second, or send, accept, or knowingly carry, a challenge therefor, shall hold any office in this State.”

AS TO THE STATUTES.

The distinction of the constitution between the penitentiary and other State institutions is preserved in the statutes. A separate and distinct act governs the penitentiary and the selection of its managers. Another regulates the Ohio Reformatory. As amended March 14, 1890 (87 O. L. 64), the penitentiary act provides for five managers, at least one of whom shall be a skilled, practical mechanic, and not more than three members of the same party, the governor to have power to remove for *sufficient cause*.

The Ohio reformatory law as amended April 18, 1890 (87 O. L. 226), provides for five managers, not more than three to be of the same political party, and empowers the governor to remove at *his discretion*.

On the other hand, the benevolent institutions, with possibly a few exceptions, are governed by Title 5, of Part I,

Statutory and Constitutional Prohibitions and Limitations as to Boards of State Institutions; As to Employees of Same.

of the Revised Statutes. Chapter 2 of this title, being sections 634 and 646, regulates the appointment and qualification of trustees and officers of all benevolent institutions of the State, including the Boys' Industrial School and the Girls' Industrial Home (See Sec. 634).

By the act of April 24, 1890 (87 O. L. 268), the last General Assembly made important amendments in the reading of two sections of this chapter. Section 637 was changed to read:

"No trustee hereafter appointed shall be a resident of the county in which the institution is located of which he is to be trustee," etc., while in section 540 authorizing the employment of stewards, the restriction was inserted:

"But said steward so appointed shall not at the time of his appointment be a resident of the county in which said institution is located of which he is to be steward."

These limitations forbidding the appointment of resident trustees and stewards, apply in terms only to the trustees and officers whose appointment is provided for in the chapter of which sections 637 and 640 are parts, namely, the trustees of the benevolent institutions, including the Boys' Industrial School and the Girls' Industrial Home, and, of course, excluding the penitentiary and the Ohio Reformatory; but in spirit and as indicative, though not technically expressive, of the legislative will, I take it this act applies to *all* State institutions, seeing there can be no public reason to prohibit the appointment of resident trustees and stewards of insane asylums, etc., that does not equally apply to penitentiaries.

On April 21, 1890 (87 O. L. 241), an act was passed providing:

Statutory and Constitutional Prohibitions and Limitations as to Boards of State Institutions; As to Employees of Same.

"No member of either branch of the General Assembly shall hereafter be appointed as trustee of any benevolent, educational, penal or reformatory institution in the State, supported in whole or in part, by funds drawn from the state treasury."

Though the word "trustee" is used, I take it that this act applies also to all the State institutions, including the managers of the Ohio Penitentiary and Ohio Reformatory.

The provisions of the following act of March 4, 1891 (88 O. L. 73), needs no comment:

"Not more than ten per cent. of the officers and employes of any of the public institutions of this State, which are controlled exclusively by the State, shall at the time of their appointment or employment, be residents of the same county; and all appointments or employments hereafter made in contravention of this section, are hereby declared inoperative and void from and after the passage of this act, and hereafter such appointments and employments in the aggregate, shall be so made as to equitably distribute all such employes and appointees throughout the State."

The act, of course, applies also to the penitentiary and reformatory, "to all the public institutions." I omit reference to many plain and undisputed provisions of the law relating to the propositions submitted to me, for otherwise, this communication would become interminable.

Very respectfully yours,

J. K. RICHARDS,
Attorney General.

*Justification of Board of Public Works in Leasing Certain
Land Under Sections 6 and 7 of Canal Commission,
Act of 1889.*

JUSTIFICATION OF BOARD OF PUBLIC WORKS
IN LEASING CERTAIN LAND UNDER SEC-
TIONS 6 AND 7 OF CANAL COMMISSION, ACT
OF 1889.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, January 29, 1892.

*Colonel Samuel Bachtell, Assistant Engineer, State Board
of Public Works, Columbus, Ohio:*

DEAR SIR:—I find in this office a communication from you, dated November 11, 1891, together with a resolution of the joint board of public works and canal commission, asking, whether, in view of a certain statement of facts set out in the resolution, your board was justified in making a lease of certain property to one Lee without notice to one Schlundt, under sections 6 and 7 of the canal commission act of 1889, pages 271 and 272.

In my opinion, the provisions of sections 6 and 7, so far as they relate to this transaction, may, or rather might, have been treated as directory and not as mandatory. The general rule is, that the decision of the question whether any provision of a statute is mandatory or directory, is to be governed by considerations of convenience and of justice. The question whether notice should be given, by advertisement or otherwise, to Schlundt, was one which, in my opinion, your board had a right to determine in view of the facts and circumstances of this case, as then presented to them, and if no injustice was done by dispensing with the statutory notice, then the lease to Lee was not invalidated and should not now be cancelled because your board saw fit not to make the advertisement referred to in the statute.

I return herewith the paper submitted to me. The whole question, in my opinion, is a question for your board to decide upon the facts of the case. Very respectfully,

J. K. RICHARDS,
Attorney General.

*In re Articles of Incorporation of Fraternal Protective
Union.*

IN RE ARTICLES OF INCORPORATION OF FRA-
TERNAL PROTECTIVE UNION.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, January 30, 1892.

Hon. Daniel J. Ryan, Secretary of State, Columbus, Ohio:

DEAR SIR:—I herewith return, without approval, the articles of incorporation of the Fraternal Protective Union, recently submitted to me for examination. The object of the desired incorporation, as stated in the articles, is to organize an order of property owners, with a general council, empowered to impose and collect annual dues and assessments, thereby providing a fund to protect its members against losses by fire.

The only legal object of an association of this character, recognized by the statute (R. S. Sec. 3686 and 3687), is to enable its members to insure each other against loss by fire, etc., and to enforce any contract by which they may agree to be *assessed specifically* for incidental expenses and for payment of losses to members. I take it there is a clear distinction between the creation of a *fund* by *annual* dues and assessments for protection against losses by fire, and the making of *specific assessments* to pay such losses. (See *State ex rel. vs. Monitor Fire Association*, 42 O. S. 555.) Section 3687 sets forth clearly what the articles of incorporation must contain. If it is desired to form an association on the assessment plan for the legal purposes set forth in such section, it is not a difficult matter to state the purposes so that there can be no mistake, nor any seeming authority to do that which an assessment company can not do.

I may add, in addition to the above reason for declining to approve the articles of incorporation in question, that these articles provide for the creation of an *order* with a *general council*, authorized to impose and collect dues and assessments, and transact the business of the association; while the law (See R. S., Sec. 3689 and 3690), on the con-

*In re City School District of Second Class Under Section
3904, Changing From 6 to 5; Members, Etc.*

trary, says that a board of directors, elected by the members, with a president, secretary, treasurer and other officers, shall carry on such business.

Thus it appears that not only the purpose, but the mode and means of carrying them out, of the proposed association, fail to conform to the law.

Very respectfully,
J. K. RICHARDS,
Attorney General.

IN RE CITY SCHOOL DISTRICT OF SECOND
CLASS UNDER SECTION 3904, CHANGING
FROM 6 TO 5; MEMBERS, ETC.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, February 4, 1892.

Hon. C. C. Miller, State Commissioner of Common Schools:

DEAR SIR:—I find in this office a letter from you to my predecessor, dated December 28, 1891, asking his opinion on certain points. While I am not clear as to my power to pass upon the questions submitted by you, yet I give you my opinion for what it is worth.

Query 1—"A city district of the second class may under section 3904, of the Ohio school laws, change from six members to as many members as the city has wards. If this city wishes to change back again to six members, how shall it proceed?"

Answer—The Legislature has not said *how*, and because it has not, I am inclined to think the Legislature never intended that a "change back" should be made. The mischief that might result from vesting in the board of education of such a district the power to say what kind of a board should succeed it, composed of what members—whether six or the number of wards, how elected—whether at large or from wards, and for what term—whether three or six years, all tend to show that the Legislature designedly omitted to provide for a "change back."

In re City School District of Second Class Under Section 3904, Changing From 6 to 5; Members, Etc.

Query 2—"Are probate judges eligible as members of a board of education? Under the thirteenth section of the truant law, probate judges have jurisdiction to try offenses under said act."

Answer—I know of no constitutional or statutory prohibition against a probate judge being elected a member of a board of education. It may be urged, that the duties of a probate judge are in some cases, as suggested by the inquiry, inconsistent with those of a member of a board of education; but is not that an argument to be addressed to the Legislature, in favor of a law making probate judges ineligible for election as members of boards of education, and meanwhile, until such law be passed, is it not a matter for the consideration of the people before whom a probate judge is a candidate for election as a member of a board of education?

Query 3—"Has a city or village board of education the legal right to abolish the board of examiners and accept certificates issued by the county board of examiners?"

Answer—Section 4077, Revised Statutes, provides, "there shall be a board of examiners for each city district of the first class." Section 4084 provides that similar boards shall be appointed in city districts of the second class and in certain village districts. These provisions, in my opinion, require the creation and continued existence of boards of examiners in the city and village districts indicated. The fact that an additional qualification is required for membership in such city and village boards of examiners, namely five years' practical experience in teaching, a qualification not required of members of county boards of examiners, strengthens the conclusion that the Legislature did not intend to give city boards of education the power to abolish city boards of examiners and hand their work over to county boards composed of members of different qualifications.

Very respectfully,

J. K. RICHARDS,
Attorney General.

*Concerning Deed to Mr. Morris Wertheimer, Defiance,
Ohio, to be Made by Board of Public Works.*

CONCERNING DEED TO MR. MORRIS WERTHEIMER, DEFIANCE, OHIO, TO BE MADE BY BOARD OF PUBLIC WORKS.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, February 5, 1892.

To the Board of Public Works of Ohio:

GENTLEMEN:—I find in this office a communication from your board dated October 20, 1891, accompanied by a resolution adopted October 13, 1891, requesting the written opinion of the attorney general upon the question as to whether a deed can be made to Mr. Morris Wertheimer, of Defiance, for a piece of land valued at \$300.00, and now leased to him for the term of fifteen years, at a rental of six per cent. per annum of the valuation.

Section 11 of the canal commission act, as amended May 1, 1891 (O. L. Vol. 88, 507), contains the authority for the sale of such land. But this section provides, that land that cannot be leased so as to yield six per cent. on the valuation thereof, may be sold at public, or if the lands are appraised at \$500.00 or less, at private sale. The land in question has been and is leased so as to yield six per cent. on the valuation, and, therefore, it seems to me does not come within the description of the land that may be sold by the commission. If Mr. Wertheimer's lease were cancelled and the land revalued at a higher figure so that it could not be leased so as to yield six per cent. on such valuation, then it could be sold at private sale at the appraised value. I enclose the original lease.

Very respectfully,

J. K. RICHARDS,
Attorney General.

*Contracts to be Entered Into by Board of Managers of
Ohio Penitentiary.*

CONTRACTS TO BE ENTERED INTO BY BOARD
OF MANAGERS OF OHIO PENITENTIARY.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, March 1, 1892.

Mr. B. F. Dyer, Warden of the Ohio Penitentiary:

DEAR SIR:—On the 23d ult. you handed me on behalf of the board of managers of the Ohio penitentiary, a written communication requesting my official opinion on certain points, which I give in the order in which submitted:

Query 1—"Can a legal contract be entered into for a term of years for a less price than 70 cents per diem for able bodied, or 50 cents for minors and infirm convicts?"

Answer—The statute says (section 4, act of February 27, 1885, 82 O. L., p. 60): "No arrangement will be made or entered into by the board for a longer period than one year, that will produce less than 70 cents per day for able bodied convicts." This language appears to me to be plain and answers your question as to able bodied convicts in the negative. I know of no statutory provision as to minors.

Query 2—"When a bid is made under the piece price plan with schedule attached, stipulating price to be paid for each article, and also a clause guaranteeing the State a certain price per diem for each convict employed, can the contractor elect as to which plan of working shall govern?"

Answer—My understanding is, that it is for the board of managers to say whether they will accept pay for the labor of convicts according to the schedule or insist upon the guarantee. Otherwise, of what use is the guarantee?

Very respectfully,

J. K. RICHARDS,
Attorney General.

In re Claim of William Thomas Against Board of Public Works for Damages Resulting From Overflow by Mercer-Auglaize Reservoir.

IN RE CLAIM OF WILLIAM THOMAS AGAINST
BOARD OF PUBLIC WORKS FOR DAMAGES
RESULTING FROM OVERFLOW BY MERCER-
AUGLAIZE RESERVOIR.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, March 11, 1892.

The Board of Public Works, Columbus, Ohio:

DEAR SIRs:—You have referred to me for my opinion upon the same, the claim of William Thomas against the board of public works, for \$2,400.00 damages for the overflow of his land in Auglaize County, by the Mercer-Auglaize reservoir, namely:

For the overflow of 80 acres for 9 years.	..\$2,160.00
For the overflow of 40 acres for 2 years.	240.00
Total\$2,400.00

Accompanying the claim is a statement of facts, namely, that in the years 1841 to 1846, the Mercer-Auglaize reservoir was constructed and filled with water. Section 17, included for the most part in the reservoir thus constructed, was owned by the federal government. In 1867, 120 acres in section 17 was patented to Hodridge and Franklin who, in 1883, sold to William Thomas. Forty acres of this, Thomas held for two years and then sold. He still owns the other 80 acres. The whole of the forty acres was and is subject to total overflow, and the same is true of the 80 acre tract with the exception of a few acres.

You do not specify in your resolution, whether you desire my opinion as to your power to pay this claim or as to the justness of the claim itself. I have heard arguments from Messrs. Jones and Watson in favor of Mr. Thomas' claim. Their contention was, that though the State used the land since 1841, the State could not and did not by

In re Claim of William Thomas Against Board of Public Works for Damages Resulting From Overflow by Mercer-Auglaize Reservoir.

prescription acquire the title to the land; that the title remained in the general government until finally it was patented to Hodridge and Franklin and by them conveyed to Thomas, who owns it now and is entitled to recover damages for its overflow. Suppose we admit, that the title is in Thomas, does that justify this claim? When Thomas bought the land, it was overflowed and had been for over forty years. The situation of the land in this respect undoubtedly affected its price. Thomas paid less, because the land was subject to overflow. It was not a case of the purchase of land fit for use above the reach of water, which was subsequently overflowed by the fault of the State. The question is, Has not Mr. Thomas already been compensated for the unfavorable condition of his land in the low price he paid for it?

Another consideration that suggests itself is, whether under section 7703 of the Revised Statutes (Smith & Benedict's Edition), Mr. Thomas is not limited in his claim to the damages sustained within the year prior to its presentation. This section provides, that any person whose property has been, or may be injured by any overflow of any reservoir, may at any time within one year apply to the board of public works for damages. The damages are then to be ascertained by a commission, and there is the further provision, that when it shall be apparent that the overflow will be of frequent occurrence, it shall be the duty of the board to appropriate the easement or right to overflow the land. Now, when the State provided a clear remedy for Mr. Thomas, can he be said to have the right to stand by for nine years and claim three dollars per acre, per year, for an overflow against which he had never protested and for which he had claimed no damages? Can he buy overflowed land, forty acres of it, and hold it for two years, sell it, and nine years afterwards claim three dollars an acre per year for the use of such overflowed land by the State? I can see great public mischief likely to flow from the endorse-

*Construction of Section 1548 R. S., as Amended 80 O. L.,
p. 160.*

nient by the board of public works of such action as a basis of recovery against the State. If Mr. Thomas has the right to present and urge his claim now, it is no new right, but the same right that he has held ever since he bought this overflowed land. Some reasonable diligence should be required from those thus claiming damages against the State. The reason the statutes require a speedy presentation of the claim for damages through overflow is, that the State may appropriate and acquire the perpetual easement and right to overflow. Now that this claim has been made, the board of public works should appropriate such portion of this land or such easement over it as may be needed for the use of the reservoir. I have already indicated what I think about the claim for damages. I am inclined to think that the board of public works has the power to adjust this matter without further legislation.

Very respectfully,
J. K. RICHARDS,
Attorney General.

CONSTRUCTION OF SECTION 1548 R. S., AS
AMENDED 80 O. L., P. 160.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, March 16, 1892.

Hon. B. S. Wydman, House of Representatives:

DEAR SIR:—You referred to me a letter from Mr. Warwick dated March 4, asking for a construction of section 1548 of the Revised Statutes, as amended March 23, 1891 (O. L. Vol. 80, p. 160).

The question is, whether the act of March 23, 1891, re-grades cities of the second class upon the basis of the census of 1890. This act is known as the Springfield municipal act. Unless it has changed the law, the grades of cities of the second class as well as those of the first, are

*Construction of Section 1548 R. S., as Amended 80 O. L.,
p. 160.*

fixed by their population according to the census of 1870 (the section governing this matter having been enacted as a part of the revision of 1879), subject, of course, to the right of a city to advance in grade, by a vote of its citizens, as its growth may warrant. Accordingly, the grades of the second class cities as fixed by the revision of 1880, are as follows:

First grade, population 30,500 to 31,500, Columbus; second grade, 20,000 to 30,500, Dayton; third grade, 10,000 to 20,000, Akron, Hamilton, Portsmouth, Sandusky, Springfield and Zanesville; fourth grade, Canton and others. Since 1880, Chillicothe, Steubenville and Youngstown have advanced by a vote of their citizens from the fourth grade to the third grade. The requirement of a vote of the citizens on a change of grade, is wise and just, for a change of grade means a change of officers, of the manner of selecting them, of the powers accorded them, of the limits of taxation—in short of the mode of government.

Did the legislature, irrespective of the wishes of the people, intend by the act of March 23, to change the grade and, consequently, the government of second class cities? Let the *whole act* show what the intention was. The act is one giving Springfield a new form of government. To do this without violating the provisions of the constitution prohibiting special acts conferring corporate powers, section 1548 was so amended so as to create a new grade, called "third grade (a)," based on the census of 1890, and so limited as to include Springfield alone. This was not *classification* quite so much as *specification*. An examination of the other sections of the Revised Statutes amended, will show they were amended only by the insertion of words making them applicable also to cities of the "third grade (a)." The act and every part of it looks to "third grade (a)" and to the "third grade (a)" alone. In point of fact, dropping for a moment the fiction of classification, the act is virtually a special one, which had in view only Springfield, and was passed without consideration, under suspension of the rules, upon the request of the people of that place.

*Construction of Section 1548 R. S., as Amended 80 O. L.,
p. 160.*

If the Legislature intended by amending section 1548, not only to create a new grade for Springfield's benefit, but also regrade all the second class cities of the State, according to the census of 1890, then it intended to lift Columbus, Dayton and Youngstown—all of which had by the last census more than 31,500 inhabitants—out of their grades and above all grades and leave them ungraded. It intended to create a first grade of the second class in which no city would be at present included, for no city by the last census had a population of from 30,500 to 31,500. It intended to advance Akron and Zanesville from the third grade, and Canton from the fourth grade, to the second grade, giving to these three cities alone the laws enacted for Dayton; and to advance East Liverpool, Findlay, Ironton, Lima, Mansfield, Massillon, Newark and Tiffin from the fourth to the third grade. Such startling changes in grades and laws, without choice or preparation on the part of the citizens, were not, it seems to me, contemplated or intended by the Legislature. If to regrade cities according to the last census was an object of this act, why did not the act regrade all the cities of the State, those of the first as well as those of the second class, thus securing uniformity, consistency and opportunity of regular advancement? And if the object was to regrade only cities of the second class according to the census of 1890, why, in the first place, looking to the actual facts, do not the grades defined have reference to the population of the cities affected, as ascertained by such census? And, in the next place, coming to the terms of the act, if the Legislature had in mind the census of 1890, when defining all the grades, why did it not use like language throughout? Why should the words, "Those which on the first day of July, 1890, had," etc., be used only when defining "third grade (a)?" And finally, if the first grade and the second grade are based upon and refer to the same census as "third grade (a)," namely, the census of 1890, we are confronted with the absurdity of the Legislature having thus fixed and established, by the same section, grades which overlap "third grade (a)," 28,000 to 33,000,

*In re Board of Managers of Ohio Penitentiary Paying for
Legal Service Out of Current Expense Fund.*

covering part of the second grade, 20,000 to 30,500, and all of the first grade, 30,500 to 31,500, and therefore, do not admit of progression.

These are some of the reasons for my view, that the Springfield act was not intended to, and did not, regrade second class cities, but, leaving the system and basis of the classification as before, simply created an unconnected, extraneous grade for the sole benefit of Springfield.

Very respectfully,

J. K. RICHARDS,
Attorney General.

IN RE BOARD OF MANAGERS OF OHIO PENITENTIARY PAYING FOR LEGAL SERVICE OUT OF CURRENT EXPENSE FUND.

The State of Ohio,
Office of the Attorney General,
Columbus, Ohio, March 23, 1892.

Hon. E. W. Poe, Auditor of State, Columbus, Ohio:

DEAR SIR:—In your letter of the 16th inst., you submit to me two questions:

First—You state that recently the managers of the Ohio Penitentiary allowed the firm of Nash & Lentz for legal services rendered the State in the case of the Patton Manufacturing Company vs. the managers and warden of the Ohio Penitentiary, \$275.00, payable out of the current expense fund of the institution, and asked whether such amount is payable as allowed.

This case was one brought during my predecessor's term, enjoining the wardens and managers from the use of certain shop room within the penitentiary, that belonged to the State and was needed to carry out certain prison contracts. It being impracticable for General Watson to give personal attention to the case, at his suggestion, Nash & Lentz were employed by the managers to dissolve the in-

In re Extradition of William S. Witman.

junction, so the managers might be free to use the shop room in question in carrying out pending and contemplated contracts for the employment of prisoners, thus producing revenue to the State. It seems to me a legal expense thus incurred is an expense to run the institution, in other words a current expense, and that the account should be paid as allowed.

Second—You state the same managers allowed each non-resident member \$75, payable out of the current expense fund, for expenses in attending an investigation of the board ordered by the last General Assembly, and ask whether such account is one for which you are authorized to draw your warrant.

I am of the opinion that it is not. The act of May 4, 1885, provides that such manager shall receive as compensation for his services the sum of \$10 a day for not to exceed 100 days in each year, which shall include all expenses. The managers of a public institution exercising a public trust, should expect and be ready at all times to explain and defend their official conduct before the General Assembly, who represent the people; and for this they should not get extra pay.

Very respectfully,

J. K. RICHARDS,
Attorney General.

IN RE EXTRADITION OF WILLIAM S. WHITMAN.

Office of the Attorney General,
Columbus, Ohio, March 28, 1892.

Hon. William McKinley, Jr., Governor of Ohio:

DEAR SIR:—You have referred to me the application of the governor of Virginia for the extradition of William S. Witman, a resident of Ironton, Lawrence County, indicted in Rockbridge County, Virginia, for the larceny of three promissory notes, and requested me to investigate and report with respect to the same.

In re Extradition of William S. Witman.

An application for the extradition of Mr. Witman on the same charge, was made to Governor Campbell and heard upon the facts by the governor and the then attorney general. Whereupon, General Watson, on November 14, 1891, advised the governor, that the evidence submitted failed to satisfy him that the offense charged in the indictment had been committed, and wholly failed to show that, if any offense had been committed, it had been committed within the State of Virginia. Wherefore, he recommended that the governor decline to deliver Mr. Witman to the Virginia officers.

On such hearing, I am informed an agent of the prosecuting company who was conversant with the facts, was present and presented the Virginia side of the case.

Upon this second application, no person conversant with the facts has presented himself in favor of the application. I have heard the sworn statements of Mr. W. S. Witman and Mr. A. C. Witman, supported by certain contracts, and other papers and documents.

From the evidence submitted, it appears, that on the 21st day of August, 1890, Mr. W. S. Witman entered into a contract with the Rockbridge Company to build and equip a foundry at Glasgow, Virginia, for a stipulated amount. Upon the completion of this contract, an adjustment between Mr. Witman and the company of the balance due him was had, and three notes aggregating over \$23,000.00, being the notes described in the indictment, were executed and delivered to him. These notes were secured by \$50,000.00 of bonds on the plant, which bonds by the terms of the notes, were to be held by the first National Bank of Ironton, and on default of payment sold, but only by the joint consent of both the maker and holder. This provision, requiring the consent of the Rockbridge Company for the sale of the bonds on default, being unsatisfactory to Mr. Witman, he returned the notes and collateral to the Rockbridge Company, which took them back and in

In re Extradition of William S. Witman.

exchange gave other notes with the usual provision authorizing the sale of the collateral by the holder on default. It was upon the transaction I have described, that the charge of larceny against Mr. Witman, is based.

After giving these notes as described, the Rockbridge Company set up a claim against Mr. Witman growing out of the contract, and subsequent thereto, Mr. Witman went to Rockbridge county. There, the officers of the company demanded of him the return of the notes and threatened if he did not sign an order which they had prepared, for the delivery of these notes by the First National Bank to their agent, they would have him arrested for larceny of the notes, or in other words, upon the same charge on which the indictment is based. An officer stood by with a warrant to enforce the threat. Under these circumstances Mr. Witman signed the order and was allowed to return to Ohio. But, in point of fact, the notes had already been transferred. In view of these facts, it is my opinion:

1. The offense of larceny, as charged in the indictment, was not committed.

2. If any offense was committed, it was not committed within the state of Virginia, but within the State of Ohio, where Mr. Witman is present and ready to answer under the law.

3. That this application is not made for the purpose of enforcing the criminal laws of Virginia, for Mr. Witman has, since the transaction, been within the reach of the officers of Rockbridge county, when they were conversant with the facts, but for the purpose of pressing a private claim.

I, therefore, recommend that you decline to honor the requisition in this case.

Very respectfully yours,

J. K. RICHARDS,

Attorney General.

*Construction of Section 2732 R. S., as Amended, 88 O. L.
341.*

CONSTRUCTION OF SECTION 2732 R. S., AS
AMENDED, 88 O. L., 341.

Office of the Attorney General,
Columbus, Ohio, March 29, 1892.

Hon. E. W. Poe, Auditor of State:

DEAR SIR:—You have referred to me, for my opinion, a communication from Mr. Richard Smith, of the Board of Review, of Cincinnati, requesting my views upon the proper construction of Section 2732, Revised Statutes, as amended by the act of April 23, 1891, (88 O. L., 341), popularly known as the Rawlings law.

This section (2742) provide how manufacturers shall list their property for taxation.

The amendment makes no change in the provision, that the manufacturer shall list at their fair cash value all engines and machinery, including all tools and implements, used or for use in his business. Such was the law before the amendment, and is the law now.

The change is in the mode of returning for taxation the value of the raw material, and the manufactured and partly manufactured articles.

Before the amendment, the manufacturer was required to list the average value, estimated according to the rule applied to merchants' stock, of all articles held for the purpose of being used in his manufacturing business, on hand during the year previous, or during the portion of such year he may have been engaged in business; in other words, the average value of all raw material before it had entered into the process of being manufactured. *Sebastian vs. Ohio Candle Co.*, 27 O. S., 459.

Manufactured or partly manufactured articles were not required to be returned for taxation unless they had been on hand one year or more before listing day.

The Rawlings law applies to the latter class of articles, partly or wholly manufactured articles, the same rule of

valuation, on the average system, applied by the former law to the raw material alone, thus requiring the manufacturer to return for taxation the average value of all raw material and all manufactured and partly manufactured articles on hand during the year previous to listing day, or on hand during the portion of such year he may have been engaged in business.

Omitting unnecessary words, the present law provides, that the manufacturer shall include in his statement the average value of all articles held for the purpose of being used in any process of manufacturing, and also of all articles at any time manufactured or changed in any way by him, which from time to time he shall have had on hand during the year next previous to the first of April annually, if so long he shall have been engaged in such manufacturing business, and if not, then during the time he shall have been so engaged. This average value is to be ascertained by taking the value of all of said property, that is, all the raw material, the partly manufactured and the completed articles, owned by the manufacturer on the last business day of each month he was engaged in business during the year, adding such monthly values together, and dividing the result by the number of months in business. The result will be the average value to be listed.

This appears to me to be plain, but an illustration may make it plainer. Suppose the average system discarded and the manufacturer required on listing day to return all his property for taxation. In addition to tools and machinery he would have to list the value of all untouched raw material, of all the raw material which had entered the manufacturing process, or in other words of all partly manufactured articles, and finally of all the finished products or manufactured articles. But to require all manufacturers to make such a return on any one day would hit some unfairly hard and let others go scot free, dependent on the sort of business and the needs of the trade. To reach and effect all alike, the average

*Disposition of Money Collected Under Section 251a, R. S.,
Not Paid Under Protest.*

system is adopted. Manufacturers are required to return for taxation all their property. There is no exemption; but as to their stock, from the time it comes into the industry as raw material, through all the stages of conversion, until it issues forth as finished product,—its value, the value of raw material of manufactured and partly manufactured articles, is to be ascertained by the average system as described.

Very respectfully,
J. K. RICHARDS,
Attorney General.

DISPOSITION OF MONEY COLLECTED UNDER
SEC. 251a, R. S., NOT PAID UNDER PROTEST.

Office of the Attorney General,
Columbus, Ohio, May 12, 1892.

*Hon. William Kirkby, Commissioner of Railroads and Tele-
graphs:*

DEAR SIR:—In your favor of the 11th inst., you state there was turned over to you by your predecessor, Hon. J. A. Norton, \$1,356.96, being fees collected by him under section 251a of the Revised Statutes, known as the "dollar-a-mile" act, but not paid under protest, which money you now have on deposit in a bank in this city, and you ask, in view of the fact that this law has been declared unconstitutional, whether you have the power to dispose of this money otherwise than by covering it into the state treasury, and whether you should cover it into the state treasury.

While these fees were collected under an unconstitutional law and hence were illegal exactions, still they were paid voluntarily, without protest, and under no compulsion

In Changing of Corporate Name by Seneca County Mutual Insurance Company to Home Insurance Company, Under Section 3238a, R. S.

on the part of the railroad companies. Other fees collected under this same act have been paid into the state treasury, and I am inclined to think that money thus paid voluntarily to an officer of the State, becomes the property of the State, which cannot be recovered back, and should be paid into the state treasury by you.

Very respectfully,

J. K. RICHARDS,
Attorney General.

IN CHANGING OF CORPORATE NAME BY SENECA COUNTY MUTUAL INSURANCE COMPANY TO HOME INSURANCE COMPANY, UNDER SECTION 3238a, R. S.

Office of the Attorney General,
Columbus, Ohio, April 8, 1892.

Hon. Daniel J. Ryan, Secretary of State:

DEAR SIR:—I have a communication from you stating that the Seneca County Mutual Insurance Company has presented for record in your department a certificate changing its name to "The Home Insurance Company"; and that it has done this presumably under the provisions of section 3238a of the Revised Statutes, and asking whether a company created by a special act as this company was in the year 1850, can avail itself of the provisions of section 3238a to change its name.

I am inclined to the view that a corporation created before the adoption of the present constitution may avail itself of any of the provisions of the general incorporation laws of the state at its pleasure subject to the consequences, that by taking action under the existing corporation laws, it shall be deemed to have consented to be controlled by them and

In Changing of Corporate Name by Seneca County Mutual Insurance Company to Home Insurance Company, Under Section 3238a, R. S.

to release the peculiar rights it may have had under its special charter. (Sec. 3234.)

Any change or amendment made in the articles of incorporation under section 3238a, whether in the name, the amount of capital stock or the purposes or objects of the incorporation, must of course, conform to the general or special provisions of the existing laws regulating the corporation of the particular character which seeks to make such amendment in its articles of incorporation. Insurance companies other than life, are required by section 3632 to submit through the secretary of state their articles of incorporation to the attorney general for examination and after his approval, the secretary of state may reject any name or title of any company applied for, when he deems the same similar to the one already appropriated or likely to mislead the public, and by the next section, 3633, the secretary of state is authorized to cause articles of incorporation of such insurance company to be deposited with the superintendent of insurance who may withhold from the company the certificate of authority if its name is so similar to the name of any other company as to mislead the public. In addition, section 3653 requires that every mutual company shall embody the word "mutual" in its title.

So far as the application in question is concerned, it seems to me that it is necessary for this company to retain the word "mutual" in its name. It cannot designate itself as the "Home Insurance Company." If "Home" is the proper name, it must be the "Home Mutual Insurance Company," and then the secretary of state and the superintendent of insurance have the right to decide whether the name "Home Mutual Fire Insurance Company" is one likely to mislead the public. Under these restrictions I am inclined to think that his insurance company may accept the provisions of existing laws and change its name by a proper certificate filed for such purpose.

Very respectfully yours,

J. K. RICHARDS,
Attorney General.

*Conditions Upon Which Associations Organized Under the
Laws of Another State Can Transact Business in This
State.*

CONDITIONS UPON WHICH ASSOCIATIONS OR-
GANIZED UNDER THE LAWS OF ANOTHER
STATE CAN TRANSACT BUSINESS IN THIS
STATE.

Office of the Attorney General,
Columbus, Ohio, May 12, 1892.

*Hon. W. H. Kinder, Superintendent of Insurance, Colum-
bus, Ohio:*

DEAR SIR:—Section 3630e, as amended March 31, 1891,
(88 O. L. 252) defines the conditions upon which associa-
tions organized under the laws of any other state may trans-
act the business of life and accident insurance on the as-
sessment plan in this State.

Among these conditions and limitations is the follow-
ing:

“Provided also, that such corporation, com-
pany or association in transacting business in this
State, shall be subject only to section 3630 of the
Revised Statutes, and sections supplementary
thereto.”

Section 3630c, to the provisions of which foreign as-
sessment company is thus made subject “in transacting busi-
ness in this state” reads as follows:

“No such corporation, company or association
issuing certificates or policies, or undertaking or
promising to pay members during life, any sum of
money or thing of value, or certificates, or policy
guaranteeing any fixed amount to be paid at death,
except such fixed amount or endowments shall be
conditioned upon the same being realized from the
assessment made on members to meet them, shall
be permitted to do business in this State, until they
shall comply with the laws regulating regular
mutual life insurance companies.”

In view of these provisions you have, in your communi-
cation of the 5th inst., requested my official opinion, whether
the limitation of section 3630c “applies to all policies issued

*Conditions Upon Which Associations Organized Under the
Laws of Another State Can Transact Business in This
State.*

by an association of another state, or whether it will be a sufficient compliance with said section if the policies issued by an association of another state for special use in Ohio, contain the condition required by said section 3630c."

Section 3630c is primarily, a regulation of assessment associations organized in Ohio, and provides, that the amount to be paid by such associations "shall be conditioned upon the same being realized from assessments made on members to meet them." Section 3630c provides, that the foreign assessment association "in transacting business in this state," shall be subject to this limitation applied to Ohio associations; but it does not provide, that in transacting business outside of this State, the foreign association shall be subject to this limitation. I am, therefore, of the opinion, that if the foreign assessment association "in transacting business in this State" inserts in all policies or certificates, issued to members in this State, the condition prescribed in section 3630c, namely, that the amount to be paid shall be realized from the assessments made on members to meet them, thus placing the foreign association and the Ohio association on equal terms in the transaction of business in this State, that the law will be complied with.

I am confirmed in this view by the fact that section 3630c further provides, that the foreign assessment association shall be authorized to transact business in this State to the restricted extent authorized by our law, the insurance being confined to the benefit of families and heirs of members, notwithstanding the fact that the law of the state under which it was organized may empower it to issue policies insuring lives on the assessment plan, without limitation. By this proviso, passed March 31, 1891, the Legislature let down the bars put up by section 3630, and supplementary sections, as construed by a line of Supreme Court decisions, against the admission of foreign assessment associations to do business in this State, and to the extent named, provided that the

Construction of an Act to Regulate Branding of Cheese in State of Ohio and to Prevent Fraud in its Manufacture and Sale.

business the association is to do in Ohio, and not the business it may do in other states, under the law of its creation, shall fix the terms of its admission into this State. Thus the limitation in Ohio, as to who may be beneficiaries need not apply outside of Ohio, and I take it, that the limitation as to the sources, from which the amount to pay losses on Ohio policies shall be realized, need not apply as to business in other states. The policy of the one provision confirms, it seems to me, the correctness of the other construction.

Very respectfully yours,

J. K. RICHARDS,
Attorney General.

CONSTRUCTION OF ACT TO REGULATE BRANDING OF CHEESE IN STATE OF OHIO AND TO PREVENT FRAUD IN ITS MANUFACTURE AND SALE.

Office of the Attorney General,
Columbus, Ohio, May 13, 1892.

Hon. F. B. McNeal, Dairy and Food Commissioner, Columbus, Ohio:

DEAR SIR:—You have requested my official opinion upon the following questions in respect of the proper construction of an act to regulate the branding of cheese in the State of Ohio, and to prevent fraud in its manufacture and sale, passed March 30, 1892:

I. Question. "Does this act require the branding of cheese according to the per cent. of butter fats contained in the milk from which the cheese is made, or according to the per cent. of butter fats contained in the cheese itself?"

Answer. I am of the opinion, that it is the per cent. of butter fats contained in the milk from which the cheese is made which determines the grade and brand of cheese under the act. If all the butter fats are present in the milk,

Construction of Act to Regulate Branding of Cheese in State of Ohio and to Prevent Fraud in Its Manufacture and Sale.

no portion having been removed, cheese made from it shall be stamped "Ohio Full Cream." This provision is perfectly plain. Then follow these words: All cheese manufactured as above required, from pure and wholesome milk, but from which a portion of the butter fats has been removed, shall, if *it* contains not less than 75 per centum of pure butter fats, be stamped "Ohio State Cheese." The pronoun "*it*" italicized, refers, it seems to me, to the noun "milk," and not to the noun "cheese." The wording of the sentence, the context of the section, and the fact that no cheese contains 75 per centum of pure butter fats, confirm this construction. The same interpretation should be applied to the succeeding definitions of grades of cheese.

2. Question. "Does the law require the branding of all cheese made in the State of Ohio, whether sold in or out of the state?"

Answer. A careful reading of the entire act leads me to answer this question in the affirmative. Section 4 provides "Any manufacturer of cheese who shall sell or dispose of any cheese without being stamped as required by this act" is subject to its penalties. This is equivalent to saying, that all cheese manufactured in Ohio must be stamped before being disposed of, it matters not where, whether in this State or outside of the State.

Very respectfully,

J. K. RICHARDS,
Attorney General.

As to Whether or Not Company for Profit Found for Treatment and Cure of Liquor, Morphine and Tobacco Habits Can Be Incorporated in This State.

AS TO WHETHER OR NOT COMPANY FOR PROFIT FOUND FOR TREATMENT AND CURE OF LIQUOR, MORPHINE AND TOBACCO HABITS CAN BE INCORPORATED IN THIS STATE.

Office of the Attorney General,
Columbus, Ohio, May 26, 1892.

Hon. C. L. Poorman, Secretary of State:

DEAR SIR:—You ask me in your communication of this date submitting the proposed articles of incorporation of the,
“Can a company, for profit, which is formed for the treatment and cure of the liquor, morphine and tobacco habits, and other forms of narcotic poison, be incorporated under the laws of this State?”

Section 3235, R. S., prohibits the formation of corporations for the purpose of carrying on professional business. While there may be room for difference of opinion, I do not feel warranted to overrule the opinion of my immediate predecessor, as well as the holding of yours, that the purpose of the company you describe, is the carrying on of professional business, the business of the profession of medicine in one of its many modes, and that, therefore, you will be justified in declining to file the articles of incorporation of such a company.

Very respectfully,
J. K. RICHARDS,
Attorney General.

In re Status of Certificates of Indebtedness to Be Issued by Board of Trustees of Ohio State University Under Authority of an Act of April 15, 1892—Manner of Computing Good Time of Prisoners Confined in Ohio Penitentiary.

IN RE STATUS OF CERTIFICATES OF INDEBTEDNESS TO BE ISSUED BY BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY UNDER AUTHORITY OF AN ACT OF APRIL 15, 1892.

Office of the Attorney General,
Columbus, Ohio, May 27, 1892.

Captain Alexis Cope, Secretary, Board of Trustees, Ohio State University:

MY DEAR SIR:—In response to your inquiry of this date respecting the status of the certificates of indebtedness to be issued by the Board of Trustees of the Ohio State University, under authority of the act of April 15, 1892, I beg to say, that, in my opinion, such obligations, being issued by the express authority of the General Assembly, in anticipation of state levies for the support of a state institution, out of which they are to be paid are not simply the obligations of the trustees of the university, or of the university itself, but have back of them the faith and credit of the State, whose revenues are impliedly pledged to their payment. The State cannot, with a due regard for its honor and credit, permit these obligations, the proceeds of which it has used, to go unpaid.

Very respectfully,

J. K. RICHARDS,
Attorney General.

MANNER OF COMPUTING GOOD TIME OF PRISONERS CONFINED IN OHIO PENITENTIARY.

Office of the Attorney General,
Columbus, Ohio, June 17, 1892.

To the Managers of the Ohio Penitentiary, Columbus, Ohio:

DEAR SIR:—In a communication received from your secretary, and dated the 13th inst., you request my written

Manner of Computing Good Time of Prisoners Confined in Ohio Penitentiary.

opinion as to the manner of computing good time of prisoners confined in the Ohio penitentiary, in view of the amendment made May 4, 1891, of the act of April 14, 1884; and desire to know, "Whether or not it is proper to give each prisoner in the prison May 4, 1891, the benefit of the new law and count good time from the date of his incarceration as per the act of May 4, 1891, or to figure the 1884 law, on any part of the term served, and if so, to give the proper manner of computing the same."

I have given the matter thus submitted to me careful consideration, and while I regret to be obliged to differ from the view taken by my predecessor, I have come to the conclusion that each convict who was confined in the prison at the time of the existing law, namely, May 4, 1891, or has since been confined or who may hereafter be confined, for a definite term other than life, is entitled to good time computed under the act of May 4, 1891, from the date of his incarceration; in other words, the deduction to be allowed for good conduct to prisoners confined in the penitentiary at or since the passage of the act of May 4, 1891, is to be computed from the beginning of the term of imprisonment, although such term may have commenced prior to the passage of the act in question. In my view the repeal of the act of April 14, 1884, took away from the managers the power to allow good time under that act, and since such repeal all good time must be computed under the existing law and computed from the date when the term of imprisonment began, although such term may have commenced prior to May 4, 1891.

Very respectfully,

J. K. RICHARDS,

Attorney General.

*Terms Upon Which Foreign Insurance Companies May Do
Business in This State.*

TERMS UPON WHICH FOREIGN INSURANCE
COMPANIES MAY DO BUSINESS IN THIS
STATE.

Office of the Attorney General,
Columbus, Ohio, June 20, 1892.

Hon. W. H. Kinder, Superintendent of Insurance:

DEAR SIR:—In your favor of the 25th ultimo, you called my attention to the following portion of section 3604, relating to the terms upon which foreign insurance companies may do business in this State: "Nor shall any such company take risks or transact any business of insurance in this state, unless possessed of the amount of actual capital required of similar companies organized in this state under the provisions of this chapter, nor unless the entire capital stock of the company is fully paid up, and invested as required by the laws of the state where organized;" and requested my opinion upon the following points:

First—"Does said section 3604 require the *entire* capital stock of a company of another state to be *fully* paid up?"

Second—"Will the statute be fully met if the *entire* capital stock of such company is paid up in accordance with the laws of the State of its organization,"

Third—"Will said provision be fully met if \$100,000 of its capital stock is paid up?"

The doubt which suggests your inquiry, arises from the wording of the second and third clauses of the portion of section 3604 quoted, namely, "Nor unless the entire capital stock of the company is fully paid up, and invested as required by the laws of the state where organized." It is insisted by some, that this means "Nor unless the capital stock of the company is paid up and invested as required by the laws of the state where organized." But to reach this construction, it is necessary to ignore not only the comma after the words "paid up," but the word "entire" before capital stock, and the word "fully" before "paid up." My own view

*Construction of Certain Provisions of an Act Regulating
Building and Loan Associations, Passed May 1, 1891.*

is, that those clauses should be read separately. They require:

1. That the *entire* capital stock of a foreign company shall be *fully* paid up; and,
2. Invested as required by the laws of the state where organized.

This provision requiring the entire capital stock of a foreign company to be fully paid up, is but the same provision applicable by section 3591 to Ohio companies, whose "whole capital is required to be paid in."

The answers to your second and third queries follow as a matter of course, from what I have said.

Very respectfully,

J. K. RICHARDS,

Attorney General.

CONSTRUCTION OF CERTAIN PROVISIONS OF
AN ACT REGULATING BUILDING AND LOAN
ASSOCIATIONS, PASSED MAY 1, 1891.

Office of the Attorney General,
Columbus, Ohio, June 20, 1892.

Hon. W. H. Kinder, Inspector of Building and Loan Associations:

DEAR SIR:—In response to your favor of the 8th inst., requesting my opinion upon certain provisions of the act of May 1, 1891, regulating building and loan associations, I beg to say:

1. In view of the provision of section 6 of the act referred to, that "all expenses of such association shall be paid out of the earnings only," I am of the opinion, that no building and loan association can lawfully make an assessment upon its stock for the specific purpose of paying expenses.

2. Section 3 provides: "Any member, however, who withdraws his entire stock or whose stock has matured, shall be entitled to receive all dues paid in and dividends declared,

As to Chief Inspector of Workshops and Factories Having Supervisory Power Over All Shops and Factories in State Not Excepting Those in Cincinnati and Cleveland.

less all fines or other assessments, and less a pro rata share of all losses if any have occurred," which, I take it, prohibits any building and loan association from prescribing that a withdrawing member shall receive only a certain per centage of dividends declared, the balance being assessed against him as a withdrawal fee. He is entitled to receive all dues paid in and dividends declared, less the specified deductions.

Very respectfully,

J. K. RICHARDS,

Attorney General.

AS TO CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES HAVING SUPERVISORY POWER OVER ALL SHOPS AND FACTORIES IN STATE, NOT EXCEPTING THOSE IN CINCINNATI AND CLEVELAND.

Office of the Attorney General,
Columbus, Ohio, June 21, 1891.

Hon. Wm. Z. McDonald, Chief Inspector of Workshops and Factories:

DEAR SIR:—You have requested my opinion as to whether, under the statutes regulating your department, you have supervisory power over all the shops and factories in this State, not excepting those in the cities of Cincinnati and Cleveland. You state that many complaints come to you of a lack of proper fire escapes in the shops and factories of the cities named, but that you are kept from taking any action in response thereto, by an opinion of my predecessor, that the act creating supervising engineers for Cleveland and Cincinnati repealed by implication, your authority to enforce the erection of fire escapes in the factories of these cities.

The original act creating your department, passed April 29, 1885, was an act, "for the purpose of facilitating an ef-

As to Chief Inspector of Workshops and Factories Having Supervisory Power Over All Shops and Factories in State Not Excepting Those in Cincinnati and Cleveland.

efficient and thorough inspection of workshops and factories *throughout the State of Ohio.*" The State was divided into districts, in which the counties of Cuyahoga and Hamilton were included. It was made the duty of yourself and subordinates to visit *all* shops and factories in the State, and among other things examine as to means of exit in case of fire or other disaster. You were given right of entry not only into all the shops and factories in the State, but into all public institutions having shops and factories. Should you find the ventilation or sanitary arrangements injurious to the health of employes, or the machinery so located as to be dangerous, or the means of exit in case of fire or other disaster insufficient, it was made your duty to notify the owners to make the proper alterations and require them to do so. The State imposed this duty upon your department for the benefit of men, women and children employed in the factories of the State, wherever operated.

The supervising engineers in Cincinnati and Cleveland are local officers, selected by the local authorities, who, among powers, have power to require the erection of fire escapes in certain cases. The act creating them does not exempt the shops and factories in these cities from your supervision, unless the repealing clause, "all acts or parts of acts inconsistent or in conflict with this act be and the same are hereby repealed," has that effect.

Repeals by implication are not favored. The repugnancy between two statutes must be clear before the second will be held to have repealed the first. If the statutes can be reconciled, if both can operate, both will be taken as operating. After careful consideration, I have failed to perceive that the exercise of your authority and that of the city officials named, in respect of fire escapes, are incompatible, so incompatible as to oust your department of power clearly given it and vest such power exclusively in the local authorities. It is not an unusual thing for both state and local au-

Construction of Certain Points in Mine Inspector's Law.

thorities to have power to compel certain things to be done. The local authorities act for local interests, the State in the interest of the whole people. In the case in question, if the city officials compel the erection of proper fire escapes, there will be no need for you to act; but if they do not, then in the interest of the whole State, and for the protection of those whose health and life is confided in a manner to your keeping, you should have the power to act, and should act.

Very respectfully,

J. K. RICHARDS,
Attorney General.

CONSTRUCTION OF CERTAIN POINTS IN MINE
INSPECTOR'S LAW.

Office of the Attorney General,
Columbus, Ohio, June 21, 1892.

Hon. R. M. Haseltine, Chief Inspector of Mines:

DEAR SIR:—In reply to your favor of the 3d inst., requesting my opinion upon certain points in connection with your department, I beg to say:

1. The statute (Sec. 297) fails to state how long a shaft mine with only one outlet can be worked with twenty men. It states that such a mine can be worked with not more than twenty men while being worked for the purpose of making communication between two outlets. I apprehend it is for the inspector to say, whether, in view of all the circumstances, the mine is being operated for the purpose of opening an additional outlet, or communicating with such additional outlet, and if so, whether more than a reasonable time is being consumed for that purpose.

2. In response to your query, whether a shaft mine can continue operations with twenty men until all doubt is removed as to whether the quality and quantity of the coal is such as to justify the sinking of a second opening, I take the view that a reasonable time and reasonable opportunity should be allowed for such investigation. It is a matter of

With Reference to Scioto River.

judgment and discretion. On the one hand the operator should not be required to sink a second shaft until a fair opportunity is had for determining whether the mine can be operated; on the other hand, the operator should not be permitted to work the mine with one outlet only for the mere purpose of taking out coal under the pretense of making such investigation.

3. You ask what number of men can be employed in a shaft mine, engaged in drawing pillars after the second opening has been destroyed preparatory to abandonment. The statute plainly says twenty persons.

Very respectfully,

J. K. RICHARDS,

Attorney General.

WITH REFERENCE TO SCIOTO RIVER.

Office of the Attorney General,

Columbus, Ohio, June 25, 1892.

To the Board of Public Works, Columbus, Ohio:

GENTLEMEN:—At the request of Hon. Charles E. Groce, one of your members, your assistant engineer in a recent communication, requested my opinion on the following question:

“In the construction of the Ohio canal, the State of Ohio appropriated the Scioto River where needed as a feeder to said canal, and erected dams in order to raise the surface of the water in the river to a sufficient elevation to turn into canal such quantity of water as might be needed. One dam across said river and for said purpose, was constructed about two miles below Circleville. About 1844, the State raised this dam about eighteen inches. A Mr. Foreman (the owner of a flouring mill on Darby Creek, a tributary of and entering said Scioto River a short distance above this dam) applied in the Pickaway County court and was allowed an injunction preventing the State from again raising the dam above the elevation as then

Payment of the National Guard.

existed. Since then, annually, during the seasons of low water, in order to obtain a sufficient quantity of water for the navigation of the canal, the State has temporarily placed planks or boards on the top of the dam in order to turn the water into the canal and thus prevent the limited amount of water furnished by the river from escaping. To this action on the part of the State, the present owners of the mill above referred to, object unless paid by the State for this privilege."

"Query: Has not the State the right to temporarily place plank or boards on top of said dam, of such height as would simply give the canal a sufficient supply as may be necessary, if the plank were not higher than the surface of the water would be at an ordinary stage?"

In my opinion, the State has such right.

Very respectfully yours;

J. K. RICHARDS,

Attorney General.

PAYMENT OF THE NATIONAL GUARD.

The State of Ohio,
Office of Attorney General,
Columbus, Ohio, June 25, 1892.

Hon. E. J. Pocock, Adjutant General of Ohio:

DEAR SIR:—You have referred to me the bill of A. J. Crilley, sheriff of Licking County, Ohio, for \$50.50, for one hundred and one meals at fifty cents a meal, furnished to the members of the Ohio National Guard, called out by him April 12, 1892, to suppress a riot and preserve the peace. Attached to this bill is the written opinion of the Prosecuting Attorney of Licking County, addressed to the commissioners, stating that they had no authority to pay it, but that the claim was properly payable by the State.

The statute, section 3081, provides, that each enlisted man of the National Guard when in actual service in case of riot, shall receive two dollars for each day's service per-

*In re Employing of Person to Care for Crops on Ohio
National Guard Encampment Grounds in Licking Co.*

formed, together with the necessary transportation, commissary and quartermaster stores and medical supplies; and section 3083 provides, that the payment of the services per day shall be made on the pay roll upon a warrant of the adjutant general, approved by the governor, out of the moneys in the treasury appropriated for that purpose. It also provides, that "the necessary commissary and quartermaster stores for the troops in actual service shall be contracted for by the proper department officers by direction of the commander-in-chief, and paid in like manner."

It will be observed there is no provision in the statute for the payment by the State of a bill of this character. Commissary and quartermaster stores are to be contracted for by the proper department officers, by direction of the commander-in-chief, and paid in pursuance of such contract. It does not appear that these meals were contracted for by the proper officers of the National Guard or that they were not furnished gratuitously by the sheriff or by the county, to the members of this company who were citizens of the town or county where the trouble occurred.

Very respectfully,
J. K. RICHARDS,
Attorney General.

IN RE EMPLOYING OF PERSON TO CARE FOR
CROPS ON OHIO NATIONAL GUARD EN-
CAMPMENT GROUNDS IN LICKING COUNTY.

Attorney General's Office,
Columbus, Ohio, June 25, 1892.

Hon. William McKinley, Jr., Governor of Ohio:

DEAR SIR:—You have referred to me a communication from the adjutant general, stating, that during the latter part of 1891, Licking County deeded to the State 125 or more acres of land to be used for the encampment grounds for the Ohio National Guard; that crops now growing on said land and part will soon be ready for harvest; that he believes it

*As to Whether or Not Manufacturer of Oleomargarine May
be Prosecuted for not Selling Same to Dairy and Food
Commissioner When Proper Price is Tendered Such
Manufacturer, Etc.*

is necessary to have some one named as temporary custodian or agent to see that the crops are properly cared for and that the proceeds are used for the improvement of the land for the purpose it was so generously donated by the taxpayers of Licking County.

You have referred this communication to me, asking my advice as to what should be done. It is my opinion, that in view of the fact, that under the law, the adjutant general, subject to your control, has charge of the military department of the State, with the custody and care of the property belonging thereto, that he should employ, as he suggests, a person to take charge of the land, care for the crops, and turn over to him their proceeds, which should be kept in a separate fund to await further orders respecting their disposition.

Very respectfully,

J. K. RICHARDS,
Attorney General.

AS TO WHETHER OR NOT MANUFACTURER OF
OLEOMARGARINE MAY BE PROSECUTED
FOR NOT SELLING SAME TO DAIRY AND
FOOD COMMISSIONER, WHEN PROPER
PRICE IS TENDERED SUCH MANUFACTUR-
ER, ETC.

Attorney General's Office,
Columbus, Ohio, June 27, 1892.

Hon. F. B. McNeal, Dairy and Food Commissioner:

DEAR SIR:—You have submitted to me certain questions which I shall answer in their order.

Question I. "When the manufacturer of oleomargarine refuses to sell a sample sufficient for analysis to the dairy and food commissioner, when the price thereof is tendered him, can he be prosecuted for such refusal, under sections 4 and 5 of the pure food law, passed March 20, 1884?"

*As to Whether or Not Manufacturer of Oleomargarine May
be Prosecuted for not Selling Same to Dairy and Food
Commissioner When Proper Price is Tendered Such
Manufacturer, Etc.*

Answer. I am inclined to think he may. The act in question is designated to provide against the adulteration of food and drugs. By section 2, it is provided, that "the term 'food' as used herein, shall include all articles used for food or drink by man, whether simple, mixed or compound." By section 3, it is provided, that in certain specified instances, food shall be deemed to be adulterated. Among these instances is the following:

"(6). If it (the article of food) is colored, coated, polished or powdered whereby damage or inferiority is concealed, or if, by any means, it is made to appear better or of greater value than it really is."

Section 4 provides, that every person manufacturing, offering or exposing for sale any article of food included in the provisions of this act, shall furnish to any person interested or demanding the same, a sample for analysis. It is evidently not intended to require that the adulteration of the food shall be proved before the right to a sample for analysis accrues to the interested person demanding the same. If the adulteration were proved within the meaning of this act, then there would be no need for a sample for analysis. The object of requiring a sample to be furnished is, that anyone interested and suspecting the character of the food, may have the opportunity of testing whether it is adulterated or not. The dairy and food commissioner, of all other persons, is the one interested in this respect. In my view, any article of food which he suspects to be adulterated, he has the right to demand and receive a sample of for analysis. Oleomargarine is a recognized article of food. Although sold as oleomargarine, he may have reason to believe that under clause 6 it was adulterated by the use of some means making it appear better or of greater value than it really is. Then he has the right to demand and receive a sample to test the question.

As to Whether or Not Manufacturer of Oleomargarine May be Prosecuted for not Selling Same to Dairy and Food Commissioner When Proper Price is Tendered Such Manufacturer, etc.

Question 2. "Section 3 of the act of May 8, 1886, creating the office of dairy and food commissioner, authorizes the commissioner or any assistant to enter any factory, store or other place where they have reason to believe that food or drink is made or sold, and to examine the books and to open any package containing or supposed to contain any article of food or drink, and to examine or cause to be examined, and analyze the contents thereof. What means has the commissioner to enforce the authority thus conferred?"

Answer. The means to enforce the authority thus conferred are, it seems to me, given by the act to provide against the adulteration of food and drugs, whose provisions I have already explained. This section of the act creating the office of dairy and food commissioner, urges the correctness of the construction already placed on the act to prevent adulteration.

Question 3. "The act passed April 14, 1886, makes it unlawful for anyone knowingly to offer for sale any vinegar found upon proper test to contain any preparation of lead, copper, sulphuric acid, etc. How is a conviction to be had under this act in any ordinary case?"

Answer. If there is a common test which all sellers of vinegar can readily apply, and if they were notified by the commissioner to test their vinegar and fail to do so, then they might be held to knowingly offer for sale or have in their possession such adulterated vinegar. Or, of course, in any other way, by information from the commissioner or his assistants, or otherwise, notice is brought to them that they are probably selling adulterated vinegar and they persist in doing so, they might be convicted under the act. Of course, under this section a man could not be convicted for having in his possession adulterated vinegar which he had no reason to believe was adulterated, but on the contrary, in good faith, believed was free from the impurities named.

Very respectfully,

J. K. RICHARDS. *Attorney General*

Costs in Cases Under Compulsory Education Law, Where Child is Found to be a Juvenile Disorderly Person and Sent to Boys' Industrial Home, Should be Paid by County Commissioners.

COSTS IN CASES UNDER COMPULSORY EDUCATION LAW, WHERE CHILD IS FOUND TO BE A JUVENILE DISORDERLY PERSON AND SENT TO BOYS' INDUSTRIAL HOME, SHOULD BE PAID BY COUNTY COMMISSIONERS.

Attorney General's Office,
Columbus, Ohio, June 29, 1892.

Professor R. H. Morrison, Superintendent of Schools, Cardington, Ohio:

MY DEAR SIR:—The communication of prosecuting attorney Berry having been referred by me to State Commissioner of Common Schools, Corson, has never been returned to this department, so I could answer it. It is my opinion, however, that the costs in cases under the compulsory education law, where a child is found to be a juvenile disorderly person and sent to the Boys' Industrial School, or the Girls' Industrial Home, should be paid by the county commissioners under the provisions of section 769, which says: "The expenses incurred in the transportation of a youth to the Boys' Industrial School, shall be paid by the county from which he is committed, etc., and the costs in any case shall be repaid in like manner upon the certificate of the proper officer of the court," etc. I can find no provision under the statute for the payment by boards of education, of such costs and expenses.

Very respectfully,
J. K. RICHARDS,
Attorney General.

In re Disposition of Fines, Growing Out of Dairy and Food Prosecutions.

IN RE DISPOSITION OF FINES, GROWING OUT
OF DAIRY AND FOOD PROSECUTIONS.

Office of the Attorney General,
Columbus, Ohio, August 16, 1892.

Doctor F. M. McNeal, Dairy and Food Commissioner, Columbus, Ohio:

DEAR SIR:—In your favor of this date, you submit to me the following question: “The amended act to create the office of dairy and food commissioner, etc., passed April 16, 1892, provides, that all fines, shall be paid by the court to the commissioner and by him paid to the state treasurer and credited to a fund appropriated for the use of the commissioner.”

Question—“Where a magistrate holds a fine assessed April 22, 1892, wherein complaint had been entered April 11, 1892, is the court required to pay the proceeds of said fine to the dairy and food commissioner or to the state treasurer?”

The act of April 16, 1892, referred to by you, provides: “All fines assessed and collected under prosecutions begun or caused to be begun by the commissioner, shall be paid by the court to the commissioner and by him paid into the state treasury, and be credited to a fund hereby appropriated for the use of the commissioner.”

It will be observed, that the fines to be paid by the court to the commissioner, are all fines assessed and collected under prosecutions *begun or caused to be begun* by the commissioner. The word “begun” is definite. It may refer to the prosecutions begun before the passage of the act or begun after the passage of the act. If the Legislature had intended to restrict the course of the disposition referred to, to fines collected under prosecutions begun after the passage of the act, could it not have said so in plain terms? In my opinion, the Legislature by this provision, intended that all fines which might be collected after the passage of the act,

*Money of State in Hands of One of Its Disbursing Officers
is Not Subject to Process of Garnishment for Debt of
Employe of State.*

whether the prosecutions were instituted before or after its passage, should be paid to the commissioner. I find no constitutional objection to this construction of the law. The statute is purely remedial, relating to the disposition of moneys belonging to the state.

Very respectfully,
J. K. RICHARDS,
Attorney General.

MONEY OF STATE IN HANDS OF ONE OF ITS
DISBURSING OFFICERS IS NOT SUBJECT TO
PROCESS OF GARNISHMENT FOR DEBT OF
EMPLOYEE OF STATE.

Office of the Attorney General,
Columbus, Ohio; August 17, 1892.

*A. E. Parrish, Esq., Financial Officer, Cleveland Asylum for
Insane, Cleveland, Ohio:*

MY DEAR SIR:—In response to your favor of the 16th inst., I beg to say I am of the opinion, that money of the State in the hands of one of its disbursing officers, is not subject to process of garnishment for the debt of an employe of the State. I beg to refer you to the Tenth Edition of Swan's Treatise, p. 405, foot note; Howard, U. S. p. 20, and Mechem on Public Officers, Sec. 876.

A similar question coming from the Ohio Soldiers' and Sailors' Home at Sandusky, was passed upon by my predecessor, General Watson, in the way I have indicated.

Very respectfully,
J. K. RICHARDS,
Attorney General.

*In re Extradition of Person From Canada for Crime of Rape
—Service of Militiamen on Juries; Abolishment of
Struck Juries.*

IN RE EXTRADITION OF PERSON FROM CANADA
FOR CRIME OF RAPE.

Office of the Attorney General,
Columbus, Ohio, August 17, 1892.

Mr. J. Q. Files, Prosecuting Attorney, Etc., Wauseon, Ohio:

DEAR SIR:—On my return yesterday after an absence of some weeks, I found your favor of the 1st inst., asking whether a person can be extradited from Canada for the crime of rape. Under Art. 1 of the extradition convention between this country and the United Kingdom, concluded July 12, 1889, and ratified March 11, 1890, the provisions of the tenth article of the treaty of 1842, are made applicable, among other additional crimes, to that of rape. You will find a copy of this treaty in Moore on Extradition, page 1097.

Very respectfully,

J. K. RICHARDS,
Attorney General.

SERVICE OF MILITIAMEN ON JURIES; ABOLISH-
MENT OF STRUCK JURIES.

Office of the Attorney General,
Columbus, Ohio, August 19, 1892.

General E. J. Pocock, Adjutant General of Ohio:

DEAR SIR:—You have referred to me a communication dated July 18, from Captain Stearns, Company "D," Fifth Infantry.

In response, I beg to say, that I take it, the effect of the act of May 4, 1891 (88 O. L. 683) is to abolish struck juries in Cuyahoga County. Of course, if there are no struck juries in Cuyahoga County, no one, whether a member of a military company or not, will be obliged to serve on struck juries in that county.

I doubt whether under section 3055, a company located in Cuyahoga County, would have the right to accept contributing members from other counties and certify such contributing members to the clerk of the court in such county,

*Mayor Member of Board of Health—Institution for Blind;
Pupils May Remain No Longer Than Authorized by Law.*

of jurors. Section 3055 empowers such certification only to the clerk of the court of the county in which the company or organization is located.

Very respectfully,

J. K. RICHARDS,

Attorney General.

MAYOR MEMBER OF BOARD OF HEALTH.

Office of the Attorney General,

Columbus, Ohio, August 24, 1892.

*Dr. C. Probst, Secretary, State Board of Health, Columbus,
Ohio:*

DEAR SIR:—In response to your favor of the 20th inst., I beg to say, that in my opinion the mayor is a member of the board of health, provided by section 2113, and is entitled to a vote upon all questions coming before such board. The statute says explicitly, "said board shall be composed of the mayor, who shall be president by virtue of his office, and six members to be appointed by the council," etc.

Very respectfully,

J. K. RICHARDS,

Attorney General.

INSTITUTION FOR BLIND; PUPILS MAY REMAIN
NO LONGER THAN AUTHORIZED BY LAW.

Office of the Attorney General,

Columbus, Ohio, August 24, 1892.

*Dr. H. P. Fricker, Ohio Institution for Blind, Columbus,
Ohio:*

DEAR SIR:—In your favor of the 22d inst., you present to me the following case:

A pupil was admitted to your institution September 14, 1881, who had been born May 1, 1870. This pupil remained at the institution continuously, with the exception of two or

*Institution for Blind; Pupils May Remain no Longer Than
Authorized by Law.*

three terms, when absent on account of sickness, until of age, which occurred May 1, 1891. The pupil was then given an additional year under section 667, and now asks to be permitted to remain at the institution for a period to cover the time absent before becoming of age. The question is: Can the trustees accede to this request?

I regret to say, that I am constrained to think that the statute does not authorize the trustees to permit this pupil to remain longer at the institution. Section 666 says: "Pupils admitted under the age of fourteen years may remain until the age of twenty-one years." This provision applies to the pupil in question. Section 667 says: "Persons over twenty-one years of age may be received for one year for the purpose of learning any trade or employment taught in the mechanical department," etc. This extension of time has been taken advantage of. I can find no other provision of the law warranting a grant of further time at the institution. The portion of section 666 quoted does not provide that pupils admitted under the age of fourteen years may remain for a specified number of years, as is the case with pupils admitted between the ages of fourteen and twenty-one. The latter class are entitled to remain for a period of seven years, but the first class only until the age of twenty-one years, and that age this pupil has reached.

Very respectfully,

J. K. RICHARDS,

Attorney General.

Articles of Incorporation; Purpose Must be Specifically Stated.

ARTICLES OF INCORPORATION ; PURPOSE MUST
BE SPECIFICALLY STATED.

Office of the Attorney General,
Columbus, Ohio, August 26, 1892.

Hon. C. L. Poorman, Secretary of State:

DEAR SIR:—I return herewith the articles of incorporation of the Fraternal Beneficial Association, and of the order of Associated Clubs of North America. I suppose the purpose of the articles of the Fraternal Beneficial Association is to form a company or association for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the family or heirs of the deceased members of such company or association. Such being the case, the purpose should be so stated in the articles of incorporation. The purpose stated in these articles is: "To provide a fund the beneficiaries thereof and for the widows and orphans of its members." This purpose is ambiguous and not in accordance with the provisions of the statute regulating this class of corporations.

As to the articles of incorporation of the Order of Associated Clubs of North America, it would appear that the intention was also to form an association under section 3630, for the mutual protection and relief of its members and for the payment of stipulated sums of money to the family or heirs of the deceased members of such company. It is provided by the statute, that such an association may receive money either by voluntary donation or contribution or collect the same by assessment on its members, etc. Yet, in these articles of incorporation, there is no clear statement of the purpose of the association. If the desire is such as I suggest, it is not difficult to clearly state the objects of the proposed organization.

Very respectfully,
J. K. RICHARDS,
Attorney General.

Duty of Canal Commission in re Disputed Land in "Radabaugh Survey" of Mercer County Reservoir.

DUTY OF CANAL COMMISSION IN RE DISPUTED
LAND IN "RADABAUGH SURVEY" OF MER-
CER COUNTY RESERVOIR.

Office of the Attorney General,
Columbus, Ohio, September 2, 1892.

To the Canal Commission of Ohio, Columbus:

DEAR SIRS:—In a communication of this date, you call my attention to certain land lying along the north side and included within certain surveys of the Mercer County Reservoir, which is claimed by a Mr. Moore and a Mr. Gordon. Your more specific inquiry is directed to land claimed by those persons, which lies between what is known as the "Conover Survey" of this reservoir, made in 1841, and what is known as the "Radabaugh Survey," made in 1889, and you ask what the duty of the commission is with regard to such disputed land.

It is my understanding that the courts before whom the question has been brought, have decided, that all land included within the Conover survey of this reservoir, was appropriated by and is the property of the State. Now, since such land is claimed by private individuals, I take it, that the duty of the commission under the acts creating it, is to investigate the facts bearing upon the ownership of the land in dispute, and if they find such land to belong to the State, make a finding to that effect; and thereafter to lease or sell such land in accordance with the provisions of the statute.

Very respectfully,
J. K. RICHARDS,
Attorney General.

Fees of Prosecuting Attorneys Where State Fails.

FEES OF PROSECUTING ATTORNEYS WHERE
STATE FAILS.

Office of the Attorney General,
Columbus, Ohio, September 9, 1892.

*Mr. J. W. Higgins, Prosecuting Attorney, Etc., Jackson,
Ohio:*

DEAR SIR:—Pressing official duties have prevented an earlier reply to yours of the 31st ultimo. I cannot give you an official opinion on the questions you submit, but since you ask for my opinion "official or otherwise," I take up the points in the order in which you submit them:

1. I apprehend that the commission allowed the prosecuting attorney by section 1298, is on moneys collected by them in criminal cases, and does not extend to fines paid into the county treasury by magistrates, mayors, etc.

2. The failure in felonies referred to in section 1308, which authorize the payment of fees of witnesses, is, in my judgment, a failure of the prosecution at whatever stage it may occur. A prosecution once begun either succeeds or fails, and it fails if it does not succeed—that is, it fails if it does not result in a conviction.

Section 1309 provides, for an allowance to certain officers in lieu of fees in causes of felonies wherein the state fails at any stage of the prosecution, and in misdemeanors wherein the defendant proves insolvent; that is, I take it, where, after a conviction, the costs cannot be collected from the defendant. There is, as you suggest, an apparent inconsistency between this section and section 1311, section 1309 apparently limiting the allowance in misdemeanors, to cases where, after a conviction, there is a failure to collect the costs from the defendant, while section 1311 clearly includes cases of misdemeanors where the magistrate has exercised due care in taking security from the prosecuting witness and yet fails to collect the costs. By this section, misdemeanors in which the magistrate has exercised due care in taking security for costs and the State fails to con-

*Right of Governor to Dispense With Statutory Provisions
Regulating Granting of Pardons*

vict, are added to the class of causes in which an allowance may be made by section 1309. As to the stage of the prosecution at which a failure in such misdemeanors must occur to entitle the magistrate to an allowance, it occurs to me that whatever failure would authorize the collection of costs from the prosecuting witness who had given security for the same, will authorize the allowance by the commissioners in case the costs cannot be collected, after the magistrate has exercised the care in taking security required by the statute.

There are a number of opinions given by my predecessors at a time when they were authorized to give official advice upon such matters, which, while they do not cover all the points you have submitted, sustain the general line of interpretation of these sections which I have adopted. I quite agree with you, that these sections of the statute are to a degree, inconsistent, and, therefore, not to me susceptible of a perfectly clear and satisfactory interpretation.

Very respectfully,

J. K. RICHARDS,
Attorney General.

RIGHT OF GOVERNOR TO DISPENSE WITH
STATUTORY PROVISIONS REGULATING
GRANTING OF PARDONS.

Office of the Attorney General,
Columbus, Ohio, September 12, 1892.

Hon. William McKinley, Jr., Governor of Ohio:

MY DEAR SIR:—I am of the opinion, that under section 88 of the Revised Statutes, when the warden and a majority of the directors of the penitentiary unite in the recommendation for a pardon of a convict, you have the power to dispense with the statutory provisions regulating the granting of pardons. The provision is, virtually, that the warden shall unite with the board of managers in recommending

Woman Cannot be Indicted Under Section 6815, R. S., for Producing an Abortion Upon Herself; May be Guilty of Murder or Manslaughter if Child Dies After Being Born Alive.

such pardon, and a majority of the managers constitute the board.

I return the paper of recommendation,

Very respectfully,

J. K. RICHARDS,

Attorney General.

WOMAN CANNOT BE INDICTED UNDER SECTION 6815, R. S., FOR PRODUCING AN ABORTION UPON HERSELF; MAY BE GUILTY OF MURDER OR MANSLAUGHTER IF CHILD DIES AFTER BEING BORN ALIVE.

Office of the Attorney General,
Columbus, Ohio, September 10, 1892.

C. C. Bow, Esq., Prosecuting Attorney, Etc., Canton, Ohio:

MY DEAR SIR:—The novelty of the questions you submit in your favor of the 25th ultimo, and the little time my other duties have left me for their examination and consideration, is the cause of the delay in answering them.

1. I am inclined to the view, that a woman cannot be indicted under section 6815, R. S., for producing an abortion upon herself. The wording of the section itself, and the wording of the acts, which, preceding it in the history of the criminal law of this state, defined a similar crime, leads me to conclude, that the person procuring or producing an abortion who is punishable by the law, is a person other than the woman on whom the abortion is produced. I have not been able to find any case in which a woman has been indicted and convicted for procuring an abortion upon herself. There are two Iowa cases, *Abrams vs. Foshee*, 3 Io. 275, and *Hatfield vs. Gano*, 15 Io. 177, which hold that, under Iowa statutes,

Woman Cannot be Indicted Under Section 6815, R. S., for Producing an Abortion Upon Herself; May be Guilty of Murder or Manslaughter if Child Dies After Being Born Alive.

similar in wording to our own, the procuring of an abortion by a married woman upon herself was not a crime. In 1 Bish. Crim. Pro., sec. 1174, this language is used: "Of this class is a woman on whom an abortion was performed at her own request. Assuming her not to be indictable, still, on an indictment against the guilty party, her testimony is open to special observation."

In a note to *Rex vs. Enoch*, 5 C. & P., 541, it is stated:

"The statute (9 Geo. 4, C. 31, S. 13) makes it a capital offense to procure a miscarriage of a woman quick with child, and a transportable offense to procure the miscarriage of any woman not quick with child; and the same statute makes the concealment of the birth of a dead child, a misdemeanor; but it seems that the first and second of these offenses must be committed by some person *other than the woman herself*; and it seems that the third can only be committed *by the woman herself*."

2. You inquire, "If a woman pregnant with child uses an instrument upon herself to produce an abortion, and in so doing injures the child in the womb, which is afterwards born alive but dies soon after birth from the injuries received in the womb at the hands of the mother, is that woman indictable for manslaughter?"

The question is an interesting one, and the authorities are not all one way, yet I am disposed to think, that the weight is on the affirmative side, and the woman is indictable for murder or manslaughter.

Coke, 3 Institute, p. 50, says, that if the child be born alive and dies of a wound inflicted while *en ventre sa mere*, it is murder. On the other hand, Lord Hale, 1 Hale, P. C. 433, says that it is not murder or homicide. Blackstone, 4 Black Com., 198, follows Coke, saying: "If the child be

Woman Cannot be Indicted Under Section 6815, R. S., for Producing an Abortion Upon Herself; May be Guilty of Murder or Manslaughter if Child Dies After Being Born Alive.

born alive and dieth by reason of the potion or bruises it received in the womb, it seems by the better opinion, to be murder in such as administered or gave them."

Russell follows Coke and Blackstone, and the later English decisions have taken the same view of the act.

Thus, in *Rex vs. Enoch*, 5 C. & P., 539, one of the prisoners, Mary Pulley, was charged with the murder of her bastard child, by stabbing it in the head with a fork. The question seems to have been, whether the child had lived after birth. Godson, the prosecutor, said: "The wound might have been given before the child was born and the child might have lived afterwards." Justice Park replied: "Yes, but there must have been an independent circulation in the child, or the child cannot be considered as living for this purpose."

In *Rex vs. Senior*, 1 Mood. C. C., the prisoner was charged with manslaughter of an infant child by a blow inflicted on its head in the course of delivery, of which, after being born alive, the child died. It was contended, that the child being *en ventre sa mere* at the time the wound was given, the prisoner could not be guilty of manslaughter; but the courts, following Coke and Blackstone, overruled the objection.

In *Queen vs. West*, 2 C. & K., 784, Judge Maule said to the jury:

"If a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living and afterwards dies in consequence of its exposure to the external world, the person who, by her misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

If a woman is guilty of the crime of producing an abor-

Woman Cannot be Indicted Under Section 6815, R. S., for Producing an Abortion Upon Herself; May be Guilty of Murder or Manslaughter if Child Dies After Being Born Alive.

tion upon herself, of course she would be guilty of manslaughter, if, while doing such unlawful act, she occasions such injuries to the child, that, after being born alive, it dies of the injuries; and if a woman being pregnant, with child, intentionally inflicts a wound on the child while in the womb for the purpose of killing it, and the child after being born alive, dies of such wound, she is guilty of murder. These conclusions are plain; but still, if the woman intending only to procure an abortion and not intending to kill the child, does an act, the natural and probable consequence of which is to inflict such injuries on it as to occasion its death after being born alive, such woman, under the authorities I have quoted, would be guilty of murder or manslaughter.

A certain amount of care is required of a woman pregnant with child. She cannot consider herself alone; she must look out for her unborn babe.

In *Regina vs. Middleship*, 5 Cox C. C., 275, the prisoner was charged with manslaughter committed by delivery of her child in a privy where it was suffocated. Judge Earle charging the jury said:

“Parents are bound to take care of and sustain their children, and if in consequence of their failing to perform these duties, death ensues, it is murder or manslaughter, according to the circumstances.”

And so, in *Regina vs. Handley*, 13 Cox, C. C. 79, decided in 1874, where the prisoner was indicted for the wilful murder of her new born child. The proof showed that no one was present when the child was born. The child was discovered some days afterward in a box under the prisoner's bed, dead. Brett, Judge, said:

“If the prisoner had determined that no one but herself should be present at her child's birth, she would in the eyes of the law, have invested

Woman Cannot be Indicted Under Section 6815, R. S., for Producing an Abortion Upon Herself; May be Guilty of Murder or Manslaughter if Child Dies After Being Born Alive.

herself with the responsibility from the moment of birth, namely, that of the care and charge of a helpless creature, and if, after having assumed such a care and charge, she allowed the child subsequently to die from negligence, that would make her guilty of manslaughter."

In the same charge, the judge said:

"If the prisoner made up her mind to conceal the birth and did attempt to conceal it by methods which would probably end in death, and they did end in death, she would be guilty of murder, even though she did not intend murder."

To paraphrase this, if a woman quick with child makes up her mind to procure an abortion and does produce it by methods which naturally and probably would occasion the death of the child after its birth, and the child is born alive and dies in consequence of such wound inflicted by the mother, she would be guilty of murder, for one is presumed to intend the natural and probable consequence of his acts. I enclose you a rather fuller statement of certain cases that I have referred to. If I had more time, I should be glad to examine this question more fully.

Very respectfully,

J. K. RICHARDS,

Attorney General.

P. S.—I suppose you have read 1 Whar. Crim. Law, Sections 445, et seq. and 592; also 1 Arch. Crim. Prac. and Plead., p. 732.

J. K. R.

Whether Time Spent by Insane Convicts in Central Insane Asylum, Who Were There by Being Removed by Governor From the Penitentiary, Should be Deducted From Term of Sentence.

WHETHER TIME SPENT BY INSANE CONVICTS
IN CENTRAL INSANE ASYLUM, WHO WERE
THERE BY BEING REMOVED BY GOVERNOR
FROM THE PENITENTIARY, SHOULD BE DE-
DUCTED FROM TERM OF SENTENCE.

Office of the Attorney General,
Columbus, Ohio, September 12, 1892.

*Mr. Julius Whiting, Jr., Manager of the Ohio Penitentiary,
Canton, Ohio:*

DEAR SIR:—On the 9th inst. you personally called my attention to a joint resolution of the General Assembly, adopted April 24, 1877, (74 O. L. 539) requesting the governor to cause the removal of some fifty odd insane convicts confined in the penitentiary, to the central insane asylum, and asked whether the time passed by convicts thus removed, in the insane asylum, should be deducted from the term of sentence of those who subsequently were returned to the penitentiary.

I find upon investigation, that the records of the governor's office show that the convicts recommended thus to be transferred, were removed by order of the governor, which order suspended the execution of sentence against each of them during the time they might be confined in the asylum and until they should be restored to reason. In view of this order of the governor, the following provision of section 91 answers your question: "If the sentence be suspended and the convict recovers his reason, the sentence, so far as not before executed, shall at the termination of the suspension be fully executed."

Very respectfully,
J. K. RICHARDS,
Attorney General.

Further in re Insane Prisoner Being Removed to Insane Asylum by Governor.

FURTHER IN RE INSANE PRISONER BEING REMOVED TO INSANE ASYLUM BY GOVERNOR.

Office of the Attorney General,
Columbus, Ohio, September 19, 1892.

Mr. Julius Whiting, Jr., Manager, Ohio Penitentiary, Canton, Ohio:

DEAR SIR:—In my letter of the 12th inst., I expressed the opinion, that time spent by an insane prisoner in the insane asylum, to which place he had been transferred by order of the governor suspending the execution of his sentence, will not count as time served on his sentence; and that after being returned to the penitentiary, on recovery of his reason, his sentence, so far as not before executed, should be fully executed.

In response, you call my attention to the fact, that one or more of the convicts in question have been returned to the penitentiary not restored to reason but still insane. Conceding that insane prisoners returned to the penitentiary when restored to reason must serve out their sentence, the question is, whether prisoners still insane are subject to the same rule.

The execution of the sentence of the insane convict was suspended by order of the governor when he was transferred to the asylum. His (the convict's) consent to such suspension was not necessary to make it effectual. See, *in the matter of Victor*, 31 O. S. 208. The suspension having thus begun still continues, unless the return of the convict to the penitentiary ended the term of suspension. It appears from the wording of section 91, that the governor may order an insane convict whose sentence is suspended, *to be confined in the penitentiary* or conveyed to the asylum.

I know of no way of restoring the time spent in the asylum to the prisoner so as to cut short his sentence. The only remedy that occurs to me is for the governor either

*Building and Loan Associations May Pay Expenses Only
Out of Earnings.*

to pardon or commute the sentence of the convict, as he may do under section 91.

Very respectfully,
J. K. RICHARDS,
Attorney General.

BUILDING AND LOAN ASSOCIATIONS MAY PAY
EXPENSES ONLY OUT OF EARNINGS.

Office of the Attorney General,
Columbus, Ohio, September 21, 1892.

Hon. W. H. Kinder, Inspector of Building and Loan Associations:

DEAR SIR:—In response to your favor of the 20th inst., requesting my opinion upon certain questions growing out of the enforcement of the act of May 1, 1891, (88 O. L., p. 469), regulating building and loan associations, I beg to say:

1. In view of the provision of section 6 of the act referred to, that "all expenses of such associations shall be paid out of the earnings only," I am of the opinion, that such an association can not properly pay expenses from its general funds without regard to the earnings of the association.

2. By section 3, such association is empowered "to borrow money not exceeding 20 per cent. of its assets and issue its evidences of indebtedness therefor;" and it is granted further "all such powers as are necessary and proper to enable such association to carry out the purpose of its organization." In the light of these provisions, I am inclined to think that such an association may lawfully create an indebtedness in anticipation of the collection of the earnings for the purpose of paying its expenses; but the expenses

Construction of Section 1117 R. S.

must be limited to the amount of earnings for the current year. Pending the collection of the earnings, they may be anticipated but not exceeded, for the purpose of paying the expenses necessary to enable the corporation to carry out the purpose of its organization.

Very respectfully,

J. K. RICHARDS,

Attorney General.

CONSTRUCTION OF SECTION 1117 R. S.

Office of the Attorney General,
Columbus, Ohio, September 15, 1892.

Mr. J. W. Seymour, Prosecuting Attorney, Medina, Ohio:

DEAR SIR:—I question my authority under section 208 as amended January 20, 1891, (88 O. L., p. 10), to give you official advice upon the questions propounded in your favor of the 13th inst. As a matter of accommodation, however, I give you the views I have reached from an examination of the acts and sections to which you refer.

The act of April 18, 1892, (89 O. L. 384), repeals section 1117, as enacted May 4, 1891, (88 O. L. 577). This latter act provided for the creation of a "treasury fee fund." The present section 1117, provides, that the percentages and allowances paid into the county treasury by the treasurer, shall be credited to the "general or county fund." The answer, therefore, to your first question is, that there is no treasury fee fund provided by law.

Section 1117, as amended April 18, 1892, provides, that the treasurer and his deputy or deputies shall be paid out of the county treasury monthly, upon an order of the county auditor. There is nothing in this section providing, that the compensation of the treasurer and his deputy or deputies shall be limited to the percentages and allowances received or collected by him and turned into the treasury and credited to the general or county fee fund. Therefore, I take it, that

Construction of Act of April 8, 1892, (89 O. L. 237), Regulating Practice of Dentistry in This State.

the treasurer and his deputies are entitled to the salary and compensation provided by law, irrespective of the amount of percentages and allowances covered by them into the treasury. This answers your remaining question.

I might add, it occurs to me, that the portion of section 1260*b* (89 O. L. 387) to which you call my attention, only refers to such salaries of officials and deputies as by law are made payable out of and limited to the amount of specific funds made up of fees or moneys collected by them and covered into the county treasury, to the credit of such funds. You will observe by a perusal of the statutes relating to compensation of county clerks, recorders, etc., that there is such a specific limitation in each case.

Very respectfully,

J. K. RICHARDS,

Attorney General.

CONSTRUCTION OF ACT OF APRIL 8, 1892, (89 O. L. 237), REGULATING PRACTICE OF DENTISTRY IN THIS STATE.

Office of the Attorney General,
Columbus, Ohio, September 21, 1892.

Doctor Grant Molyneaux, Secretary, Board of Dental Examiners, Cincinnati, Ohio:

DEAR SIR:—Sometime ago, a communication from you to ex-Attorney General Watson, submitting certain questions with reference to the proper construction of the act of April 8, 1892, (89 O. L. 237), regulating the practice of dentistry in this State, reached this office. I have delayed answering the communication in the hope that I might have a personal talk with you respecting its contents. In this hope, I have been disappointed, but I give you the conclusions I have reached after a careful reading of the act.

Construction of Act of April 8, 1892, (89 O. L. 237), Regulating Practice of Dentistry in This State.

1. The words "regularly, since July 4, 1889, engaged in the practice of dentistry in this State," mean steadily or continuously engaged in such practice; and the practice of dentistry does not include, I take it, a term of pupilage. There is a distinction between the study and the practice of dentistry, just as there is between the study and the practice of law, or the study and practice of medicine. A person cannot be said to be engaged in the practice of dentistry who is simply a pupil, and is not qualified to do and does not do the work of a dentist on his own responsibility. The act itself (Sec. 6991) gives a good definition of what constitutes the practice of dentistry. A person who has been engaged in the practice of dentistry, as above indicated, since the 4th of July, 1889, whether of age when he began the practice or not, came within the class of those entitled to a certificate on making the necessary proof and paying the prescribed fee.

2. A graduate of medicine must obtain the certificate of your board before engaging in the practice of dentistry. The exemption set out in section 6991 applies to dental operations performed by legally qualified physicians and surgeons in connection with the practice of their profession of medicine and surgery. The act recognizes a distinction between such operations incidental to the practice of medicine and surgery and the regular practice of dentistry, requiring a certificate from your board.

3. A physician who, in the practice of his profession, performed occasional dental operations, cannot be said to have been regularly engaged in the practice of dentistry, and hence is not entitled to a certificate to practice dentistry under the time exemption of the act.

4. The provision of section 6991, "but nothing in this act shall be taken to apply to acts of bona fide students of dentistry done in pursuance of clinical advantages under the direct supervision of a preceptor who is a licensed dentist in this state," does not authorize such students to be sent out by their preceptor to perform dental operations beyond his

*In Cities Not Having Population of 9,000 Citizens, Do Not
Have to Register.*

direct and personal supervision. The purpose of the law is to protect the public against the work of those unskilled in dentistry, by requiring proof of skill before power to practice dentistry is acquired. It permits, however, the performance of dental operations by students so they may acquire the skill which in time, on the certificate of your board, will admit them to practice, provided the skill requisite for the protection of the patient is present in the person of the licensed dentist overseeing the work.

Very respectfully,

J. K. RICHARDS,

Attorney General.

IN CITIES NOT HAVING POPULATION OF 9,000
CITIZENS, DO NOT HAVE TO REGISTER.

Office of the Attorney General,
Columbus, Ohio, October 1, 1892.

*Mr. James Ward Keyt, Clerk, Deputy State Supervisors,
Piqua, Ohio:*

DEAR SIR:—I question my right to give your board official advice, but, however that may be, it is my understanding that it is not necessary for the voters of Piqua to register. The registration law, under section 2 of the act of 1889, (86 O. L. 269) is limited in its operation to cities having a population at the last federal census (meaning the census of 1880) of less than nine thousand." Piqua did not have nine thousand population at the census of 1880. There are many cities in this state which have nine thousand population now and had nine thousand population by the census of 1890, to which the registration law does not apply.

Very respectfully,

J. K. RICHARDS,

Attorney General.

Construction of Act of March 21, 1888, (85 O. L. 99), Providing for Collection of Information, Relative to Accidents Occurring in Workshops, Etc.

CONSTRUCTION OF ACT OF MARCH 21, 1888, (85 O. L. 99), PROVIDING FOR COLLECTION OF INFORMATION, RELATIVE TO ACCIDENTS OCCURRING IN WORKSHOPS, ETC.

Office of the Attorney General,
Columbus, Ohio, October 8, 1892.

Hon. William Z. McDonald, Chief Inspector of Workshops and Factories:

MY DEAR SIR:—In a communication of this date, you have called my attention to the act of March 21, 1888 (85 O. L., p. 99) providing for the collection of information relative to accidents occurring in the workshops and factories of the State; informed me that your department has construed this statute as requiring reports of serious accidents to employes only in the establishments referred to, including (under Sec. 2) street railways, and requested my opinion as to whether or not such construction of the law is correct.

I have carefully read and considered the language of the act in question. The act requires "a report of each and every serious accident resulting in bodily injury to any person which may occur in their establishment"; but the general words "to any person" are limited by subsequent provisions in the same section. Thus: "If death shall result to any employe from any such accident, said report shall contain," etc.; or, "if the accident has caused bodily injury of such a nature as to prevent the person injured from returning to his or her employment, etc., "the report shall contain, etc. It is clear from these provisions, that manufacturers, including operators of street railways, are required to report serious accidents to employes; if death results, the report must contain certain facts; if deprivation of employment for a time, certain facts. I am, therefore, of the opinion, that your construction of this act is correct.

Very respectfully,

J. K. RICHARDS,
Attorney General.

In re Duty of Commissioners Appointed by County Commissioners to View, Survey and Locate Five or More Roads.

IN RE DUTY OF COMMISSIONERS APPOINTED
BY COUNTY COMMISSIONERS TO VIEW, SUR-
VEY AND LOCATE FIVE OR MORE ROADS.

Office of the Attorney General,
Columbus, Ohio, October 6, 1892.

Hon. John L. Vance, Gallipolis, Ohio:

MY DEAR SIR:—In a communication dated the 5th inst., you state that the commissioners of Gallia County, on Saturday last, acting under section 4758, R. S., appointed three "commissioners to view, survey and locate," five or more roads, etc., which commission is composed of Messrs. Amos Boggs, D. Y. Williams and yourself; and that the question has arisen: Is it the duty of the commission to select the roads to be viewed, etc., or is it the duty of the county commissioners to make such selection?

This question on behalf of the county commissioners and the commission, you have submitted to me. I question my right to give you an official opinion upon this matter, seeing that the law makes the prosecuting attorney legal advisor of county officers; but with the understanding that my opinion is not to be used to forestall or overrule the views of your prosecuting attorney, I beg to say, I am inclined to think, after a careful reading of the section referred to, and of the chapter of which it is a part, that it is the duty of the county commissioners to select the roads to be viewed, surveyed and located.

Very respectfully,

J. K. RICHARDS,

Attorney General.

In all Counties Probate Judges Have Jurisdiction to Enforce Section 7008, as Amended 89 O. L. 518—Creditors Bill Lies to Collect Note Held by Convict Against Whom Costs Have Been Adjudged and Unsatisfied.

IN ALL COUNTIES PROBATE JUDGES HAVE JURISDICTION TO ENFORCE SECTION 7008, AS AMENDED 89 O. L. 518.

Office of the Attorney General,
Columbus, Ohio, October 11, 1892.

Mr. Chas. Lawyer, Prosecuting Attorney Jefferson, Ohio:

DEAR SIR:—In a communication dated the 8th inst., you submit to me the question, whether or not the probate judge, in counties where the probate court has not criminal jurisdiction under the general statutes, has authority under section 7008, as amended May 4, 1892, (98 O. L. 518) to entertain an information or hear a complaint charging a violation of the section mentioned, by refusal to pay the dog tax or a failure to return a dog for taxation.

I am of the opinion, that in all counties probate judges have jurisdiction to enforce the provisions of this section. The answer to your question, therefore, is in the affirmative.

Very respectfully,

J. K. RICHARDS,
Attorney General.

CREDITORS BILL LIES TO COLLECT NOTE HELD BY CONVICT AGAINST WHOM COSTS HAVE BEEN ADJUDGED AND UNSATISFIED.

Attorney General's Office,
Columbus, Ohio, October 17, 1892.

M. H. Donahue, Esq., Prosecuting Attorney, New Lexington, Ohio:

DEAR SIR:—In a recent communication, you submit to me the following question:

“A is convicted of a felony and sentenced to the penitentiary for a term of years and adjudged to pay the costs of prosecution. Execution for

In re Articles of Incorporation of Mercantile Credit Guarantee Company.

costs issued and was returned unsatisfied, after which the State paid the costs. Defendant is the owner of a certain note and mortgage to secure the payment of the same on real estate, and B holds note and mortgage as bailee, but claims no right or title thereto. Cannot a creditor's bill be filed to obtain the money due on said note and mortgage, and compel bailee to bring the same into court to satisfy the judgment for costs?"

I am inclined to think that such an action will lie, and that it should be brought by you in the name of the State, making parties defendant, the convict, the bailee who holds the note and mortgage, and other interested parties.

Very respectfully,
J. K. RICHARDS,
Attorney General.

IN RE ARTICLES OF INCORPORATION OF MERCANTILE CREDIT GUARANTEE COMPANY.

Office of the Attorney General,
Columbus, Ohio, November 11, 1892.

Hon. W. H. Kinder, Superintendent of Insurance:

DEAR SIR:—You have submitted to me the articles of incorporation, under the laws of West Virginia, the form of application, and policy or contract of indemnity, of the Mercantile Credit Guarantee Company, whose head office is in New York City.

The articles of incorporation create a company for the purpose of insuring, indemnifying, etc., merchants, etc., against loss by reason of the insolvency or non-payment of debts due them by persons to whom they have sold goods on credit. The contract of indemnity is an agreement by the company in consideration of a certain sum to purchase a certain amount of uncollectable debts for merchandise sold within a stipulated period.

I am inclined to agree with you, that this amounts sub-

*As to Right of Board of Public Works to Lease Berme Bank
of Miami and Erie Canal for an Electric Railroad.*

stantially to a contract of insurance under section 289 of our Revised Statutes, the insurance of merchants doing a credit business, against loss through bad debts; and in view of the fact that the business of insurance is regulated in our State by special statutes, no corporation can be organized to do insurance under our general laws, but only under the special statutes applicable thereto; and that there is no provision for the incorporation of a domestic insurance company to do the sort of business this company does, and that there is no statute authorizing the license of a foreign company to do this kind of insurance, it seems to me that you are right in holding, that this company cannot lawfully transact its business in this State without further legislation. It cannot make insurance without being licensed to do so, and there is no authority for the licensing of foreign companies to do the sort of insurance it proposes to do. I return the papers.

Very respectfully,

J. K. RICHARDS,

Attorney General.

AS TO RIGHT OF BOARD OF PUBLIC WORKS TO
LEASE BERME BANK OF MIAMI AND ERIE
CANAL FOR AN ELECTRIC RAILROAD.

Attorney General's Office,
Columbus, Ohio, November 15, 1892.

*To the Board of Public Works of the State of Ohio, Co-
lumbus, Ohio:*

GENTLEMEN:—You have submitted to me an application for a lease of the berme bank of the Miami & Erie canal, from the village of St. Marys, to the terminus of said canal in the city of Cincinnati, Ohio, and asked my opinion as to whether the Board of Public Works “have the right to lease the berme bank of the canal for an electric railroad upon the recommendation of the canal commission.”

*As to Right of Board of Public Works to Lease Berme Bank
of Miami and Erie Canal for an Electric Railroad.*

The canal commission was first created by the act of March 28, 1888, in order to survey and determine the boundaries of lands appropriated for canal purposes and owned by the State, "the boundaries of which are not now accurately known and of record." By this act and subsequent acts, such land, that is land the boundaries of which are in dispute, found by the canal commission to be the property of the State of Ohio, and which in the opinion of said commission, the board of public works and its chief engineer, shall not be deemed necessary for the actual use, efficiency and operation of the canals of the State, shall be valued by the commission and leased upon certain terms and conditions. If not in the possession of any person having a building on it, land may be immediately leased for fifteen years. If in the possession of a person owning a building thereon, such person shall be entitled to the lease. If, however, he does not apply for and enter into the lease within ten days after the finding of the commission that the land belongs to the State, then the property is to be leased upon advertisement.

I am inclined to think from the provisions referred to, as well as others, contained in the acts regulating the canal commission, that the authority to lease given under these acts, is an authority to lease land, the boundary and ownership of which having been in dispute, has been found by the canal commission to be the property of the State. Such land may be leased either to persons occupying it or to others. I do not understand, however, that these acts give the board of public works authority to lease on the recommendation of the canal commission, land held for canal purposes, the boundaries of which are not in dispute, and the ownership of which has not been passed on by the canal commission. Such I understand is the character of the land referred to in the application submitted to me, to-wit, the berme bank of the Miami and Erie canal from St. Marys to the terminus of the canal in Cincinnati, Ohio.

Taxes; Superintendent of Insurance Has no Authority to Reimburse Company for Taxes Wrongfully Paid.

I am, therefore, constrained to answer your question in the negative.

Very respectfully,
J. K. RICHARDS,
Attorney General.

TAXES; SUPERINTENDENT OF INSURANCE HAS
NO AUTHORITY TO REIMBURSE COMPANY
FOR TAXES WRONGFULLY PAID.

Attorney General's Office,
Columbus, Ohio, November 29, 1892.

Hon. W. H. Kinder, Superintendent of Insurance:

DEAR SIR:—In your favor of the 18th of August, you state, that in making the charge against the Pacific Mutual Life Insurance Company of California, for the year 1891, under section 2745, Revised Statutes, you refused to give the company credit for a voucher of \$192.62, for taxes in Cuyahoga County, which should have been paid in the year 1890, but were not paid until July, 1891, and you submit to me whether you were correct in such refusal.

Along with your communication, you submitted letters from my predecessors, General Kohler and General Lawrence, sustaining your construction of the law.

I have carefully read the statute upon this subject and am not disposed, in view of its wording, to overrule my predecessors and yourself. The deductions which the superintendent of insurance is authorized to make from the two and one-half per cent. tax levied on the gross premium receipts of insurance companies, are confined to taxes for the current year paid in the different counties, and cannot be taken to include taxes for preceding years which have been paid by insurance companies in counties and for which they failed to get credit from the State at the proper time. Neither the superintendent of insurance nor the

In re Ohio Building and Loan Company Issuing Stock Lawfully Provided by Laws of Ohio.

State is responsible for the failure of insurance companies either to pay taxes to the county when due or to claim deductions for taxes so paid at the proper time.

Very respectfully,

J. K. RICHARDS,

Attorney General.

IN RE OHIO BUILDING AND LOAN COMPANY
ISSUING STOCK LAWFULLY PROVIDED BY
LAWS OF OHIO.

Office of the Attorney General,
Columbus, Ohio, November 30, 1892.

Hon. W. H. Kinder, Superintendent of Insurance:

DEAR SIR:—Sometime ago, you submitted to me proposed amendments to the constitution and by-laws of the Ohio Building & Loan Co., of Cleveland, and requested my official opinion as to whether a building and loan association, organized and operated under the laws of Ohio, could lawfully issue the class of stock provided for thereby. At the same time, you informed me, that in your opinion, it could not.

The amendments whose validity is in question, divide the stock of this company into two classes, namely, installment stock and paid-up stock.

“Paid-up stock may be issued at \$100.00 per share to be paid in advance, on which dividends earned to the maximum amount of eight per cent. per annum shall be paid the holder semi-annually out of the net earnings of the company. No withdrawal fee shall be charged on this class of stock, and in consideration thereof and the payment of the dividends in cash semi-annually, the holder shall not be entitled to any further participation in

In re Ohio Building and Loan Company Issuing Stock Lawfully Provided by Laws of Ohio.

The result of the adoption of these amendments will be the creation of a class of preferred stock, stock entitled to a semi-annual cash dividend of not exceeding eight per cent. out of the net earnings of the company. In consideration of such preference, such stock is not entitled to any further participation in the earnings; and the question to be determined is, whether the act of May 1, 1891, (88 O. L. 471), permits of such classification and preference.

While this act gives no express authority to issue the class of stock in question, the general grant of section 3 "to issue stock to members on such terms and conditions as the constitution and by-laws may provide, include the desired power, unless other provisions of the act operate as a limitation on this general grant by prohibiting the proposed preference.

If, from a reading of the entire act, it appears the Legislature intended, that in Ohio building and loan associations, all losses shall be shared and earnings distributed in the same proportion among all members, then obviously a classification based upon an unequal distribution of earnings is impliedly prohibited by law.

The division of earnings is regulated by section 6, which requires, that after the expenses have been paid out of the earnings and a portion of the earnings set aside for a fund for contingent losses, "the residue of such earnings shall be transferred as a dividend, annually or semi-annually, in such proportion to the credit of all members, as the corporation by its constitution and by-laws may provide, to be paid to them at such time and in such manner in conformity with this act, as the corporation by its constitution and by-laws may provide. All losses shall be assessed in the same proportion and manner on all members after the amount in the reserve fund has been applied to the payment of the same."

As to losses, this section unquestionably puts all members on the same footing,—“all losses shall be assessed in

In re Ohio Building and Loan Company Issuing Stock Lawfully Provided by Laws of Ohio.

the same proportion and manner on all members." To the same effect is the provision in section 3, that there shall be deducted from the amount paid the withdrawing member, among other things, "a pro rata share of all losses."

As to profits, this section requires that the residue of the earnings shall be transferred as a dividend, annually or semi-annually, to the credit of all members. The corporation may in its constitution and by-laws provide the proportion, time and manner in which the dividend shall be paid and transferred, but it must be transferred to the credit of and paid to *all* members. I take it, that the proportion refers to the mode of computation of the amount due to individual members. The corporation may determine this mode of computation; but the inference from the language of section 6, in my opinion, is, that the same mode of computation must apply to all members. Taking this section and, indeed, the whole act, while the language with respect to the division of profits is not so clear as that used with respect to the sharing of losses, still it seems to me, that as to both profits and losses, all members stand on the same footing. All members in proportion to the value of their holdings, are equally interested in the profits. The residue of earnings is to be passed to the credit of all members and is to be paid to all members. Apparently, as in the case of losses, so in the case of profits, there is no distinction among members recognized, no preference among stock contemplated.

The views above indicated, which sustain your rejection of these amendments as not being proper under the law, have been reached after much time and thought, which explains the delay in answering your communication. Being the result of interference and not from clear expression, they are not free from doubt, and hence not perfectly satisfactory, but they comport with the spirit and object of these associations, and tend to encourage savings in the quarters where these companies originated and do the most

*As to Right of Superintendent to Receive Girl Over 14 Years
of Age and Unable to Read or Write the English
Language.*

good, by assuring to all members an equal share in the profits—the same interest, in short, in the earnings that they have in the losses—equal profits as well as equal risks.

Very respectfully,

J. K. RICHARDS,

Attorney General.

AS TO RIGHT OF SUPERINTENDENT TO RECEIVE
GIRL OVER 14 YEARS OF AGE AND UNABLE
TO READ OR WRITE THE ENGLISH LAN-
GUAGE.

Office of the Attorney General,
Columbus, Ohio, December 14, 1892.

*Mr. A. W. Stiles, Superintendent Girls' Industrial Home,
Delaware, Ohio:*

DEAR SIR:—You have submitted to me the commitment papers in the matter of Rhoda Ratcliff, sent to your institution from Lawrence County, and requested my opinion as to whether you have the right to receive a girl on the charge of truancy who is over fourteen years old, unless the papers show she is unable to read and write the English language.

Prior to the passage of the act of April 18, 1892 (89 O. L. 389) a child over fourteen could not have been committed to your institution on the complaint of a truant officer for truancy, under the compulsory education act, unless it was charged and appeared that it could not read and write the English language, but by the amendment to section 1 of the compulsory education law made by the act mentioned "all youth absenting themselves from a school without such excuse (and section 1 sets out the only available excuses) are subject to the penalties of section 8 of the compulsory education act, that is, they are liable to be sent to your institution and the other institutions named in that section. I return the papers. Very respectfully,

J. K. RICHARDS

*As to Guilt of Inspector of Dairy and Food Department,
When Buying Adulterated Food for Prosecuting the
Vendor Thereof.*

AS TO GUILT OF INSPECTOR OF DAIRY AND
FOOD DEPARTMENT, WHEN BUYING ADUL-
TERATED FOOD FOR PROSECUTING THE
VENDOR THEREOF.

Office of the Attorney General,
Columbus, Ohio, December 20, 1892.

*Hon. F. B. McNeal, Dairy and Food Commissioner, Co-
lumbus, Ohio:*

DEAR SIR:—You have submitted to me the following question and requested my official opinion thereon:

Question. "Where, by direction of the dairy and food commissioner, and inspector appointed by him, purchases or causes to be purchased, an adulterated article of food (knowing the same thereof to be in violation of law) for the purpose of prosecuting the vendor thereof for such sale, and the vendor is convicted therefor, is the inspector also guilty of any offense by reason of section 6804, R. S., or any other law?"

Answer. The act of March 20, 1884, (81 O. L. 67) made it an offense to "offer for sale or sell" any adulterated food. The offense is committed under this act when one offers such food for sale. It is not necessary that a sale should take place to constitute the offense. Still, a sale is ample and convincing proof, that the article sold has been and is unlawfully offered for sale.

The act of May 8, 1886, (83 O. L. 121) creates the office of dairy and food commissioner, gives him and his assistants power to inspect articles of food offered for sale, charges him (as amended April 16, 1892, 89 O. L. 359) "with the enforcement of all laws against fraud and adulteration or impurities in foods and drinks," and authorizes him "to employ such experts, chemists, inspectors, etc., as may by him be deemed necessary for the proper enforcement of the laws."

*As to Guilt of Inspector of Dairy and Food Department,
When Buying Adulterated Food for Prosecuting the
Vendor Thereof.*

Section 6804 provides, that whoever aids, abets or procures the commission of an offense is equally guilty with the principal offender.

Now, the question submitted to me is, whether an inspector who buys an article of food which he believes to be adulterated,—buys it for the purpose of securing the proof that the law is being violated by the person who offers such food for sale,—is guilty as the procurer of the offense under section 6804.

To state this question is to answer it, and to answer in the negative. While there must be a seller and a buyer to constitute a sale, yet the act of selling is treated as distinct from the act of buying. This is so under the liquor laws and it so under the pure food laws. It is not an offense to purchase impure food; it is an offense to sell impure food. The act is for the protection of the purchaser and public, not of the seller. I take it that a purchaser can waive the protection the law throws about him and purchase adulterated food without violating any law, although the vendor violates the law when he sells such food. But, obviously, a food inspector who purchases adulterated food, does not instigate or procure the commission of an offense. Before the purchase is made, the offense has already been committed in the offer for sale of the prohibited article. All the inspector does is to bring about exposure of the offender and proof of the offense. This is not merely a lawful but a laudable act in the inspector,—a necessary act for the protection of the public.

There are numerous authorities on this point. I refer to 1 Wharton Criminal Law, 9 Edition, section 149 (4) and cases cited. Also, 1 Bishop New Criminal Law, section 658 and notes.

Very respectfully,

J. K. RICHARDS,

Attorney General.

Trustees May Authorize Superintendent of Institution to Act as Financial Officer—In re Ohio Farmers' Insurance Company.

TRUSTEES MAY AUTHORIZE SUPERINTENDENT OF INSTITUTION TO ACT AS FINANCIAL OFFICER.

Office of the Attorney General,
Columbus, Ohio, December 30, 1892.

Hon. E. W. Poe, Auditor of State:

MY DEAR SIR:—In response to your communication of the 29th inst. I beg to say, that in view of the fact that the Working Home for the Blind is governed by a special act, I see no objection to the trustees authorizing the superintendent to act as the treasurer or financial officer, and receive and pay out moneys drawn upon their requisitions, provided he file a proper bond and be paid no further compensation for his additional services, his salary as superintendent being fixed by law.

I return the copy of the resolution of the trustees which you enclosed.

Very respectfully,
J. K. RICHARDS,
Attorney General.

IN RE OHIO FARMERS' INSURANCE COMPANY.

Office of the Attorney General,
Columbus, Ohio, December 31, 1892.

Hon. W. H. Kinder, Superintendent of Insurance:

MY DEAR SIR:—You have submitted to me a copy of the charter of The Ohio Farmers' Insurance Company, of Leroy, Ohio, with the amendments and the action of the company in changing its name and modifying its charter. At the same time, you called my attention to the fact, that while the company was originally chartered as a mutual fire insurance company, in 1872, by the enactment of what is now known as section 3653 of the Revised Statutes, it ob-

In re Ohio Farmers' Insurance Company.

tained the right to issue policies upon the "stock plan." In this connection, you stated, that you had sometime prior thereto, caused an examination to be made of the affairs of the company, a copy of which you enclosed, which showed, that the net assets of the company had fallen to the sum of \$69,860.80, being below the amount required by section 3653, to entitle it to issue policies upon the stock plan.

The report also showed that the company had issued no mutual policies for more than twenty years, having, upon the passage of the section referred to, abandoned the "mutual plan" of insurance and issued all of its policies upon the "stock plan."

It further appeared from the report, that the company was given credit upon the examination for 170 Wayne county bonds of the par value of \$85,000.00, issued to secure the location of the Ohio Agricultural Experiment Station, under the act of April 23, 1891, which act has been declared invalid, as being in contravention of the constitution.

In view of these facts, you submitted to me the following questions:

1. Are the Wayne county bonds valid, and should the company receive credit therefor in listing its assets?
2. Has the company a legal existence in view of the fact that it lacks mutual membership?
3. If there is no legal organization, what legal proceedings should be taken to protect the interest of the policy holders?
4. If the company has a legal existence and is able in the future to re-establish itself upon the standard required by section 3653, namely: show net assets amounting to \$200,000.00, can it lawfully resume the issuing of policies upon the stock plan?

The Ohio Farmers' Insurance Company was incorporated under the special act of February 8, 1848, (46 O. L. 95.) It was created a mutual insurance company to be managed by a board of directors chosen by the members of the company, and every person interested in the company by insuring therein was to be a member during the term of his in-

In re Ohio Farmers' Insurance Company.

insurance. The board of directors were to be chosen annually and were to "continue in office until others shall have been chosen and qualified." By section 5 of the original act, every person becoming a member by effecting insurance, was required to deposit a premium note, not exceeding six per cent. of which was to be immediately paid, and the remainder when required for the payment of losses.

By the act of January 3, 1851, (49 O. L. 355,) the following provision was made for the payment of a cash premium in lieu of the premium note already alluded to:

"The amount to be paid at the time application is made for insurance in this company may be determined by the directors and may include such an amount as will pay the applicant's proportion of losses and expenses during the term of such insurance.

The name of the company was changed to its present name by proceedings in the Court of Common Pleas of Medina County, in 1862, and in 1872 (69 O. L. 140,) the section was enacted now known as section 3653 which reads as follows:

"Every mutual company shall embody the word "mutual" in its title, which shall appear upon the first page of every policy and renewal receipt, and every stock company shall express, upon the face of every policy or renewal receipt, in some suitable manner, that such policy or receipt is a stock policy or receipt; but no other class of companies doing business in this state, shall issue any policy other than that appropriate to its class, except that any mutual company now doing business in this state having net assets not less than \$200,000.00 invested as provided in section 3637, may issue policies either upon the mutual or stock plan, and may continue to do such kind of business so long as its assets continue so invested," etc.

It is well settled, that a mutual insurance company may do business either upon the premium note or the cash prem-

In re Ohio Farmers' Insurance Company.

ium plan, and no matter whether the insured gives a premium note or pays in cash, in either event, if he is insured on the mutual plan, he becomes a member of the company. In other words, the mere payment of the entire premium in cash does not put the insured in the position of one who insures in a joint stock company, who is not a member of or in any way interested in the corporation which insures him.

Under the amendment of January 3, 1851, this company was empowered to issue policies upon the cash plan; but the person insuring under this amendment and paying a cash premium still became a member of the company.

Ohio Mutual Insurance Company vs. Marietta Woolen Factory, 3 O. S., 348.

Union Insurance Company vs. Hoge, 21 Howard, 35.

Mygatt vs. New York Protection Insurance Company, 21 N. Y., 52.

The distinction between taking out a cash policy on the mutual plan and taking out a policy on the stock plan is, that while in both cases the premium is paid in cash, in the first the insured becomes a member of the company, and in the second he does not. The payment of a cash premium does not decide the character of the policy as to whether it is mutual or stock. A mutual company may insure for either note or cash; so may a stock company. The distinction between them rests upon different principles. A stock policy is issued solely upon the credit of the capital stock of the company to one who may be an entire stranger to the corporation, who acquires no right of membership by reason of the policy, no right to participate in its profits, and who subjects himself to no liability by reason of its losses.

Schimph vs. Lehigh Valley Insurance Co., 86 Pa., 373.

The distinction pointed out is clearly drawn in the case *in re Minneapolis Mutual Fire Insurance Company* (Supreme Court of Minnesota, decided April 8, 1892, 51 N. W. R., 921). The Minnesota law, construed in this case, authorized a mutual company with a capital stock of \$200,-

In re Ohio Farmers' Insurance Company.

000.00 to assume risks on the all-cash plan. It was provided that holders of policies on the all-cash plan should not be members of the corporation. The court say, that this act permitted mutual insurance companies to enter into contracts of insurance based upon their accumulated capital, into which the peculiar feature of mutual insurance did not enter. Holders of all cash non-participating policies simply contracted with the incorporation for insurance, relying upon its financial responsibility which was assured by the stipulated capital or net assets. Into such policies, the mutual feature did not enter.

Coming back to the Ohio Farmers' Insurance Company, while ever since the amendment of 1851, it had power to issue mutual policies on the cash premium plan, it first acquired authority to issue policies on the stock plan by the enactment of section 3653, and the possession of the net assets of \$200,000.00 therein required. Operating legally under this section, it has issued all of its policies upon the stock plan. The question is: Has it a legal organization in view of this fact?

I am inclined to think, that if all of the present policy holders of the Ohio Farmers' Insurance Company had, from the time they became insured on the stock plan, occupied the same position to the company that policy holders of a purely stock company occupy to it, namely, stood wholly outside the company and took no part in its management, the company would still have a legal existence, for the directors chosen when there were policy holders who acted as members, would continue in office until other directors should be chosen by policy holders interested in the company. Certainly, it cannot be said, that the Legislature, by authorizing a mutual company with net assets of \$200,000.00 to issue policies either upon the mutual or stock plan, thus giving it the option to issue all of its policies on the stock plan, had intended to and did provide for such a company a method of legalized suicide.

But, in point of fact, as you have stated to me verbally,

In re Ohio Farmers' Insurance Company.

certain policy holders in this company have right along acted as members and voted for and chosen directors.

Now, as already pointed out, the only difference between a policy holder upon the stock plan and one upon the mutual cash premium plan is, that the former is not a member and the latter is. But if the former chooses to waive his privilege of standing outside of the company, and participates in the election of its directors, he becomes in my opinion, the holder of a mutual policy upon the cash premium plan. The company and the policy holder are the two interested parties. Nobody else can object, for nobody else is effected injuriously.

The answer to your second question is, therefore, that the company has a legal existence.

The third question requires no answer in view of this holding.

As to the Wayne county bonds, these bonds were issued under an act of the Legislature authorizing any county, on a vote of its citizens, to bond itself to secure the location of the Ohio Agricultural Experiment Station. Wayne county issued these bonds, the insurance company bought them, the commissioner of Wayne County took the money of the insurance company and turned it over to the State. The State still has \$22,262.62 of this donation in the state treasury. The balance was used to buy a valuable farm in Wayne County, which the State owns. Thus the State now has, in the shape of cash and a farm, the money which the insurance company paid for the bonds. The bonds have not yet been declared invalid. While the Supreme Court decided the act unconstitutional, it remanded the case to the Common Pleas Court to permit the commissioners of Wayne County to answer, setting up facts which they claimed were sufficient to estop the plaintiffs from asserting the invalidity of the bonds.

It does not yet appear what the result of the suit will be; the bonds may yet be held valid. But, however that may be, the State has the money of this insurance company, and

In re Ohio Farmers' Insurance Company.

the State cannot, in honor, permit the company or its policy holders to lose a dollar through this transaction. If Wayne County is prevented from paying these bonds, then the State cannot refuse to repay to the insurance company the money the insurance company gave for the bonds. No other course is consistent with justice and fair dealing, and the State is not less bound to act justly and deal fairly, than are individuals.

I am, therefore, of the opinion that you did right in allowing the company credit for these bonds in listing its assets.

Your final question is, whether this company can lawfully resume the issue of policies on the "stock plan," whenever it is able to re-establish itself on the standard required by section 3653, and exhibit net assets of \$200,000 properly invested.

The statute says, "any mutual company now doing business in this state, *having* net assets not less than \$200,000.00, etc., may issue policies either upon the mutual or stock plan, and may continue to do such kind of business so long as its assets continue so invested." To answer the question put in the negative, is to hold that only a mutual company which had \$200,000.00 net assets, at the time of the passage of section 3653, is entitled to its privileges. The word "*having*," above italicized, has in my opinion no such restricted application. It is the fact of having, not the time when had, which counts. Whenever a mutual company described in section 3653, has net assets of the amount and kind required, and so long as it continues to have such assets, it may issue policies on the stock plan. Such net assets are the guaranty of responsibility, the accumulated capital on the credit of which the company may act as a stock company, and issue policies on the stock plan. The presence of the assets gives the privilege, the absence takes it away. A company may have the privilege awhile, lose it for a time, and regain it, dependent on the amount and character of its net assets. If another examination of the Ohio Farmers'

In re Latimer Contract.

Insurance Company should show, that by reason of closer collections or for any cause, its net assets, properly invested, have again reached the figure required by the statute, \$200,000.00, I take it the company might lawfully resume the issue of policies on the stock plan.

Very respectfully,

J. K. RICHARDS,
Attorney General.

IN RE LATIMER CONTRACT.

Office of the Attorney General,
Columbus, Ohio, January 4, 1893.

*Doctor H. C. Eymann, Superintendent, Cleveland Asylum
for Insane, Cleveland, Ohio:*

DEAR SIR:—I promised you after your conversation with me day before yesterday, to write you my views about what the trustees should do with respect to the Latimer contract.

I am satisfied from an examination of the authorities, that no lien can be taken by the sub-contractors or material men on the cottages in process of construction, they being public buildings. I think that the weight of authority also is against the right of the sub-contractors and material men to take a lien on subsequent payments which may be due the head contractor, for the erection of public buildings, such as these, but still there has been no decision upon this particular point in this State since section 3193 was amended so as to read as it does now. If the trustees should follow the letter of the law and refuse to recognize the right of the sub-contractors and material men to detain the amount yet due on Latimer's contract and have it distributed pro rata among themselves and should pay Latimer or his assignee, Reaugh, whatever balance may be due him, it is