Relative to Issuing a Warrant of Extradition Against Matthias Sclough on the Requisition of the Governor of Pennsylvania.

RELATIVE TO ISSUING A WARRANT OF EXTRADITION AGAINST MATTHIAS SCLOUGH ON THE REQUISITION OF THE GOVERNOR OF PENNSYLVANIA.

Attorney General's Office,
Columbus, January 22, 1861.

To His Excellency, William Dennison, Governor of Ohio:

SIR:—Your letter of the 21st instant, enclosing a requisition on you from the Governor of Pennsylvania for the apprehension and delivery of one Matthias Sclough, an alleged fugitive from justice of that State, with accompanying papers, and a request as to whether in my opinion they are sufficient to justify you in issuing a warrant of extradition, was duly received. I have carefully examined that question, and am satisfied that they *are not.*

The requisition itself is in the ordinary form, and, as is usual in such cases, after reciting the charge against the alleged fugitive, states "that it has been represented to me that he has fled from the justice of this State." The papers accompanying the requisition are—First, a copy of an indictment, found by the grand inquest of the county of Berks, on the 6th day of August, 1860, charging that Matthias Sclough did, on the 8th day of December, A. D. 1859, at the county of Berks, aforesaid, commit fornication with one Rebecca Burkey, and a male bastard child, on the body of the said Rebecca did then and there beget. A second count charges the commission of the same offence at the same place, but avers that said Rebecca has since married, and is now Rebecca Heckman. This indictment is certified to by the clerk of the court under his hand and official seal. Second, a copy of the journal entries of certain proceedings had at the November term, 1860, of the Court of Quarter Sessions of Berks County, stating that on this November 7,

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1860, the *defendant's counsel* came and plead not guilty, and thereupon came a jury, to-wit: etc., who found the defendant guilty; thereupon a motion was made for a new trial, and afterwards, to-wit, December 22, 1860, the recognizance for the appearance of Matthias Schlough at November session, 1860, forfeited on proclamation "made." This entry is also certified by the clerk under his hand and official seal. Third, an affidavit by one Charles Keller that he and one Hines entered into a recognizance for the appearance of Matthias Schlough at the November session, 1860, of the Court of Quarter Sessions of Berks County, that at said term said Slough was found "guilty," that he failed to appear when called for sentence, and that he is now in the county of Delaware, in the State of Ohio. This affidavit purports to be sworn to before Israel Dew, J. P.

If Matthias Schlough is now a resident of the State of Ohio, he owes to it allegiance, and is entitled from it to protection. He has a right to demand that before his personal liberty is abridged, the strictest letter of the law shall be complied with. Your excellency must be satisfied that the party sought is properly charged, in another State with "treason, felony, or other crime," and that he *has fled from* the justice of the State in which he is charged, *to the* State where he is sought. That he has *so fled,* your excellency must be clearly satisfied, before you can issue your warrant. Unless you are so satisfied, the requisition can in no case be complied with. That there is no satisfactory evidence of that nature, in *these papers,* is very clear. The recital, to that effect, in the requisition is no evidence of anything, it is simply a formal statement, which is always thus made. In ordinary cases, the fact that a party had been tried and convicted would be strong evidence. How is it in this case? It does not appear that he was present at the trial at all, or that he was ever even arrested. The very fact that the record does not show that he was arrested, or plead

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to the indictment, or present at the trial, but that *defendant's counsel* plead not guilty is *very significant.*

The affidavit of Keller is *also significant.* He totally avoids saying that the accused was ever arrested, or attended the trial, or was ever in the State. He simply says that he (the accused) failed to appear to answer, and he is now in the county of Delaware in the State of Ohio. When we likewise consider that, by the laws of Pennsylvania, if a man and woman commit this offence, that is, fornication, in another State, and it results in a bastard child, which is born in the State of Pennsylvania, the man may be indicted and tried in the county where the child is born, these judicial proceedings become entitled to still less weight; and every candid examiner must admit that these papers afford no proof that the party accused ever fled from the justice of Pennsylvania. There is another defect in these papers. There is nothing to show that the name of Israel Dew, signed to the affidavit, is genuine, that he has any official character, or, as such officer, has power to administer oaths.

Is the crime charged one which comes within the spirit of the language used in section two, article four, constitution of United States, which defines the offences for which requisitions may be made as "treason, felony or other crime," evidently meaning by the words "other crime," those of *like grade* with treason and felony? The offence here charged is not one of that *grade*, on the contrary, it is one of the *lowest grade.* By the laws of Pennsylvania at the time the offence was committed, 1839, it was punished by 21 lashes, a fine of ten pounds, and the reputed father was charged with the expense of maintaining the child. By the laws of 1859, the punishment is changed to fine of not exceeding $100, and the support of the child. It is then of the same grade of offence as selling liquor contrary to law. Can it be claimed that your excellency, every time a man escapes to Pennsylvania to avoid a prosecution for liquor selling,

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can make a requisition on the governor of that State for him, or that he would be bound to deliver him up? Surely not.

But I also claim that this indictment does not charge any offence known to the laws of Ohio. Even as an indictment for fornication alone, a party could not be held under it for an hour. A single act of sexual intercourse, between an unmarried man and woman, in Ohio, is not a criminal offence. They must live and cohabit in a state of fornication. This indictment makes no such charge. In fact, the charge, as made, assimilates itself more to a proceeding under our bastardy act than to a criminal proceeding for fornication. But was the offence properly charged in the indictment as for the crime of fornication, under our statute, it would long since have been barred by the statute of limitations, and not the least remarkable fact presented by these papers is that this indictment was found nearly *twenty-one* years after the commission of the offence, long after the woman with whom it was committed had married, and the bastard child, if alive, must long since have been able to support itself. What object is now to be gained by this prosecution, I am unable to see. I can not believe that this fact was brought to the knowledge of the executive of Pennsylvania, nor can I believe that this man, who, I am informed, has *constantly* for over twenty years last past, been a quiet, respectable citizen of Delaware, should on such a showing, be dragged from home, family and friends, for an offence of this character, which even in this State has for over twenty years been barred by the statute of limitations.

JAMES MURRAY,
Attorney General.

Relative to Construction of Section 35 of the "Penitentiary Act;" Costs of Conviction When Prisoner Remanded For New Trial.

RELATIVE TO CONSTRUCTION OF SECTION 35 OF THE "PENITENTIARY ACT;" COSTS OF CONVICTION WHEN PRISONER REMANDED FOR NEW TRIAL.

Attorney General's Office,
Columbus, January 22, 1861.

Hon. John Prentiss, Warden Ohio Penitentiary:

You submit, for my opinion, two questions:

First, Whether a person imprisoned in the penitentiary, and, whose judgment and sentence having been reversed, is remanded back for new trial, is entitled, on being sent back under such remand, to the sum of five dollars as provided by the thirty-fifth section of the "penitentiary and convict act."

I answer "no." The clear and obvious intent of that act was to provide each convict on his final discharge, with funds sufficient to reach his home or friends, or, in case he or she had neither home or friends, then to provide him or her with the means of support until such time as employment could be found. In the case of a convict remanded for new trial, the reasons of this payment wholly fail; the expenses of the convict back to the county from which he came are borne by the State. He is taken back by an officer of the penitentiary, for the purpose of being retried, and all the costs of the trip are paid by such officer. The payment of five dollars to such a person could subserve no good purpose, and for that reason I am clearly of opinion that it ought not to be paid.

The second question submitted is, whether, in case of such reversal and remand of the prisoner, the costs ought not to be paid to the county to which he is sent, and from which he came. With this question I have had very considerable difficulty, but after mature consideration,

Relative to Construction of Section 35 of the "Penitentiary Act;" Costs of Conviction When Prisoner Remanded For New Trial.

I am of the opinion that whenever in such case a prisoner is remanded for a new trial, the county from which he came and to which he is returned, is bound to repay the costs which they have received from the treasury of state.

When the prisoner is returned for a new trial he stands precisely in the same situation that he did before any sentence was passed upon him, and the officers of the county are no more indebted to their costs from the State than they would have been had a new trial been granted to the prisoner after his conviction in the inferior court, and before sentence. In case of such new trial, if the accused be again convicted and sentenced to the penitentiary, the State would again be liable for the payment of the whole of the costs accruing on both trials, but in case the defendant be not so convicted, on such subsequent trial, the State is not liable for the costs accruing on either trial.

The State cannot be liable in any case, unless there is a judgment against teh accused, and penitentiary-sentenced party, for the costs. In case of the reversal of the judgment and sentence, the defendant is no longer liable for costs; if collected from the property he could recover it back. Whether he will again be liable for costs or not depends entirely on the result of such subsequent trial. Whenever the liability of such accused party for costs ceases, the liability of the State ceases also. Of this proposition I think there can be no dispute. What remedy has the warden of the penitentiary, or the State of Ohio, for the recovery of the costs thus paid out of the State treasury? In the absence of all legislative enactment on the subject, I can only advise that the warden shall in each case, on the return of the prisoner to the county from which he came, leave with the auditor of such county, a statement of the amount of costs paid by the State, with a request that such account may be submitted to the commissioners of the county, and in case they decide in favor of its payment, then,

that it may be remitted to the warden, who will account for it as in other cases. In case of a refusal by the commissioners to make payment as requested, a statement to that effect, with the amount of the costs paid, should be forwarded to the proper officer, who will either take steps for its collection or otherwise dispose of it as the nature of the case may require.

JAMES MURRAY,
Attorney General.

RELATIVE TO POWERS OF THE BOARD OF PUBLIC WORKS.

Attorney General's Office,
Columbus, January 25, 1861.

Hon. John L. Martin, care of Board of Public Works:

SIR:—You ask my opinion on the following state of facts:

On March 26, 1860, the legislature of Ohio passed an act making appropriations for the maintenance and repair of the public works for the fiscal year ending November 15, 1860, and for the quarter ending February 15, 1861, 57 Vol. Ohio Laws, pages 120, 1, 2. By that act $90,000 is appropriated for the superintendence, etc., Miami and Erie Canal for the year ending November 15, 1860, and $15,000 for the quarter ending February 15, 1861. At the close of the fiscal year, November 15, 1860, there remained of the appropriation an unexpended balance of about $35,000. This large balance was not left because unnecessary to be expended on that division of the public works, but was retained in the treasury by the commissioner in charge of that division, to pay contractors and employees with whom contracts for repairs had been made, but whose contracts were not to be performed until after the close of navigation in

the year 1860, and when such repairs could be made without interruption to navigation, and consequently with less delay, as well as expense, both to the State and those engaged in the navigation of that portion of the canal.

Can such balance in the treasury of the appropriation of the last fiscal year, be now drawn out by the acting commissioner of that division for the payment of necessary repairs to be made thereon, by such contractors and employees?

I have no doubt whatever that it may be so drawn. The legislature *has not limited the time* during which such repairs shall be made; the time of making necessary repairs is left to the discretion of the acting commissioner in charge. The appropriation under such circumstances would last for two years from the time it was made. The appropriation is for what purpose? I answer, to pay for such repairs, etc., as may become necessary during the fiscal year; and if repairs become necessary during the fiscal year, the fact that they are not completed for weeks or months after the expiration of the year will by no means prevent the application of so much of the appropriation as may be necessary for their payment. The appropriation remains in life, if needed, for two years from the time it is made, but is applicable only to repairs which become necessary during the period for which it was appropriated. In other words, the appropriation for the fiscal year ending November 15, 1860, is to be applied to payment for all repairs that become necessary and were ordered by the acting commissioner, up to November 15, 1860. Such repairs as became necessary after that period, and prior to February 15, 1861, must be paid for alone out of the appropriation for *that* period. It matters not when the repairs are completed (if during the constitutional life of the appropriation), the test, and the sole test, to be applied is when the repairs became necessary and were ordered by the acting commissioner of the division. It seems to me very clear that all repairs that became necessary and were ordered by the acting commissioner in charge of

Relative to Payment of a Salary to Armorer on Resolution of General Assembly.

the Miami and Erie Canal, for the fiscal year ending November 15, 1860, may be paid out of the appropriation for that period without reference to the time when the same are completed or the money drawn for its payment, provided that it be within the constitutional life of the appropriation.

JAMES MURRAY,
Attorney General.

RELATIVE TO PAYMENT OF A SALARY TO ARMORER ON RESOLUTION OF GENERAL ASSEMBLY.

Attorney General's Office,
Columbus, January 28, 1861.

Hon. R. W. Tayler, Auditor of State:

SIR:—The legislature of Ohio, in the general appropriation act of March 24, 1860, provided for the "payment of an armorer, to be employed by the quartermaster general, and paid on his certificate, at the rate of one dollar and fifty cents per day." The quartermaster general, having made out a bill in his own favor as armorer, the auditor of state, on grounds which appear to me entirely satisfactory, refused to allow the account. The legislature then, by joint resolution, authorized and directed the auditor of state to grant an order to the quartermaster general for payment to him of such sum and rate per diem as was appropriated for the payment of an armorer, under the above mentioned act. That officer having again presented his bill, claiming one dollar and a half per day for 289 days (being every secular day) between February 29, 1860, and February 1, 1861, you now inquire "whether a resolution of the General Assembly has the force and effect of an appropriation act, constitutionally passed, so as to justify the payment of

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this bill, or so to change the force and effect of the appropriation act of last winter as to authorize the payment?"

After mature consideration I answer in the negative. No resolution of the General Assembly can appropriate money from the State treasury. No claim against the State, no matter how just, nor how long overdue, can be paid, unless the General Assembly, by law, make a specific appropriation for that purpose. The State vs. Medberry *et al*, 7 O. S. Rep. 528, Art. 2, Sec. 22, Const. of Ohio. Now, to pass a law, it is necessary that the vote shall be taken by yeas and nays and entered upon the journal, and that it shall receive the concurrence of a majority of all the members elected to either house (Art. 2, Sec. 9, Const. of Ohio). Also, that it shall be read on three different days, unless in case of urgency three-fourths of the house in which it shall be pending shall dispense with such rule. Art. 2, Sec. 16. Now, a resolution is not, within the meaning of the constitution, a law—it requires none of its formalities, it needs not that the yeas and nays be called on its passage, nor that a majority of the members elected to either house concur, nor that it be read on different days. In no view that can be taken, is the auditor of state authorized to order any money to be paid out of the treasury by virtue of any resolution. No money can be allowed by him to be drawn from the treasury unless he has the authority of a law passed in the mode required by the constitution of Ohio.

JAMES MURRAY,
Attorney General.

With Regard to Clerkship of Fulton County; Case of Merrill Appointed to Fill Vacancy.

WITH REGARD TO CLERKSHIP OF FULTON COUNTY; CASE OF MERRILL APPOINTED TO FILL VACANCY.

Office of the Attorney General,
Columbus, February 8, 1861.

H. R. Bayes, Esq., Clerk-elect Fulton County:

SIR:—Your letter of the 29th ult., this day received by me, raises the following question:

When the term of N. Merrill, present clerk, expires?

Merrill was in 1853 appointed to fill a vacancy. It is not stated, but I suppose that he was appointed, as he should have been, to justify his election in 1854. After the election in the fall of 1853, he was then elected in 1854 and again in 1857. Now, the provisions of the law on that subject are well settled by express decision of the Supreme Court, which you will find by reference to 6 Ohio State Rep. 43, that if Merrill was elected in 1854 to fill the vacancy, then he should have taken the office under his election from the day of the election. His next term would then commence on the day of the October election, 1857, and your term on the day of the October election, 1860. But if Merrill was appointed prior to the fall election in 1853, an election should have been held that year instead of in 1854. If none was held, however, his term would in any event expire when his successor was elected and that was in October, 1854.

His term as clerk then commenced. His term again commenced at the October election in 1857, and your term as his successor commenced in October, 1860. You will find this whole matter fully settled if you will get the 6th Vol. of Ohio State Reports and read the opinion of the court in the case of the State ex rel vs. Neibling, on page 43 of that volume. Yours, etc.,

JAMES MURRAY,
Attorney General.

RELATIVE TO OVERWORK OF CONVICTS IN OHIO PENITENTIARY.

Office of the Attorney General,
Columbus, February 9, 1861.

To the Hon. The Board of Directors of the Ohio Penitentiary:

GENTS:—Yours of the 1st instant was received by me on my return from the City of Washington last night.

I have carefully considered the memorial submitted to you by the several contractors and enclosed in your note to me, and am of opinion that, as to the first request, you have under section nine of the act referred to in the memorial, power in the warden and directors, to grant to the several contractors a uniform credit of three months for the hire of the convicts employed by such contractors.

The second request of the memorialists presents a point of much greater difficulty. By section fourteen of the act referred to, you are bound to make such arrangements with the contractors as will permit the convicts to have a certain amount of labor allotted to each of the convicts employed as his day's labor.

When that labor is done, what is to become of the balance of the day? It may be occupied in attending the prison school or in labor for the contractor at the same rate the contractor pays the State for the same work. The discretion as to whether the convict will attend the prison school or labor for the contractor is, by law, vested in the convict himself. He may deprive himself of the right to do either by insubordination, violation of rules and in like method, but so long as he so conducts himself as to have a right in the exercise of the discretion thus given him by the express letter of the law, either to attend school or labor, I am of the opinion that the right thus guaranteed cannot be taken from him by the act of your board. It may be and perhaps is a hardship on the contractors thus to compel

Relative to Claim of Bernard Clayne For Damages to Lands Occasioned by Overflow of Canal at Toledo.

them to pay for labor which is unnecessary and the fruit of which may remain on their hands for months without the ability on their part to dispose of it, but I am unable to see any way of escape from the positive express letter of the law, which gives to the convict the right after his day's task is done, to spend the balance of the time in labor for the contractor, who is bound to pay to the convict the same rate for that labor which he is bound to pay to the State for the same kind of work. The reason of the law is apparent, and the hardship if at this particular time it be one, is of that class which can only be remedied by an application to the law-making power. I am, therefore, of opinion that you have no power to grant the second request of the memorialists.

Respectfully yours,

JAMES MURRAY,
Attorney General.

RELATIVE TO CLAIM OF BERNARD CLAYNE FOR DAMAGES TO LANDS OCCASIONED BY OVERFLOW OF CANAL AT TOLEDO.

Attorney General's Office,
Columbus, February 9, 1861.

Hon. A. L. Backus, President Board of Public Works:

SIR:—Your letter in relation to certain claims against the State of Ohio, for damages caused to the property of Bernard Clayne and others by the overflow of the embankment of the canal at Toledo, Ohio, addressed to my predecessor (Hon. C. P. Wolcott), and by him unanswered, was last night placed in my hands, with a request that I would answer the inquiries therein contained.

The facts as they appear from the papers, are as follows: That some five or six years ago one Scott, acting on his own responsibility, not being an officer or agent of or

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authorized by the State, for his own purpose, cut down or lowered the embankment of the canal at or near the city of Toledo; that apprehending danger, these parties notified superintendent in charge of that division of the canal of Scott's act and of the danger to be apprehended; that he failed, although he had ample time for that purpose, to guard against the danger, and subsequently the banks of the canal were overflowed and much damage resulted to these applicants by reason thereof. That immediately after such damage occurred, these applicants filed their petition in due form of law, asking the board of public works to appoint appraisers, etc.; that in a few weeks the application was returned, with a note from the secretary of the board, stating that the board considered that the State was not liable, but that Scott was; that this action and return of the papers was without applicants' consent, and that it all took place within one year from the time of the injury complained of. The applicants then brought suit against Scott and were defeated in the Common Pleas and District Court, on the ground that the State was liable and not Scott. The application was again renewed to the board of public works, with an affidavit of H. B. Commager, one of the attorneys of the applicants, showing the above facts. Upon that application various questions are raised, such as, whether more than one year having lapsed since the damage was sustained, any action can now be taken? Whether the former action as detailed in the affidavit of Commager, is not a bar to further action, without an act of the General Assembly specially authorizing it? And finally, whether the affidavit of Commager is competent evidence? I have omitted to state that there is no record evidence; that this application was made as stated in the affidavit of Commager, or that any action whatever was taken by the board upon it. After mature consideration I am of the opinion that all acts and transactions of your board must be made matters of record, and that no act of the board can be shown, except by the record, or by proof

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of its loss, and then proof may be made of its contents; but unless such record is shown to have existed, there can be no secondary proof. The application stands on different ground. If once made, in due time, it cannot be disposed of, except by the action of the board, and if such application has been lost or mislaid or improperly returned without action, the applicants may at any time supply its place and demand of the board that it be legally acted upon, and the applicants may show, by any testimony, parol or otherwise, which may be satisfactory to the board, that such application was made, and having made such showing the board will be required to act upon it. It will not do for them to say that they have already acted upon it, for there is no proof of such action that the law will recognize as competent evidence; it is true that the board may now, if satisfied that this application was ever *officially* acted upon, enter upon their record a statement of such action, but they are not required to do so, nor would they be justified in so doing unless clearly and fully satisfied that official action was had upon it, nor would it be right to do so for the simple purpose of placing a bar in the way of these applicants having their claim fairly investigated. I am clearly of opinion that while this application cannot be entertained as an *original one*, now for the first time made, yet it may be regarded as supplying the place of the application originally filed, and the board on satisfactory evidence of that fact, will be required to act upon that application, and to make such action a matter of record.

Whether the appliaction is such an one as, on the papers presented, should be entertained by the board, is a question on which I do not pass.

Yours, etc.,

JAMES MURRAY,
Attorney General.

Relative to Application of Jackson, DeFrees and Others for Relief; Lewiston Reservoir Cases.

RELATIVE TO APPLICATION OF JACKSON, DE FREES AND OTHERS FOR RELIEF; LEWISTON RESERVOIR CASES.

Office of the Attorney General,
Columbus, February 12, 1861.

To the Honorable Board of Public Works:

GENTS:—William I. Jackson, S. L. P. DeFrees and others, formerly members of the Miami Hydraulic and Manufacturing Company, having applied to you for relief against certain suits brought against them in the Court of Common Pleas of Logan County, Ohio, by certain owners of lands, included in and covered by the waters of the "Lewiston Reservoir," you now ask my opinion as to the duty of the State to save these parties harmless from the result of these suits. By act of April 7, 1856, your board were authorized to enlarge this "reservoir," and to enter and condemn all land necessary for that purpose provided they should first sell enough of the surplus water of the Miami and Erie Canal to pay all the costs and expenses thereof. In Apirl, 1857, the sum of $20,000 was appropriated to pay for the lands necessary to be condemned. Under the acts of April 12, 1858, and March 31, 1859, the auditor of state and attorney general were authorized to settle with the Miami Hydraulic and Manufacturing Company and upon such settlement all the title and interest of said company in said "reservoir" was to rest in the State and the contract of April 7, 1856, between the company and the board of public works was declared void and of no effect On the 8th day of April, 1859, a final settlement between the State and said company was effected, and on that day the company executed to the State their deed of release of all right, title and interest in the Lewiston Reservoir with its appurtenances. In that settlement the company were paid for all expenditures and labor, for all lands the title to which they had

acquired and a reasonable compensation for the services and expenses of their individual members. The suits to which these individual members of the company are made parties are brought to recover for damages caused to the land of the several plaintiffs by reason of the overflow thereof by the waters of the reservoir and the consequent injury to adjacent lands. These lands, as I understand, to be admitted are those or of those which it will be necessary for the State to condemn; they are part of the lands embraced in the reservoir and which would have been long ago condemned by your board but for the exorbitant damages awarded in the Dunn case. Now there can be no doubt but that the State is in duty bound at a fair and honest price to condemn these lands. It is bound to pay to these same parties plaintff who are prosecuting these suits the amount of damages sustained by them to their lands from the closing of the embankments and filling up of the reservoir. As I understand the suits, they are brought to recover the value of the land actually taken for the use of the "reservoir," as well as for the injury caused to adjacent lands by the completion and filling up in the complete state of the reservoir. So far, then, as these are concerned, there can be no doubt but that the State is bound by every principle of morality, justice and of good faith to save these defendants harmless. True, these men partly constructed this reservoir, but the State has taken it off their hands, has completed it, filled it and are now occupying and using it. These defendants have not been compensated in any way or to any extent for the damages that may be recovered against them in their suits. In fact, the damages sued for do not result from the acts of defendants, but from the act of the State by its agents in the acts it has done since the work was taken out of the hands of the Miami Hydraulic and Manufacturing Company and became the property of the State. The proposition, then, that the State should take such steps as will save these parties from being mulcted in damages on account of the acts complained

of, is to my mind very clear. But what power has the board of public works in the premises? None whatever that I am able to discover. The board, it is true, were required to go on and condemn all of the lands to which the State has not acquired title, but that was made when money was appropriated wherewith to condemn. The money being exhausted, the power to condemn dies with it, and can only be revived when the appropriation is renewed. The board have no power either in the letter or spirit of the law to undertake the defence of these suits or to pay one dollar of any judgment therein that may be obtained against the defendants. But it is said that the board may make an order that counsel be employed and paid on behalf of the State to defend these suits. This also I deny. The board have no right to employ counsel or authorize them to be employed or paid in any case where the board or some of its members *as such* are not directly interested. I care not what they may have done in any other case. Such action in any case is wholly void and without the sanction or authority of law. They can no more employ counsel in or undertake the defence of suits in which the board or its members as such are not directly interested, than could the secretary or auditor of state. These memorialists then can obtain no relief whatever such as they ask from your board. You can neither defend these suits, employ counsel in them or pay judgments or costs that may be awarded. While I say this, I also say that it is the imperative duty of the State to afford these men the means of immediate relief to save them from all loss, cost and expense and for clearing up in some manner all claim for damages to land included in or adjacent to this reservoir, and that your board should press the General Assembly to grant such immediate relief.

JAMES MURRAY,
Attorney General.

Relative to Commencement and Expiration of Terms of Office of Engineers on Public Works.

RELATIVE TO COMMENCEMENT AND EXPIRATION OF TERMS OF OFFICE OF ENGINEERS ON PUBLIC WORKS.

Attorney General's Office,
Columbus, February 20, 1861.

To the Honorable The Members of the Board of Public Works:

GENTS:—You inquire when, in my opinion, the terms of "engineers" on the various divisions of the public works, appointed under the act of March 24, 1860, commence and expire? I answer, that by the provisions of section four of that act it is clearly apparent that the term of the first set of engineers appointed thereunder, *commenced* on the first Monday of April, A. D., 1860, and *expired* on the 16th day of February, A. D., 1861. Any rule or regualtion of your board, by which it is sought to extend the term of office of these "engineers" for a longer period than until the 16th February, 1861, is in direct violation of section four of the act of March 24, 1860, and is void. Even the fact that the commission of all or either of them is for a longer period will not avail. When the last moment arrives at which the board had power to make the commission extend, it becomes as absolutely null and void as though it had been originally issued without right or power to make it, or in direct violation of law. No commission to any "engineer" for a greater length of time than to February 16, 1861, is valid, and the term of all engineers, previously appointed, must expire on that day, unless there be a failure on that day to appoint or qualify a successor.

JAMES MURRAY,
Attorney General.

Power of County Commissioners to Loan or Permit to Be Loaned Public Moneys.

POWER OF COUNTY COMMISSIONERS TO LOAN OR PERMIT TO BE LOANED PUBLIC MONEYS.

Office of the Attorney General,
Columbus, February 21, 1861.

Commissioners of Muskingum County:

GENTS:—Your letter is before me, asking information on the law arising from the following state of facts:

Your county has an indebtedness due January 1, 1862. To pay it you have raised by taxation and have now on hand about $20,000. The holders of the bonds refuse to receive the amount, prior to the date at which the bonds become due. You desire to know whether you can loan this money for the intervening time, using due care, etc. As the case is not one proper to submit to me officially, or which I am officially required to attend to, I have had some doubt as to answering, but have concluded to do so in this case. After very mature consideration of the whole matter, I am of opinion that your board of county commissioners, under the foregoing state of facts, are not authorized to loan these funds, or to make any disposition of them whatever. They are a body with special and limited powers, and can do no acts, except in pursuance of a positive grant of power, by law for that purpose. They are required to levy a tax to pay this debt, but beyond that their powers cease. They cannot loan the money. They cannot even permit the treasurer to dispose of it in any way, except by deposits for safe keeping, in the subtreasury, which they are by law required to provide. The auditor has no power in the matter. All his power consists in drawing an order on the treasurer for the principal or interest of the debt, as it becomes due and as funds are provided for its payment. Has the treasurer any power to loan these funds? I answer clearly, no! If he loans the money the fact that it was the money of the county would be a complete bar or defence

Right of State to Share Accumulated Fund of the Pennsylvania and Ohio Canal Company.

to a suit on the obligations given for its repayment, and he would, in addition, be liable on conviction to imprisonment in the penitentiary for the act. He is therefore without authority to act in the manner which you suggest. In the absence of all legislation on the subject, you have no discretion but to retain the money in the treasury, until applicable to the purpose for which it was raised. I know of no manner in which you can obtain relief except by application to the law making power.

JAMES MURRAY,
Attorney General.

RIGHT OF STATE TO SHARE ACCUMULATED FUND OF THE PENNSYLVANIA AND OHIO CANAL COMPANY.

Office of the Attorney General,
Columbus, February 22, 1861.

Hon. R. C. Parsons, Speaker of the House of Representatives:

In answer to the following House resolution, to-wit:

> "Whereas, it appears from the late report of the Pennsylvania and Ohio Canal Company, that said company has on hand an accumulated fund of over ninety-six thousand dollars, in which the State of Ohio has about one-third interest;
>
> "Therefore, Resolved, That the attorney general be requested to report the House as soon as practicable why the State's proportion of said accumulated fund has not been paid into the state treasury; and also the legal rights of the State to control its proportion of said accumulated fund."

I beg leave to state that no report of said company, nor any data from which to answer the inquiries contained in

said resolution accompanied it. Nor is there any such data in my possession, or within my reach. I find that by a resolution of the General Assembly, pased April 12, 1858, the Attorney General was directed to take measures to compel said company to pay over to the State its share of said accumulated fund, but I am unable to find that any action was taken in relation to it, by my predecessor in office, nor in his absence from the city, am I able to state the reason why it was not taken. In the absence, therefore, of all information as to the purposes for which this fund has been accumulated, of the action which has been taken in relation to it by the directors appointed on behalf of the State, or of the rules and regulations of the company, I am unable to answer the inquiries contained in your resolution.

JAMES MURRAY,
Attorney General.

RIGHT OF COURT TO ALLOW GUARDS FOR PENITENTIARY CONVICTS.

Attorney General's Office,
Columbus, March 15, 1861.

Hon. John A. Prentiss, Warden of Ohio Penitentiary:

SIR:—Under "the act to regulate the taxation and payment of costs in certain cases," passed March 22, 1860, no allowance can in any case be made for a guard to assist in the transportation of a convict, when only one convict is brought to the penitentiary; nor can such allowance be made on the certificate of a clerk, that, in the opinion of the court, such guard was necessary. The power of the court to allow guards to assist the sheriff in the transportation of convicts, only extends under the above act. to cases in which more than one person is convicted at the same term of court, and in such cases, only one guard can be al-

lowed to every two convicts, unless there be a certificate of the clerk, that in the opinion of the court, it is such an extraordinary case as requires a greater number.

JAMES MURRAY,
Attorney General.

REQUISITION; JOHN W. RILEY FROM NEW YORK.

Office of the Attorney General,
Columbus, March 16, 1861.

To His Excellency, William Dennison, Governor of Ohio:

SIR:—The application to you, to issue your requisition on the Governor of the State of New York for the arrest, delivery, etc., of John W. Riley, to stand his trial upon an indictment found in Hamilton County, Ohio, charging him with embezzlement, etc., with its accompanying papers, is before me.

The papers are infrmal in this, that there is no evidence upon which your excellency would be justified in declaring that John W. Riley is a fugitive from justice—that he has fled from this State with intent to avoid arrest, or, that he left this State with intent to avoid a prosecution for the crime wherewith he stands charged in this indictment. There is no certificate of the prosecuting attorney to that effect, and I am inclined to the belief that a certificate would not be sufficient, but on the contrary that fact should be evidenced by affidavit. This defect being supplied, your excellency will then be justified in issuing your requisition. I am not aware of the form of requisition adopted in the office of your excellency, but would suggest that it should contain an averment not only that the accompanying papers are "duly authenticated according to the laws of the State of Ohio," but also that those papers are "authentic." You

will at once see the reason of the rule. The papers may be "duly authenticated," that is, executed in the "form" required by law, while at the same time they or the signatures to them may not be genuine. In a word, the averments may be true and yet the papers referred to or their signatures be aboslute forgeries.

Respectfully yours,
JAMES MURRAY,
Attorney General.

REQUISITION FOR FREDERICK STRICKLER FROM INDIANA.

Attorney General's Office,
Columbus, March 26, 1861.

To His Excellency, William Dennison, Governor of Ohio:

SIR:—Upon the application to you to issue your warrant for the extradition of Frederick Strickler, an alleged fugitive from the justice of the State of Indiana, I have to say, that the papers are defective in this, that it nowhere appears (as is required by the express letter of the constitution, as well as by the act of Congress pursuant thereto) from these papers, that this man, Strickler, has fled from the State of Indiana, with intent to avoid arrest, with intent to avoid a prosecution for the crime wherewith he stands charged. These are the facts required to be sworn to, the averments required to be made in the affidavit, and from those facts arise the conclusion of law, that the accused is a fugitive from justice. It is not competent to aver in the affidavit that the party accused is a fugitive from justice; that averment is not a fact; it is not such an averment as in case of its willful falsity, a charge of perjury could be based upon. On the contrary, to allow such an averment alone, to be sufficient, would open the widest possible door

to perjury and deceit. The deceit of pleading in all cases, both civil and criminal, is well settled, that all averments must be of fact, and that an averment which is merely a conclusion of law, is not sufficient as a predicate for action in any case. Inasmuch, then, as the averment in the affidavit is simply a conclusion of law, the result of facts, which are not averred, it is not sufficient to authorize your excellency in issuing your warrant of extradition.

JAMES MURRAY,
Attorney General.

Defect supplied. Warrant issued.

REQUISITION FOR SOLOMON FREIDMAN FROM PENNSYLVANIA; REVOCATION.

Office of the Attorney General,
Columbus, February 22, 1861.

To His Excellency, William Dennison, Governor of Ohio:

In relation to the requisition of the Governor of Pennsylvania for the surrender of one Solomon Freidman, an alleged fugitive from justice, I briefly submit to your excellency the following points:

First. Your excellency has power to revoke and countermand a warrant of extradition before its execution.

Opinion of Governor Fairfield, 6 Am. Jurist, 226.

In rem. Adams, 7 Law Rep., 387.

Second. The papers accompanying the requisition are not sufficient for the following reasons:

1st. The requisition merely states that the accompanying papers are duly authenticated according to the laws of the State of Pennsylvania; that is, that they are duly attested in the form required by the laws of that State. Now, there is no certificate and no proof that these papers are

Power of State to Abandon That Part of Miami and Erie Canal North of Swan Creek in the City of Toledo.

authentic. The record is certified by a deputy clerk. This is clearly erroneous. An authentication under the act of Congress can only be by the clerk himself; he cannot act in any case by deputy.

Lothrop vs. Blake, 3 Barr Pa. Rep. 495.

The authentication of the affidavit is by an alderman, with the certificate of the clerk or prothonotary attached. This certificate, under the act of Congress, is not sufficient, unless accompanied by a certificate of the presiding judge.

2d. The affidavit does not charge, nor is there any proof that the accused fled from the State to avoid justice; it says he is a fugitive from justice. That is a mere conclusion of law, dependent for its truth upon the facts. Those facts must be set forth, and your excellency must be satisfied that those facts *are true* before your warrant can issue. The accused must have actually fled from that State with intent to avoid a prosecution for the crime. Vide 6 Am. Jurist, 226. Lewin Pa. Cr. Law, 226.

For the reasons briefly stated I am of opinion that the warrant in this case was improperly issued.

JAMES MURRAY,
Attorney General.

POWER OF STATE TO ABANDON THAT PART OF MIAMI AND ERIE CANAL NORTH OF SWAN CREEK IN THE CITY OF TOLEDO.

Attorney General's Office,
Columbus, March 29, 1861.

Hon. E. Parrott, Speaker pro tem of the House of Representatives:

SIR:—In answer to the following House resolution:

Power of State to Abandon That Part of Miami and Erie Canal North of Swan Creek in the City of Toledo.

> "Resolved, That the attorney general be and is hereby instructed to inquire and report to the House whether in his opinion the State of Ohio has the right to abandon that portion of the Miami and Erie Canal lying north of the south bank of Swan Creek in the city of Toledo."

I beg leave to answer: That by act of Congress approved March 2, 1827, there was granted by the general government to the State of Indiana to aid her in the construction of a canal to unite at navigable points the waters of the Wabash River with those of Lake Erie a quantity of land equal to one-half of five sections in width on each side of said canal, reserving each alternate section to the United States upon condition that said canal, when completed, should be and forever remain a public highway for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States or persons in their service passing through the same.

The lands within the bounds of the State of Ohio were afterward under the authority of an act of Congress released to this State for the purpose of enabling her to construct this canal, but the release was made expressly subject to the same condition as in the grant of said lands to the State of Indiana. With the aid of the lands thus granted, the Wabash and Erie Canal was constructed so as to unite at navigable points the waters of the Wabash River with those of Lake Erie, and whether under these circumstances the General Asembly of the State of Ohio has power to abandon that portion of this canal north of Swan Creek in the City of Toledo, presented a question of no little difficulty. After mature consideration, I am of the opinion that the General Assembly does possess this power. It would certainly be a stringent construction to hold that the State of Ohio is bound for all time and under all circumstances to maintain the Miami and Erie Canal, precisely as it was originally constructed. That, however burdensome it may

Power of State to Abandon That Part of Miami and Erie Canal North of Swan Creek in the City of Tledo.

prove, however great pecuniary sacrifice it may impose, she is bound forever to maintain every part and portion of the canal, be it useful or useless as a public highway. It will hardly be claimed that the State is not at liberty to change the line of this canal from that of the original location, to fill up or abandon one portion of the line, to construct another, in a word, to do any act that it may do with any other of its public works. The State by its acceptance of these lands to aid it in the construction of this work imposed no limit upon its power, it relinquished no part of its sovereignty, none of its right of eminent domain. The only condition imposed by the United States in the grant of these lands was that through the canal constructed with the aid so extended, the property and persons in the service of the United States should forever have free transit as a public highway. I am of opinion, therefore, that the right of abandonment by the State is unquestionable, especially of the portion of the Miami and Erie Canal north of Swan Creek in the City of Toledo, because even were we to admit the grant of lands to have been made upon such a condition as to prevent the abandonment by the State of any portion of the canal which would interfere with a strict fulfillment of that condition, even then this portion of the canal is not necessary to enable the State to comply with that condition, inasmuch as that portion of the canal which will remain after such abandonment, will unite the waters of Lake Erie with those of the Wabash River. I am, therefore, very clearly of the opinion that the General Assembly has the power to abandon that portion of the Miami and Erie Canal described in your resolution. Whether the State received from the United States under the act of Congress above referred to any lands on either side of the portion of the canal now proposed to be abandoned, and if so, whether the State would not be liable for the value of the lands so received, I have no means at hand of determining, nor is it necessary now to inquire.

Constitutional Passage of Bill to Pay Bartlett and Smith's Claim.

Other questions connected with the policy of the abandonment will also arise as to whether the title to the lands through which this portion of the canal is constructed was extinguished or simply the right of way obtained by the exercise of the power of eminent domain. If the former is true, will not the State be required to fill up the bed of the abandoned portion? If they do not, will it not subject the State to claims for damages for nuisances created by stagnant pools of water, etc.? If the latter, what becomes of the property of the State, locks, etc., now a part of the portion of the canal sought to be abandoned? These and other important questions suggest themselves in considering this subject, but as no answer to them is called for by your resolution, it is not deemed necessary to consider them farther at this time.

JAMES MURRAY,
Attorney General.

CONSTITUTIONAL PASSAGE OF BILL TO PAY BARTLETT AND SMITH'S CLAIM.

Attorney General's Office,
Columbus, March 29, 1861.

Hon. E. Parrott, Speaker pro tem. House of Representatives:

SIR:—You submit to me the question whether House Bill No. 245 "authorizing the payment of the claim of Bartlett and Smith," having received only 56 votes in the House, can be considered as passed, within the meaning of section twenty-nine of article two, of the constitution of Ohio so as to authorize the payment of the money thereby appropriated.

If the subject matter of the claim has not been provided for by pre-existing law, then it is clear that the bill has not

Constitutional Passage of Bill to Pay Bartlett and Smith's Claim.

been constitutionally passed. What are the facts in regard to this claim? As I understand them, they are as follows: In 1857, Gibson, then treasurer of state, had a considerable amount of the money of the State on deposit with Atwood & Co., of the City of New York (they being selected by him as such depositaries under the authority of "an act to provide for the safekeeping and disbursement of the public moneys," passed April 8, 1856, section 12); being entirely out of funds in the treasury at Columbus, Gibson, as treasurer, on the 12th day of June, 1857, drew on Atwood & Co., for three thousand dollars of the moneys of the State in their hands. That draft was received by Bartlett and Smith on the same day, in good faith, and in the usual course of business, and they paid therefor to Gibson as treasurer of state, the sum of three thousand dollars in currency, which was applied by him in payment of the then indebtedness of the State; immediately afterward, Gibson resigned. A. P. Stone was appointed his successor, and he stopped payment of this and all other drafts then outstanding and unpaid. At this time Bartlett and Smith had in their hands funds wherewith to reimburse themselves, but upon the plighted word of the auditor and treasurer of state that this draft should be paid, they permitted all funds in their hands or under their control to be paid over to the proper officer of state, without retaining any amount whatever to guard themselves against loss on the draft.

If I am correct in this statement of facts, then it seems to me quite clear that the subject matter of this claim was provided for by pre-existing law; that the draft was properly drawn by the then treasurer of state under the authority of law; that, but for the action of the officers of state, which so far as this draft was concerned, was wholly unauthorized, it would have been promptly paid with the funds, and at the place selected by the treasurer of state under express authority of law, for its payment.

I am, therefore, of the opinion that this bill has been

Duty of Officers of State in Decennial Apportionment for Senators and Representatives.

constitutionally passed, within the meaning of section twenty-nine of article two, constitution of Ohio.', I should have been better satisfied had the bill passed by a vote of two-thirds of the members elected to the House, as that would have avoided all question in the case, and as I regard the bill as one peculiarly proper to have been so passed, there being no claim that the State can now make any shadow of defence to the payment of this claim, and the rights of the State being amply secured in case any such defence is ever discovered.

JAMES MURRAY,
Attorney General.

DUTY OF OFFICERS OF STATE IN DECENNIAL APPORTIONMENT FOR SENATORS AND REPRESENTATIVES.

Attorney General's Office,
Columbus, March 29, 1861.

To the Honorable the Governor, Auditor and Secretary of State of Ohio:

GENTLEMEN:—Engaged in determining the ratio of representation for the State of Ohio, according to the decennial census, pursuant to the provisions of section eleven of article eleven, of the constitution of Ohio, you have submitted to me, in substance, the following questions:

First. Can the county of Noble, as such, be attached to or made part of a senatorial district?

I answer that it cannot. This county was created subsequent to the adoption of the present constitution of the State of Ohio. By the seventh section of the ninth article of that constitution, the State is divided into thirty-three senatorial districts, electing for the first decennial period thirty-

Duty of Officers of State in Decennial Apportionment for Senators and Representatives.

five Senators. By the eighth section of the same article provision is made for the apportionment of fractions, after the first ten years, and for annexing districts which may fall below three-fourths of a senatorial ratio, to an adjoining district; and by section nine it is provided that if any county included in a senatorial district shall have acquired a population equal to a full senatorial ratio, it shall at a regular decennial apportionment, be entitled to a separate representation, provided a full senatorial ratio is left in the district from which it is taken. By section ten it is provided that "no change shall ever be made in the principles of representation, or in the senatorial districts, except as above provided."

The county of Noble was formed out of the counties of Washington, Morgan, Guernsey and Monroe, the first two of which form the fourteenth and the last two the nineteenth senatorial district. The consequence is that for senatorial purposes these four counties must be considered as retaining their original territorial limits, and each citizen of Noble County must continue to vote for Senator in that district to which he would have been attached, prior to the creation of that county. These principles are so distinctly announced by the Supreme Court of Ohio, in the case of Ohio ex rel vs. Dudley, 1 Ohio St. Rep. 445, that I deem it unnecessary to discuss them farther in this opinion.

Second. Where a senatorial district is found at the period of decennial apportionment to have less than three-fourths of the requisite senatorial ratio, to what district is it required to be attached?

I answer, to the adjoining district having the least number of inhabitants. Upon this point the provisions of the constitution would seem to be so explicit as to admit of no dispute. By section eight of article eleven "the same rules are to be applied" in annexing districts which may hereafter have less "than three-fourths of a senatorial ratio, as are applied to representative districts." When we refer to sec-

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tion five of the same article to ascertain what that rule is, we find that "where a county previously entitled to separate representation is found to have less than the number required by the new ratio, for a Representative, such county shall be attached to the county adjoining it, having the least number of inhabitants."

Inasmuch then as the senatorial districts can be neither altered nor divided, but must remain forever unchanged, it follows that when at a decennial apportionment one of these districts falls below three-fourths of the new ratio required for a Senator, it must be annexed to that adjoining district having the least number of inhabitants; in other words, in such case the two adjoining districts having the smallest population, are united and made one. An instance of this kind is the present seventeenth district consisting of the counties of Knox and Morrow, which not having three-fourths of the new ratio for a Senator, must of necessity be attached to the present twenty-eighth district, consisting of the counties of Wayne and Holmes, that being the adjoining district having the least number of inhabitants.

Third. Where three counties have been heretofore united in a representative district, and either one or two of them, having more than one-half the ratio now required, would be entitled, if separate, to a representative, does the fact that the third county had less than half such ratio debar the others from separate representation? I answer that it does. An instance of the application of this rule is the representative district now composed of the counties of Paulding, Williams and Defiance. The full ratio now required for a representative, in round numbers, is twenty-four thousand. One-half of that ratio would entitle either of these counties if it stood alone to a representative. Williams would be entitled to one, as she has over sixteen thousand. Defiance also, as she has over twelve thousand, but inasmuch as Paulding has only five thousand, they must all remain as heretofore, in a single representative district.

Duty of Officers of State in Decennial Apportionment for Senators and Representatives.

So, in districts composed of but two counties, as Wood and Ottawa, or Mercer and Van Wert, in each district there is one county which standing alone would be entitled to a separate representation. Yet, as the other has not a population of one-half the new ratio, they must remain together as heretofore. A contrary instance is that of the counties of Fulton and Lucas, each of which having more than one-half the new ratio, is entitled to separate representation. The provisions of section nineteen, article sixteen, require the counties therein specified as constituting one representative district, to remain together until they shall have acquired a sufficient population to enable them to elect separately. These districts are to remain as they are constituted by this section, until each and every county in such district is entitled to separate representation. This is the plain and evident meaning of this section, and it is utterly impossible to give it any other construction. The county of Wood, as an instance, may acquire a population of fifty thousand, enough to entitle her to two representatives if she stood alone, but unless the county of Ottawa also acquired sufficient population to entitle *her* to a separate representation, they must remain together, a single representative district, as provided for by the constitution. I may be in error as to the construction I have given to these various provisions of the constitution, but after mature reflection and careful examination, I am unable to come to any other conclusion than as herein expressed.

JAMES MURRAY,
Attorney General.

Averments in an Indictment for Perjury Where Proceedings Before J. P. on Trial Were Irregular; What Necessary.

AVERMENTS IN AN INDICTMENT FOR PERJURY WHERE PROCEEDINGS BEFORE J. P. ON TRIAL WERE IRREGULAR; WHAT NECESSARY.

Attorney General's Office,
Columbus, April 1, 1861.

Lyman J. Jackson, Esq., Prosecuting Attorney, Perry County, Ohio:

DEAR SIR:—Yours of 30th instant, containing the draft of an indictment against John W. Free for perjury and also certain inquiries as to the necessary averments to be made in an indictment for that offence in view of the facts stated by you, is before me.

I will proceed to answer your inquiries as fully as the pressure of official business will now permit me to do.

In regard to your obligations to prosecute in case no application is made to you for that purpose, I answer that you will be goverened in that matter entirely by your own conscience. You are undoubtedly bound to prosecute whenever you have good reason to believe that an offence against the laws of the land has been committed, whether or not application is made to you to do so, but that obligation is at all times subservient to your own discretion. You are to look to the consequences of a prosecution, ascertain whether the object of the law will thereby be attained, whether a conviction can be had and if so what, if any, good will be accomplished by it.

Now, as to the claim that the court before whom the perjury is alleged to have been committed having no jurisdiction by reason of its jury only consisting of five persons, I can only say there is nothing in it. A trial before any number of jurors in a civil case *without objection* is a waiver, but were it not the right of the legislature to authorize a trial of this kind in a civil case before a jury of any number

Averments in an Indictment for Perjury Where Proceedings Before J. P. on Trial Were Irregular; What Necessary.

is now too well settled to require discussion. If the question whether Free knew of the embarrassments, etc., of Avery at the time of his purchase was material, and clearly seems to have been so, then if he swore that he did not know of it, perjury may certainly be assigned on that testimony.

Floyd vs. The State, 30 Alabama Rep. 511.

Now as to the description of the goods sold. I would make the averment just as it is in the draft of the indictment forwarded to me, leaving out the averment that a more particular description was to the jurors unknown, because if that statement is made you are bound to prove it, and if the proof should be otherwise the variance would be fatal.

As to the description of the action during the trial of which the perjury is alleged to have been committed, I do not regard it as necessary to state what issues were made, on the trial. Simply state before whom it was, his powers, official character, etc., State names of the parties, plaintiffs and defendants, as they were and in such manner that there shall be no variance between your averment and the transcript of his docket which you will have to give in evidence; then state in the same way the object of that suit as it appears on the docket, the principal object of both these averments, of course, being that you may be able to get the docket in without subjecting yourself to objection on the ground of variance. I really do not think it necessary to set up the sale or alleged sale (for that I suppose was what it was in fact) nor the seizure of the goods on attachment, but it may perhaps be better to do so as a predicate for the trial of the right of property. But all these matters so far as they are material should appear in the averment of the object of the suit before the justice. If it does so appear, I would not make the other averment, but if *not* I would. The only rule I can give you in the absence of all the facts (and it is the true rule in all cases, which *you* can apply as well as *I*) is to make them so as to avoid all claim of variance with your proof. A variance is *rock* on which so many split and yet one so

easily avoided! Then if the averments are unnecessary, they do you no harm, as you are able at once to prove them.

After stating the suit and its whole object as shown by the record, you need not aver what the issues were nor any of them, but aver that it became and was material to show as between so and so that John W. Free had notice of the embarrassment, etc., at the time, etc., and that at the time he took an inventory, etc., and that said Free, being placed on the stand, etc., duly sworn, etc., testified under, etc., that he did not know, etc., and did not take, etc.

It seems to me that these hasty suggestions cover the whole ground of your letter. Two counts are not necessary, and with careful shaping of your averments to your proof, I think you will have no trouble. If I had time, I would draw an indictment for you, but it is impossible for me to do so now.

JAMES MURRAY,
Attorney General.

AVERMENTS IN INDICTMENT FOR PERJURY.

Attorney General's Office,
Columbus, April 8, 1861.

Lyman J. Jackson, Esq.:

DEAR SIR:—As I understand the facts in the case submitted by you, they are as follows:

Free and Filler claimed to be owners of a lot of personal property by purchase from Avery and A and Mason. All of this property was subsequently attached by the sheriff, a part under writs in favor of one set of plaintiffs, and part under another and so on, Free and F claiming all the property proceedings were commenced to try their title. In that proceeding F and F were made plaintiffs and *all* the parties at whose instance attachments were issued, were

made defendants or vice versa. The issue was as to whether the claimants were the owners of all and every part of the property attached. Now, I care not whether the joinder of all these parties at whose instance attachments were sued out as plaintiffs or defendants was regular or not. It certainly did not render the proceedings on the trial "Coram non Judice" and therefore void. If the indictment states facts showing the right to have a trial of right of property, as you may do by setting up the purchase of all of it, the attachment of all of it at the instance of different parties, the claim of ownership of all of it, that to test the right of the claimant to all or any part of the property, this suit was commenced and trial had, describing the parties as on the docket, the issue as to the right of the claimants to all or any part of the property so attached and that on the trial it became a material question as to whether, etc., stating the material thing as that about which the alleged perjury was committed; that Free was duly sworn as a witness; that such and such questions were put to him; that he answered thus and so to each, when in truth and in fact the contrary was the case, stating it in the negative, and that he well knew, etc., etc.

I am confident that the objection you make is not such an one as would relieve a person knowingly testifying to a falsehood upon the trial of the right of property from the consequences of such perjury. I would risk a conviction upon it without hesitation.

Yours, etc., JAMES MURRAY,
Attorney General.

Relating to Payment out of Contingent Funds for Ice, Soap, Etc., for Use of Public Offices.

RELATING TO PAYMENT OUT OF CONTINGENT FUNDS FOR ICE, SOAP, ETC., FOR USE OF PUBLIC OFFICES.

Attorney General's Office,
Columbus, May 4, 1861.

Hon. R. W. Tayler, Auditor of State:

SIR:—Some question having arisen as to whether under section two of the general appropriation act for 1861, it is competent for the heads of the various departments of state, to purchase and pay out of their contingent funds for ice, towel washing and soap:

I answer that it is; these articles are just as necessary to enable the persons employed in the State offices to transact the business of the State with ease, neatness and dispatch, as is the paper upon which and the pen and ink with which they write. To hold that ice, towels and soap are not articles necessary to each of the public officers for the use of the servants of the State therein employed, would be to stultify the General Assembly by whom this law was passed; *they* have recognized these articles as necessary to the public offices, for the use of the servants of the State. They are themselves *but* public servants, transacting public business, and *as such*, by reference to this very law, I find that *they* have appropriated money from the state treasury for the purchase of ice, to cool the water which *they* drank, to pay for soap, with which *they* cleansed, and for the washing of towels, which *they* used. To doubt the right of grave legislators, by *example* as well as precept, to prescribe what shall be necessary for the use of public servants in public offices, would be, not only gross injustice but manifest want of respect. I shall, therefore, continue the purchase and use of the above articles as heretofore.

JAMES MURRAY,
Attorney General.

Right of State to Charge Interest Upon Claims Against Contractors for Hire of Penitentiary Labor Does Not Accrue Until Demand Made By Expiration of Term of Credit, and Failure to Pay Within Fourteen Days Thereafter.

RIGHT OF STATE TO CHARGE INTEREST UPON CLAIMS AGAINST CONTRACTORS FOR HIRE OF PENITENTIARY LABOR DOES NOT ACCRUE UNTIL DEMAND MADE BY EXPIRATION OF TERM OF CREDIT, AND FAILURE TO PAY WITHIN FOURTEEN DAYS THEREAFTER.

Attorney General's Office,
Columbus, May 6, 1861.

Hon. Wm. B. Thrall, Comptroller of the Treasury:

DEAR SIR:—Your note of this date was duly received, and from the statement of facts therein contained, I find, that on the 20th February, A. D., 1861, the warden and directors of the Ohio penitentiary allowed to the several contractors for the hire of the labor of the convicts in that institution, a uniform credit of three months. The warden has now certified to you that a certain amount is due from these contractors, for the months of February, March and April, with interest from the close of each of said months. You now inquire whether interest can be legally charged and collected on these claims from the close of each month, during which labor was performed, notwithstanding the allowance of a credit of three months thereon.

To fully understand this question it is necessary to inquire, under what circumstances the State has a right in any case to charge interest upon these claims. The alw itself is specific upon this point, for by reference to section nine of the act of March 24, 1860, we find that the warden is required within five days after the close of each month to certify to the comptroller, a statement of the amount due from each contractor; that the comptroller is therefore required to demand immediate payment from such contractor,

Right of State to Charge Interest Upon Claims Against Contractors for Hire of Penitentiary Labor Does Not Accrue Until Demand Made By Expiration of Term of Credit, and Failure to Pay Within Fourteen Days Thereafter.

and that if payment be not made within fourteen days after demand made of claims due, then such claims bear interest at the rate of six per cent. from the close of the month in which the labor was performed. Now, a claim of this kind does not bear interest even if due unless there is a failure to pay it within fourteen days after demand made. So that even upon a claim which is due, a party may have nineteen days of grace upon it, without the payment of any interest whatever.

It is clearly apparent then, that it was the intention of the legislature that this class of claims should not only be due, but that a party should have a reasonable time to pay in, after it became due, before interest became chargeable upon it at all. Viewed in this light, there can be no trouble in answering your inquiry; none of the claims described in your note are as yet due. The warden and directors of the penitentiary as they were authorized by law to do, during the month of February, extended to these contractors a uniform credit of three months, applicable, I suppose (though it is not so stated) not only to the month of February, but also to the succeeding months of March and April; until the expiration of the period for which that credit was allowed, these claims are not due; they could not be sued; payment could not be enforced, and yet under the law, each contractor has a right to have fourteen days allowed him after demand for payment is made, and that demand cannot be made until the claim is due. What folly, then, to talk about interest being chargeable on these claims before the expiration of the credit which has been allowed, and consequently before the claim has become due.

In response to your inquiry, then, I answer, that interest cannot be charged and collected upon claims against contractors for the hire of convict labor where a uniform credit

has been allowed, until demand made after the expiration of the term of credit allowed, and a failure to pay within fourteen days thereafter.

If it was not the design of the warden and directors to dispense with the payment of interest, the allowance of credit should have been made upon that condition, or if they refuse to enter into such stipulation, then the allowance of all further credit should be forthwith revoked. I do not see at present how you are to make abatement of this interest, although the warden has improperly certified it, yet I do not at present see how you are to correct it.

JAMES MURRAY,
Attorney General.

AS TO WHAT CONSTITUTES THE "CAPITAL STOCK" OF A BANK.

Attorney General's Office,
Columbus, May 6, 1861.

Hon. R. W. Tayler, Auditor of State:

SIR:—The Western Reserve Bank inquires "What is intended to be understood by the term 'capital stock' used in the fourth section of the new tax law when applied to this bank? Are we to be taxed on $300,000 and surplus, or on $75,000 and surplus?"

I reply that I can imagine no possible reason why the term "capital stock" is used in fourth section of the tax law of April 4, 1861, should not have the same meaning and be understood in the same way as when it is used in eighth section of the banking law of February 24, 1845, under which this bank was organized. That section defines what shall constitute the capital stock of a bank organized under its provisions, and there provides that certificates of the funded debt of this State or of the United States, deposited with

As to Right of Trustees of Common Schools of Cincinnati to Build Schoolhouses for Use of Colored Children of That City.

the treasurer of state as collateral security for the redemption of the notes of circulation of any independent banking company, *shall* not be deemed a part of the capital stock of such company within the meaning of the act. Certificates of the funded debt of this State or of the United States, deposited by this bank with the treasurer of state for the purpose of redeeming their notes of circulation, do not constitute part of the capital stock of the bank within the meaning of that term as used in the fourth section of the tax law of April 4, 1861.

JAMES MURRAY,
Attorney General.

AS TO RIGHT OF TRUSTEES OF COMMON SCHOOLS OF CINCINNATI TO BUILD SCHOOL HOUSES FOR USE OF COLORED CHILDREN OF THAT CITY.

Attorney General's Office,
Columbus, May 7, 1861.

Hon. Joseph F. Wright:

SIR:—You inquire of me as to the right of the board of trustees and visitors of common schools in the city of Cincinnati to build school houses for the accommodation of the colored children of that city. In answer thereto I beg leave to state that I have no doubt whatever as to the board of directors having that right. By section six of the school act relating to the city of Cincinnati, pased January 24, 1853, the trustees and visitors have the right to purchase in fee simple, sites for school houses, and to erect thereon school buildings. By section one of an amendatory act, passed June 1, 1856, provision is made for the election of

Right of Township Boards of Education in Townships Where Number of Colored Children of Enumeration Exceeds Thirty to Build Schoolhouses for their Education.

three directors, by the adult colored male residents of each district, under whose charge the district schools established for the education of the colored children is placed. That act also provides that the management of the schools and school property of their respective districts shall be in charge of those directors, and at the same time all the powers and duties conferred or imposed upon the board of trustees and visitors of common schools in the city of Cincinnati, by sections five, six, seven, eight, etc., of the act of January 27, 1853, is conferred and imposed upon said board of colored directors. The same power to purchase sites for school houses and erect school buildings out of the money raised from colored tax payers is given to this board of colored directors, as is given to the board of trustees and visitors in other directors, as is given to the board of trustees and in other cases.

Under these circumstances, it seems to me that there can be no question as to the powers conferred upon the board of colored directors, to purchase sites for school houses and to erect school buildings thereon.

JAMES MURRAY,
Attorney General.

RIGHT OF TOWNSHIP BOARDS OF EDUCATION IN TOWNSHIPS WHERE NUMBER OF COLORED CHILDREN OF ENUMERATION EXCEEDS THIRTY TO BUILD SCHOOL HOUSES FOR THEIR EDUCATION.

Attorney General's Office,
Columbus, May 8, 1861.

Hon. Joseph F. Wright:

SIR:—You inquire of me whether township boards of

Right of Township Boards of Education in Townships Where Number of Colored Children of Enumeration Exceeds Thirty to Build Schoolhouses for their Education.

education, in townships where the number of colored children by enumeration exceeds thirty have power to build school houses for their education.

I have examined the question very carefully and am of opinion that they do possess such power. By section two of the general school law, passed March 14, 1853, provision is made for the election in each sub-district of local directors. By section seven is imposed upon such local directors the duty of establishing schools, building and repairing school houses, purchasing sites therefor, etc. By section ten township boards of education are created, who, by section thirteen, are invested with the management and control of central and high schools with power to build and repair school houses, purchase sites therefor, etc., and to them is given the same powers as are conferred on local directors, in case of their neglect or refusal to exercise them. By section thirty-one the township boards of education are required in townships where the whole number of colored children by enumeration exceeds thirty, to *establish* in their respective townships one or more schools for their education. The word "establish," in my opinion, gives to the board of trustees full power over the matter of colored schools. It gives to them discretion to employ any means which may be necessary to give colored children the advantages and facilities which are provided for the education of the more fortunate white children. The board of education may employ any means necessary to establish these schools. No one doubts that they may rent buildings or rooms in which to hold these schools. Suppose for a moment that they could not rent, that no person could be found in the township who would rent or lease his building for the purpose of permitting the children of colored persons to be educated or to attend school therein, what would be the result? Could not school be maintained? Would the board of education be

Right of Township Board of Education in Townships Where Number of Colored Children of Enumeration Exceeds Thirty to Build Schoolhouses for Their Education.

absolved from their obligation to maintain or establish schools for colored children? Surely, no one will advance such a proposition. The whole matter is within the discretion of the township board of education; they may rent a school room or they may build one just as in their discretion they may think most suitable and best for the interest of those concerned.

They are bound by the law to establish these schools. The manner and means are left entirely to their own discretion. They may establish them in a room rented, purchased, built. No limitation is placed upon the mode or manner in which they shall be established. It is simply an imperative order to establish in any mode or manner which in their judgment shall be most suitable. I am wholly unable to conceive of any reason why this board of education should not have the right to purchase sites for schools, and to build school houses thereon, if in their judgment it is right and proper or necessary so to do, for the purpose of establishing such schools.

We are not to regard section thirty-one of the general school law as containing any limitation on the previously granted powers of the township board of education. They possess all powers previously granted, and the provisions of section thirty-one are merely supplemental and additional to the powers previously conferred. No single power, no right is taken away. On the contrary, another duty, other obligations are imposed in addition to all the rights and powers conferred, and duties imposed by the preceding sections of the law. I have, therefore, no hesitation in saying that township boards of education have the right, whenever in their discretion the same shall be necessary, to purchase sites for schools and build school houses thereon, for the education of the children of colored persons, as in other cases.

JAMES MURRAY,
Attorney General.

As to the Validity of a Contract Between the Cincinnati, Hamilton and Dayton, Little Miami, Columbus and Xenia and Dayton, and Xenia and Belpre Railroad Companies for Operating Their Lines and Connection.

AS TO THE VALIDITY OF A CONTRACT BETWEEN THE CINCINNATI, HAMILTON AND DAYTON, LITTLE MIAMI, COLUMBUS AND XENIA AND DAYTON, AND XENIA AND BELPRE RAILROAD COMPANIES FOR OPERATING THEIR LINES AND CONNECTION.

Attorney General's Office,
Columbus, May 7, 1861.

R. M. Shoemaker, Esq., Dayton, Ohio:

SIR:—I have carefully examined your letter with the contract accompanying it. That contract appears to have been made between the Cincinnati, Hamilton and Dayton, Little Miami, Columbus and Xenia and Dayton, Xenia and Belpre Railroad Companies, for the purpose of running and operating the several lines of road of said companies in connection. It provides that all through rates for freight and passengers shall be from time to time fixed and maintained by an executive committee appointed in common by said roads, as provided for in said contract, and that they shall also from time to time fix and maintain so much of the local rates of either of the roads of the parties to said contract, as may be necessary in establishing the through rates in connection with any other roads. The roads are to be run under a common direction, each company furnishing its own cars, machinery, men, etc., fifty per cent. of the gross earnings being reserved by each company to defray its running expenses, etc. The balance is to be divided in certain stated proportions. The contract, subject to modification, is to remain in force for twenty years. These, without going into detail, constitute the main features of the instrument submitted to my consideration for an opinion as to its validity. The question is one not only of very great importance,

As to the Validity of a Contract Between the Cincinnati, Hamilton and Dayton, Little Miami, Columbus and Xenia and Dayton, and Xenia and Belpre Railroad Companies for Operating Their Lines and Connection.

but also of very great difficulty. I have given it very earnest attention as well as a thorough examination, and as the result thereof, now state, that in my opinion, said contract is *ultra vires,* contrary to public policy and void. To determine this point it is only necessary to glance at the lines of road of these contracting companies and their connections. The distance between the termini of the C., H. & D. R. R. from Cincinnati to Dayton is about sixty miles, connection is there made with the D. & M. Rd., the distance between whose termini, from Dayton to Toledo, is about one hundred and forty miles; connection is also made at Dayton with the S., D. & C. R. R., and from Dayton to Sandusky City, a distance of about one hundred and sixty miles, and the distance from Columbus to Cleveland, over the C., C. & C. Rd., natural connection of the L. M., C. & X. R. Rd., is one hundred and twenty-six miles. The distance from Cincinnati to Cleveland is much greater by way of these last roads, than is the distance from Cincinnati to Toledo or Sandusky City by the former. At these three points, Toledo, Sandusky City and Cleveland, heavy freights destined for the East, will always, when practicable, take the water route, because it carried through, not so fast, yet much cheaper than by the other route by rail. Freights then leaving Cincinnati, which is a common point, for the East, will naturally when it is practicable, go to Toledo or Sandusky City by rail, and there take water route, because to either of those points it has to be carried a much shorter distance by rail than if it were carried to Cleveland, and there took the water route. It is, of course, the interest of the parties to this contract, to have this freight go to Cleveland by rail, instead of to either of the other points, because by so doing they obtain pay for transporting it from Cincinnati to Columbus, a distance of one hundred and ten miles, instead of from Cincinnati to Dayton, a distance of sixty miles. The

As to the Validity of a Contract Between the Cincinnati, Hamilton and Dayton, Little Miami, Columbus and Xenia and Dayton, and Xenia and Belpre Railroad Companies for Operating Their Lines and Connection.

distance is so great as to authorize the companies to devote all their energies to compel freight to go by way of Columbus, instead of Dayton. Now, how is this accomplished? Simply under the contract, by the executive committee of this consolidation fixing the rates for the transportation of freight over the C., H. & D. Rd., to be transhipped on the D. & M. or S. D. & C. R. R., so as to compel those companies to charge the same price for its delivery at Toledo or Sandusky City, as is charged for freight transported over the L. M., C. & X. and the C. C. & C. R. Rd. to Cleveland. In this way the parties to this contract destroy all the advantage which other roads connecting with one of their lines would have by reason of being the shortest line to a water transit. They benefit themselves, they prevent competition, and thereby create a restraint upon trade. It seems to me that it can hardly be claimed that such a contract, which confers the power and produces the results which I have stated, is not in restraint of trade, contrary to public policy and void. In England the doctrine has been carried so far as to declare that an agreement by which one railway agrees to give up to another railway a part of its profits, in consideration of securing a part of the profits of the other company, is illegal and void. 29 Law Times, 186.

The next question is as to what remedy exists in favor of those who are more directly injured. I answer that it may be by injunction to restrain these companies from acting or running their roads under the contract. The suit must be brought in Hamilton County, and may be brought by any stockholder of either of the companies party to the contract, or it may be brought by any connecting railroad company, such as the D. & M. or S., D. & C., who may be injured by the action of these companies in running their roads under the contract. I do not see that any suit could

Operation of First Section of Act of April 8, 1856, to Further Prescribe Duties of County Commissioners, as Amended By Act f April 17, 1857, Limited to Counties Having Population of Over 100,000 at Taking of Federal Census in 1850.

or can be brought by me as attorney general in favor of the State of Ohio against these companies to set aside this contract, whose stock was not voted in favor of ratifying the contract. It is true the State of Ohio, as a large stockholder in the S., D. & C. R. R. Company, is deeply interested in setting this contract aside, but the State as a simple stockholder in that company, could not maintain this suit. In addition to that fact, the State is *equally interested* as a stockholder in the L. M., C. & X. R. Rd. and her losses in the one capacity are more than balanced by her gains in the other.

JAMES MURRAY,
Attorney General of Ohio.

OPERATION OF FIRST SECTION OF ACT OF APRIL 8, 1856, TO FURTHER PRESCRIBE DUTIES OF COUNTY COMMISSIONERS, AS AMENDED BY ACT OF APRIL 17, 1857, LIMITED TO COUNTIES HAVING POPULATION OF OVER 100,000 AT TAKING OF FEDERAL CENSUS IN 1850.

Attorney General's Office,
Columbus, May 10, 1861.

Amon Lemmon, Esq., Prosecuting Attorney, Harrison County:

SIR:—Your letter of the 5th instant is before me, in which you inquire whether the first section of an act further to prescribe the duties of county commissioners, passed April 8, 1856, Swan & Critchfield's Rev. Stats., Vol. 1, page 249, as amended by the act of April 17, 1857, 54 Ohio Laws,

As to Whether Funds for the Payment of Three Months' Troops at Camp Dennison in Service of the United States Can Be rovided By the State.

223, does not apply to all the counties in the State. I assure you it does not. If you had examined the amendatory act, there would have been no necessity of applying to this office for an opinion. It is more, however, the fault of Messrs. Swan and Critchfield than anyone else, for the law as it is found in their edition of the revised statutes does appear to be applicable to all the counties in the State. By turning to the amendatory act of April 17, 1857, you will find that the tenth section as amended, *limits* the operation of the first section of the original act to those counties which at the taking of the federal census in the year 1850, had a population of over one hundred thousand (100,000). I think that no county at that time had such a population except the county of Hamilton. The amendment changes the form of the limitation from a special to a general act, but in *substance* it is no more a general law than it was before. I suppose the change was made to avoid the charges that the act was in form a special one.

JAMES MURRAY,
Attorney General.

AS TO WHETHER FUNDS FOR THE PAYMENT OF THREE MONTHS' TROOPS AT CAMP DENNISON IN SERVICE OF THE UNITED STATES CAN BE PROVIDED BY THE STATE.

Office of the Auditor of State,
Columbus, June 10, 1861.

Governor Dennison:

In answer to your inquiry whether funds for the payment of the three months' troops now at Camp Dennison in the service of the United States can be provided by the State, I have to say: That by the act "To provide for the

As to Whether Funds for the Payment of Three Months' Troops at Camp Dennison in Service of the United States Can Be Provided by the State.

defense of the State and for support of the federal government against rebellion," passed April 18, 1861, the following sums were appropriated:

1st. For the purchase of arms and equipments for the militia of the State, $450,000.

2d. For carrying into effect any requisition of the President of the United States to protect the federal government, $500,000.

3d. As an extraordinary contingent fund for the governor, $50,000; making a total of $1,000,000.

By the act "to provide more effectually for the defense of the State against invasion," passed April 26, 1861, the following sums were appropriated, viz.:

1st. For expenses that might be incurred in calling the militia of the State into service in case of invasion or danger thereof, $1,500,000.

2d. For payment of the costs of the regiments of troops authorized to be called in the service of the State, $500,000.

The general appropriation bill authorized the expenditure of $25,000 for fixed ammunition. These are all the appropriations applicable to war purposes, and you will observe that the only one that can be used in aid of the United States is that of $500,000 contained in the first named act. Against this appropriation warrants have been drawn for quartering, subsisting, transporting and clothing the troops in the service of the United States, for blankets, for powder, for telegraphing, and other expenses to the amount of $492,169.38.

Upon adjustment of accounts it will be found that a portion of the drafts have been to pay for subsistence and clothing, furnished to State troops; but upon payment of contracts and accounts not yet adjusted, it will be found that the appropriation is already exhausted, or so nearly ex-

Whether "Finished Gates Found at Sundry Places Along the the Public Works" Are Proper Subjects of Appraisement Under Act of March 8, 1861, to Provide for Leasing Public Works of the State; Who to Pay Expenses of Appraisement.

hausted that further drafts cannot be made to any considerable amount.

I have the honor to be, etc.,

ROBERT W. TAYLER,
Auditor State.

I fully concur in the within opinion of Hon. R. W. Tayler, Auditor of State.

JAMES MURRAY,
Attorney General.

Attorney General's Office, June 10, 1861.

WHETHER "FINISHED GATES FOUND AT SUNDRY PLACES ALONG THE LINE OF THE PUBLIC WORKS" ARE PROPER SUBJECTS OF APPRAISEMENT UNDER ACT OF MARCH 8, 1861, TO PROVIDE FOR LEASING PUBLIC WORKS OF THE STATE; WHO TO PAY EXPENSES OF APPRAISEMENT.

Attorney General's Office,
Columbus, August 1, 1861.

To the Honorable Board of Public Works, of the State of Ohio:

GENTS:—Two questions are submitted by you for my consideration on the report of the appraisers appointed under the eighth section of the "Act to provide for leasing the public works of the State," passed May 8, 1861, the first of which arises under a protest of the lessees of the public works against the appraisement of certain "finished lock-gates found at sundry places along the line of the public

Whether "Finished Gates Found at Sundry Places Along the the Public Works" Are Proper Subjects of Appraisement Under Act of March 8, 1861, to Provide for Leasing Public Works of the State; Who to Pay Expenses of Appraisement.

works." It appears that these lock-gates were contracted for and caused to be constructed by Mr. Backus, then a member of the board of public works, for the purpose of replacing certain dilapidated and nearly worn-out lock-gates then in use along the line of his division. Some of these gates were so nearly worn out as to require to be almost immediately replaced so as to put the locks in suitable condition for the purposes of navigation, while on the other hand a few of them could with watchfulness and care have been made to last a year or two longer. The interests of navigation would seem to have required that these old and worn out lock-gates should have been replaced by new and more durable ones long ago, but for some reason or other it was not done, and the question is now presented whether the lessees of these public works are to be required to pay for these finished lock-gates as materials provided to be used by the State on the public works as specified in section eight of the above referred-to lease act, or whether they are to be regarded as a part of the public works, and as having passed by the lease. I am very clearly of the opinion that these finished lock-gates with their appurtenances are under the circumstances to be regarded as a part and parcel of the public works, that as such they passed to these lessees, under their contract, and that they are not the proper subject of appraisement and valuation under the eighth section of the lease act. It is true that they had not yet been attached to the locks so as to make fixtures in the canal, but it is equally true that they can in no case be regarded as materials provided to be used by the State on the public works. The locks in the canal with all their appurtenances, are as essentially part of the canal as is the channel through which the water runs or the water that runs through the channel. The canal could not exist and be used for purposes of nav-

Whether "Finished Gates Found at Sundry Places Along the the Public Works" Are Proper Subjects of Appraisement Under Act of March 8, 1861, to Provide for Leasing Public Works of the State; Who to Pay Expenses of Appraisement.

igation without the locks, nor could the locks exist and be used for the same purposes without suitable gates, finished purtenances, nor will it do to say that these gates, finished and in all respects ready for use, were not attached to the locks, and therefore could have been disposed of for another purpose. They could not have been used for any other purpose, unless first taken apart and remodeled, and if unattached gates may be so disposed of then upon the same reasoning attached gates may be detached and in like manner disposed of. These lessees are to be presumed to have leased this property with the knowledge of the defective condition of these lock-gates and of the fact that new gates and appurtenances had been constructed and finished, ready in all respects to take the place of those dilapidated and so nearly worn out, and as these new gates prepared and finished constituted a part and portion of the public works themselves, and not simply materials provided by the State to be used on the public works, they are to be presumed to have intended under their bid to include all such works, and to have expected them to pass under their lease, and after mature consideration, I am clearly of the opinion that they did so pass. The valuation in the list returned by the appraisers of the items for finished lock-gates and their appurtenenances should, therefore, be deducted from the total valuation returned in accordance with the rule established by the appraisers in case such deduction should be made.

The second question presented for conisderation is as to who shall pay the expenses of the appraisement. There being neither rule of law nor agreement on the subject, I am at a loss how to answer the inquiry, and can only suggese that the same rule be adopted which would prevail in a court of justice in a like case between private individuals. In such case a court would hold that each party should pay

General Assembly May Require County Officers to Report Each Year to Another Stated Public Officer the Amount of Money Received by Them as Fees for the Performance of Their Official Duties, Etc.

a share of the fees and expenses proportioned to the voice such party had in the selection of the appraisers; thus, if each party selected *one* and the two thus selected a third, then the costs and expenses would be equally divided, but should one party select two and the other party one appraiser, then the first party must pay two-thirds and the latter one-third of the expenses. In the present case the last rule is applicable, and the State, having selected two appraisers, must pay two-thirds the fees and expenses of the appraisement, and the lessees who selected only one appraiser, must pay one-third of such fees and expenses.

JAMES MURRAY,
Attorney General.

GENERAL ASSEMBLY MAY REQUIRE COUNTY OFFICERS TO REPORT EACH YEAR TO ANOTHER STATED PUBLIC OFFICER THE AMOUNT OF MONEY RECEIVED BY THEM AS FEES FOR THE PERFORMANCE OF THEIR OFFICIAL DUTIES, ETC.

Attorney General's Office,
Columbus, September 4, 1861.

J. N. Guthridge, Esq., Prosecuting Attorney, Allen County, Ohio:

DEAR SIR:—Yours of the 19th ult. was this day received by me, after an absence of some weeks from home, and I now hasten to reply to the inquiries therein contained. You call my attention to an act of the General Assembly of the State of Ohio, passed March 9th, A. D., 1861, requiring county auditors to make return to the auditor of state, of the

General Assembly May Require County Officers to Report Each Year to Another Stated Public Officer the Amount of Money Received by Them as Fees for the Performance of Their Official Duties, Etc.

amount of fees received by county officers and ask me in the first instance whether the provisions of that act are not in conflict with the constitution of the State.

In answer to that inquiry I have to say that I can conceive of no ground upon which the provisions of the act of March 9, 1861, can be claimed to be in conflict with the constitution of the State of Ohio. The officers who are by that act required to report to the county auditor are public officers; they are created by the statute, and are recognized as public officers in the constitution. As such, the public have a right to be apprised of all their acts, to know not only what fees they receive, but also what business they do. Certainly no man will claim but that their books and papers are public property; that the public, at all reasonable times have a right of access thereto, to examine them and know what they are. All the fees of these officers are matters of record, and as all other matters of record in these offices are subject to the inspection of the public, whose servants these officers are, and to whom they are responsible. The amount of fees which each one of these officers may receive is regulated by law, and is made dependent upon the amount of labor performed, no one of them receiving a stated salary. Should either one of these officers, at any time, charge illegal fees for any official duty performed by him, he may be prosecuted and subjected to a severe penalty for so doing, and it is the right of any person at any time, to examine his books and papers for the purpose of ascertaining whether he has or has not charged illegal fees. As a public officer engaged in the performance of a public duty, I am unable to conceive what provision of the constitution of Ohio is violated by the requirement of the General Assembly, that such officer shall each year make report to another stated public officer of the amount of money received by and due to him as fees for the performance of his official duties. I regard it as a

General Assembly May Require Coun'y Officers to Report Each Year to Another Stated Public Officer the Amount of Money Received By Them as Fees for the Performance of Their Official Duties, Etc.

matter of no consequence whether he is required to report the total amount thus received, item by item, or whether he is simply required to report the aggregate amount of the receipts. In either case, it is simply a police regulation, clearly within the constitutional power of the General Assembly. I see, therefore, no constitutional objection to the act in question. It is suggested, however, that this act is retroactive in its operation. I am unable, however, to conceive of any objection on that ground. As I have already stated, the fees of each of these officers are prescribed by law, and regulated by the amount of labor performed. The act in question contemplates solely to ascertain and make public the amount of fees received by and due to each officer year by year for his official labor. As each individual interested would have a right to, and by examination could ascertain the amount of money so received by and due to each officer for fees, the only effect of this act is to impose upon each of the county officers to whom it refers, an additional amount of labor, viz.: to ascertain and report so that the public may be informed thereof without farther trouble, expense or delay, that which each one of the public would have a right by examination of the books and papers of such officer to ascertain for himself. That the General Assembly have the right to impose such additional labor upon a public officer is a proposition so indisputable that it needs no argument.

The meaning of the term *"fees"* as used in this act seems to me so plain that I would scarcely be pardoned for taking time to define it. Of course, it can only apply to moneys received or due for services performed by the officer *in the capacity in which he is required to report.* In the case of a clerk of the Court of Common Pleas, it does include all costs due to him whether judgment has been rendered in the case or not. If the service has been performed, so

General Assembly May Require County Officers to Report Each Year to Another Stated Public Officer the Amount of Money Received by Them as Fees for the Performance of Their Official Duties, Etc.

that any amount is due to him, or has been paid to him therefor as clerk, he is bound to report it. If a clerk, after having issued summonses, writs, etc., in a case should die before the rendition of final judgment, it could scarcely be claimed that the fees for such services were not due nor that his administrator or executor could not recover the amount thereof. It is not a fair construction of this act to date a report from the time of taking effect of the act. The report must be for one year prior to the time at which the report is required by the act to be made. A prosecuting attorney must report all fees due or paid to him during the year, as such. I do not now recollect any other fees which he received than his annual allowance, nor do I think there are any other, but that is a question which each prosecuting attorney must decide for himself, as I have neither time nor inclination to examine the statutes to ascertain or decide whether there are any other fees than those above referred to by you.

The same rules that I have laid down in the foregoing opinion will apply to your inquiry as to what a sheriff is bound to report. He is bound to report all moneys received by or due to him for services performed by him as sheriff, during the year for which his report is made. I could hardly be expected to take the time necessary to enable me to decide what items of fees the sheriff would be bound to report. In relation to criminal cases, if an allowance is made by the court to be made out of the county treasury, in cases where the State fails to obtain a conviction, then I suppose, so far as those cases are concerned, the sheriff would be bound to report the amount of the allowance made to him and not the costs charged by him before the result of the prosecution was ascertained.

I have to ask you to excuse my delay in answering your letter, which on account of my absence in the East was not received by me until yesterday. I have examined the ques-

Diminution From Time of Service of Convicts Imprisoned in Penitentiary During Period Between April 12, 1858, and March 24, 1860.

tions submitted by you with great care, and have given you at length the result of my examination and trust you will find it satisfactory.

JAMES MURRAY,
Attorney General of Ohio.

DIMINUTION FROM TIME OF SERVICE OF CONVICTS IMPRISONED IN PENITENTIARY DURING PERIOD BETWEEN APRIL 12, 1858, AND MARCH 24, 1860.

Attorney General's Office,
Columbus, September 6, 1861.

Hon. John A. Prentice, Warden Ohio Penitentiary:

DEAR SIR:—Your note of the 17th ult. was duly received, but has remained unanswered on account of my absence from town. I have to say in answer to your inquiry, that I have very carefully examined the question, and am very clearly of the opinion that section eighteen of the "Act providing for the appointment and more thorough accountability of officers of the Ohio penitentiary," etc., passed April 12, 1858, was, during the period that act remained in force, applicable to all prisoners confined for a term of years in the penitentiary, under sentence for violation of the laws of Ohio. I have no doubt but that the act of April 12, 1858, in all except its first section, was in force from the time of its passage until repealed by the legislature March 24, 1860. If not, there would have been, during that period, no law under which the penitentiary could have been governed. The law of 1858, in express terms, repealed all prior laws, and the legislature, by their repeal of that act without reference to any former laws, treated it as valid in all except its

Diminution From Time of Service of Convicts Imprisoned in Penitentiary During Peridd Between April 12, 1858, *and March* 24, 1860.

first section. It follows then, that each prisoner, confined in the penitentiary for a term of years, under sentence for the violation of State laws was, during the period between the 12th day of April, 1858, and the 24th day of March, A. D., 1860, entitled to have such diminution of the term of his sentence as was authorized by the provisions of the eighteenth section of the act of April 12, 1858. The application to his case, during that period, of the provisions of the act of 1856, which had been in express terms repealed by the act of 1858, was wholly unauthorized and void. If, then, any prisoner now under your charge, confined for a term of years in the penitentiary, under sentence for violation of the laws of Ohio, who was so confined during the whole or any part of the period between April 12, 1858, and March 24, 1860, and yet remains, under the same conviction you will, if it has not already been done, apply to his case the rule prescribed by the eighteenth section of the act of April 12, 1858, for the period that he was confined while the act of April 12, 1858, remained in force. In brief, you will make such diminution from the time of sentence of such prisoner, as would have been made if the provisions of the eighteenth section of the act of April 12, 1858, had been from time to time applied to his case, during the period of his imprisonment in which that act remained in force, disregarding the wrongful application heretofore made, during the same period, of the provisions of the act of 1856.

Yours,

JAMES MURRAY,

Attorney General.

Law Providing for Relief of Families of Soldiers, Etc., Not Applicable to the Families of Commissioned Officers.

LAW PROVIDING FOR RELIEF OF FAMILIES OF SOLDIERS, ETC., NOT APPLICABLE TO THE FAMILIES OF COMMISSIONED OFFICERS.

Attorney General's Office,
Columbus, September 10, 1861.

Henry Weirle, Esq., Commissioner Allen County, Lima, Ohio:

DEAR SIR:—At your request my attention has been called to the act of May 10, 1860, "to afford relief to the families of soldiers mustered into the service of the United States, and in the service of the State, under the requisition of the president."

The entire subject of the relief to be granted under this act is left to a very great extent in the discretion of the county commissioners of each county. No family or member of the family of a soldier is entitled under this act, to demand relief as a matter of right. The act in question simply invests each board of county commissioners with discretionary power to grant to the family of each soldier in actual service, who was a resident of the county at the date of his enlistment, relief according to its wants and necessities, and under such rules and regulations as may be prescribed by the "rules and regulations of such board." I am of opinion that this act was not intended to apply to the families of commissioned officers, but on the contrary, the word soldier, as therein found, was intended to be used in its limited sense, and was designed to embrace "privates" only. The reason of the passage of an act of this kind, for the relief of the families of "privates," is obvious; they are paid but a mere pittance, and in many cases these privates are men who have wives and children wholly dependent upon them for support, and who, from the exigencies of the war, are suddenly taken away from their labors, without time or means to make provision for the support of those who are thus dependent

Law Providing for Relief of Families of Soldiers, Etc., Not Applicable to the Families of Commissioned Officers.

upon them, and who may thus almost in an hour, be left destitute of any present provision for the future, as also without the means of obtaining it. It is very apparent that the necessity of making provision for the relief of cases of this kind was imperative, as without it, no private who had the feeble and helpless dependent upon him, would have dared to enlist, or if he did, it would have been but to fill the land with the wail of the destitute and famishing. On the other hand, no such reason exists for requiring relief to be afforded to the families of commissioned officers. Their pay and emoluments are amply sufficient, not only for their own support, but also for the support of their families. Not one of the reasons which so imperatively required the passage of the act in question for the relief of the families of the "privates" can be urged in favor of such an act for the relief of the families of commissioned officers. I am, therefore, very clearly of the opinion that the provisions of the act in question, do not impose upon the boards of county commissioners the duty of granting relief to the families of commissioned officers, but on the contrary, it is confined to relieving the wants and necessities of the families of "privates," resident in the county at the date of their enlistment, according to the rules and regulations prescribed by the board in such cases, and in all cases subject to their discretion.

JAMES MURRAY,
Attorney General of Ohio.

JURISDICTION OF PROBATE COURT OF MERCER COUNTY.

Attorney General's Office,
Columbus, September 11, 1861.

W. L. Blocher, Esq., Celina, Ohio:

DEAR SIR:—Your letters have thus far remained unanswered on account of my absence from the city. You inquire as to the constitutionality of the act of May 1, 1861, to amend the act of March 31, 1859, supplementary to the act of April 12, 1858, in regard to the jurisdiction of the Probate Court in Mercer County.

The act of April 12, 1858, confers on the Probate Courts of certain counties criminal jurisdiction concurrent with the Court of Common Pleas as to minor offences. The act of March 31, 1859, supplementary to the former act, to certain other specified counties. The act of May 1, 1861, undertakes to amend the supplementary act by striking out the names of some of the counties to which the provisions of the act of April 12, 1858, had been extended by the act of March 31, 1859, but contains no clause repealing that act.

After mature consideration, I am of the opinion that the act of May 1, 1861, inasmuch as it contains no clause or words of repeal, as to the act of March 31, 1859, which it seeks to amend, is repugnant to the last clause of section 16, article two of the constitution of Ohio, and is for that reason unconstitutional and void. The provision of the constitution to which I have referred provides "that no law shall be revived or amended unless the new act contains the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed." This provision of the constitution is imperative, and whenever a section or sections of a former law is amended, the amendment must not only contain the entire section or sections amended, but the section or sections so amended must be repaled. Now the supplementary act of March 31, 1859, confers jurisdiction in

Term of Service of Recorders of Counties, Appointed to Fill Vacancies.

minor criminal cases on the Probate Courts of certain counties, additional to those upon whom such jurisdiction is conferred by the original act. The subsequent act of May 1, 1861, purports to amend by giving a new section in which the Probate Courts of certain counties are named as having the jurisdiction, and certain others upon whom it was conferred by the prior law are omitted, but the jurisdiction so conferred upon them by that prior law is not taken away, nor are they divested of it, either in express terms, nor by the repeal of the prior law, as the constitution requires.

I advise, therefore, that the Probate Court of Mercer County proceed to try one case of which it would have jurisdiction by the act of March 31, 1859, that the question of jurisdiction be made upon the trial, ruled in favor of the jurisdiction, and that the question be then directly made in the Supreme Court of Ohio, by application for a writ of error. This will at once settle the question, and advise the Probate Judge of your county as to his future action. If the record is sent to me, I will attend to it, so that the question may be set at rest and that if I am in error, as I may be, for I have great doubt in the matter, the error may be corrected.

JAMES MURRAY,
Attorney General.

TERM OF SERVICE OF RECORDERS OF COUNTIES, APPOINTED TO FILL VACANCIES.

Attorney General's Office,
Columbus, September 11, 1861.

Hon. C. P. Edson, Van Wert:

SIR:—Your letter of the 8th ult. has remained thus far unanswered on account of my absence from the city.

Term of Service of Recorders of Counties, Appointed to Fill Vacancies.

The question submitted by you is, as to "when the term of service of a person appointed by the county commissioners of a county, to fill a vacancy in the office of recorder, caused by death, resignation, etc., expires.

By the act of June 9, 1832, when the office of recorder in a county becomes vacant, the commissioners of the county are authorized to appoint a recorder, who shall hold his office until a recorder shall be elected and qualified. By the act of May 1, 1857, the official term of county recorders is made to commence on the first Monday in January succeeding their election. The office of county recorder is one in which the General Asembly have an unquestionable right to fix the duration of the term; provided it do not exceed three years; as well as to prescribe the period at which such term shall commence. The second (third as it is numbered) section of the act of 1831, provides, that in case of a vacancy the county commissioners shall appoint a recorder, who shall hold his office until "the next October election." Until the passage of the act of 1857, the term of office of the recorder commenced on the day of the October election, or so soon thereafter as the person elected, qualified.

The various acts on this subject, as they now stand, do not seem to contemplate the election for any unexpired portion of a term; but on the contrary, it would seem that each person elected to fill the office of county recorder, is to be elected for the full term of three years. If this be so, then it is very clear from the express language of the act of 1857, that the term of office of each person elected as such county recorder must commence in every instance on the first Monday of the January succeeding his election. That is not only the date of the commencement of the term, as fixed by law, but is the only date in any manner recognized by the law, as the period at which a person elected, can take the office. That being, therefore, the only period at which a person elected to this office, can take the office under and in pursuance of his election; and it being the period at which he

County Commissioners May Assess Taxes for Costs and Expenses of Ditch or Drain Upon Land Which They May Be Benefitted by the Drain, Although Such Lands Be Not Immediately Adjacent to its Proposed Route.

must take it, or vacate the office, it follows, that the words *"the next October election"* at the close of the third section of the act of February 25, 1836, are abrogated by the provisions of the act of February 3, 1857; consequently, a recorder appointed by the county commissioners, to fill a vacancy in that office, caused by death, resignation, etc., will hold the office from the date of his appointment and qualification thereunder, until the first Monday in January next succeeding the election of a person to fill such office, at which time the term of office of such successor will, under the provisions of the act of February 3, 1857, commence.

This is the only construction that I am able to give to the various statutes on this subject, and after mature consideration, I have to say that I regard it as the only proper one.

JAMES MURRAY,
Attorney General of Ohio.

COUNTY COMMISSIONERS MAY ASSESS TAXES FOR COSTS AND EXPENSES OF DITCH OR DRAIN UPON LAND WHICH THEY DEEM MAY BE BENEFITTED BY THE DRAIN, ALTHOUGH SUCH LANDS BE NOT IMMEDIATELY ADJACENT TO ITS PROPOSED ROUTE.

Attorney General's Office,
Columbus, October 16, 1861.

Auditor Wyandot County, Ohio:

SIR:—I have no doubt that under section nine of the act of March 24, 1859, known as the ditch or drain law, the commissioners of a county have the right to assess the cost and expenses of constructing a ditch, not only upon the

County Commissioners May Assess Taxes for Costs and Expenses of Ditch or Drain Upon Land Which They May Be Benefitted by the Drain, Although Such Lands Be Not Immediately Adjacent to its Proposed Route.

lands through and along which the ditch is constructed, but upon all lands *adjacent* to the ditch, whether contiguous, that is, immediately adjoining it, or not, which are benefitted by its construction. These costs and expenses are to be assessed upon each tract or parcel of land, in proportion to the benefit conferred. Now a large part of the lands through or immediately adjoining which a ditch or drain is constructed, may be so drained otherwise as to receive no benefit whatever from that particular ditch or drain; in that event, of course, no part of the costs or expenses of its construction can be charged upon this land. The very object of the construction of the ditch or drain may be to benefit lands near to, but not bordering upon its line; and in such case, those lands must bear their proportion, in fact, it may be the whole of the costs and expenses of its construction. To deny to the commissioners the right to assess a part of the expense on lands near to the lines of the ditch or drain, and clearly benefitted by it, as well as upon those lands bordering upon it or through which it runs, would at once destroy the right to proportion the assessments to the benefit. The law regards, not so much the nearness or distance of lands to proposed ditches, as it does the reception or non-reception of benefit to such land, from its construction. All lands within a *reasonable distance* of the line of a proposed ditch or drain, are liable or not liable to an assessment for the costs and expenses of its construction, according to whether they are or are not benefitted by it. *That* and *not* nearness or distance is to be your guide in making assessments.

JAMES MURRAY,
Attorney General of Ohio.

Families of Volunteers Residing in Ohio at Time of Enlistment, Enlisting in Regiments Formed in Other States (If Such Regiment Has Been Mustered Into U. S. Service) Are Entitled to Relief Under Act of May 10, 1861, Authorizing Levy of a Tax, Etc., for Relief of Families of Volunteers.

FAMILIES OF VOLUNTEERS RESIDING IN OHIO AT TIME OF ENLISTMENT, ENLISTING IN REGIMENTS FORMED IN OTHER STATES (IF SUCH REGIMENT HAS BEEN MUSTERED INTO U.S. SERVICE), ARE ENTITLED TO RELIEF UNDER ACT OF MAY 10, 1861, AUTHORIZING LEVY OF A TAX, ETC., FOR RELIEF OF FAMILIES OF VOLUNTEERS.

Attorney General's Office,
Columbus, October 16, 1861.

Auditor of Athens County, Ohio:

SIR:—Your letter of the 19th ult. has remained thus far unanswered on account of my absence from the State. You inquire "whether under the act of May 10, 1861, authorizing the levy of a tax of one-half mill on the dollar valuation in each county of this State, for the relief of the families of volunteers, etc., that fund can be distributed to the families of volunteers going out of this State and enlisting in regiments raised in other States."

I answer, that in my opinion it makes no difference *where* the man enlists. A person who volunteers so as to entitle his family to relief, under the provisions of the above recited act, must be a volunteer from Ohio, and must be mustered either into the service of the United States, or the actual service of the State of Ohio. Now, I do not regard it as a matter of much consequence, where an Ohio volunteer enlists, whether it be in Ohio, Indiana, or elsewhere, if, having a family in this State, he is mustered into the service of the United States; from the period that he is mustered into *that* service, he comes within the spirit of this law, and his

Collectors of Canal Tolls Entitled to Credit for Amount of Tolls Refunded, in Obedience to Instructions of Board of Public Works.

family is entitled to relief, but if on the contrary he enlists in a regiment from any other State than Ohio, and that regiment remains in the service and pay of that State, so long as it does so, his family, though residing in this State, and in other respects coming within the provisions of the above cited act, is not entitled to relief under it. It follows, therefore, that wherever a resident of Ohio, having a family therein, may enlist, whether in Ohio or elsewhere, from the moment he is mustered into the service of the United States and becomes its soldier, or into the actual service of Ohio and no sooner, his family is entitled to the relief provided for by the act of May 10, 1861, and not otherwise. You can have no difficulty in determining the correct action to take in each case, under the above rule.

JAMES MURRAY,
Attorney General of Ohio.

COLLECTORS OF CANAL TOLLS ENTITLED TO CREDIT FOR AMOUNT OF TOLLS REFUNDED, IN OBEDIENCE TO INSTRUCTIONS OF BOARD OF PUBLIC WORKS.

Attorney General's Office,
Columbus, October 17, 1861.

Hon. Wm. B. Thrall, Comptroller:

SIR:—In reference to the case of James H. Mitchell, late collector of canal tolls at Dayton, Ohio, to have entered a credit of $228.99, I understand the facts to be as follows: That the state board of agriculture shortly prior to the holding of the state fair at Dayton, A. D., 1860, were desirous of shipping a quantity of pine lumber to be used by them in preparing their grounds from Toledo to Dayton, by way of

Collectors of Canal Tolls Entitled to Credit for Amount of Tolls Refunded, in Obedience to Instructions of Board of Public Works.

the Miami and Erie Canal, made an arrangement with the board of public works by which they were to be permitted to transport it between the above named points free of tolls, but the board, to guard against fraud on the part of captains of canal boats, directed to be collected at Toledo, the port of shipment, and then by order duly entered on their journal, directed the collector of tolls at Dayton to refund to the state board of agriculture the amount as paid by them at Toledo, which he did and presenting the receipt and order aforesaid, asked credit on his account for the amount. I am of opinion that he is entitled to it. I cannot see that my opinion to you is opposed to this view of this case. No attempt is made to draw money out of the treasury, and the whole question turns on the question of the power of the board to make such an order. Ample power is given by section sixty-six of the public works act, which permits them to order tolls to be refunded, wherever and whenever it equitably should be done. Now, whether it was or was not equitable to refund in this case, or in the words of the law inequitable to retain it, we have no right to inquire. The board are sole judges on that point, and having so decided, no other officer has a right to call it in question or review it. The power to refund is ample. The board of public works are the only body or officer authorized by law to determine when they will refund. When a case arises which under the law authorizes them to order tolls to be refunded, when they so order that ends the whole matter. Their collectors are bound to obey and having obeyed, they are entitled to credit for the amount by them paid in pursuance of an order binding upon them. I think the credit should be allowed.

JAMES MURRAY,
Attorney General of Ohio.

Prosecutorship of Putnam County, October 21, 1861, to January, 1863; Case of David J. Brown Appointed October 21, 1861, to Fill Vacancy.

PROSECUTORSHIP OF PUTNAM COUNTY, OCTOBER 21, 1861, TO JANUARY, 1863; CASE OF DAVID J. BROWN APPOINTED OCTOBER 21, 1861, TO FILL VACANCY.

Attorney General's Office,
Columbus, November 11, 1861.

David J. Brown, Esq., Prosecuting Attorney, Putnam County, Ohio:

SIR:—In your statement submitted to me on the 21st ult., and an answer to which has been delayed by reason of my ill health, you set forth that at the October election, A. D., 1860. James C. Gribben was duly elected prosecuting attorney of Putnam County, Ohio, for the term of two years from the first Monday in January next ensuing; that he was duly commissioned and qualified, and continued in office until the 16th day of September, A. D., 1861, at which period he tendered his resignation; that at the next session of the Court of Common Pleas of said county, and on the first day of the session, being October 21, A. D., 1861, said resignation was accepted and David J. Brown was by the court, then and there appointed as prosecuting attorney of said county for the remainder of the unexpired term of Mr. Gribben. In the meantime, however, one James R. Linn, became a candidate before the people for the same office, and there being no opposition, was, at the October election, to-wit, October 8, A. D., 1861, duly elected; and now claims to hold said office for the unexpired portion of the term for which Mr. Gribben was elected. Under these circumstances, you ask my opinion as to who is legally entitled to hold the office for this unexpired term.

Section one of the "act in relation to prosecuting attorneys," (S. & C. Rev. Stat., page 1,225) provides for the election of such officer in each county in the State, on the

Prosecutorship of Putnam County, October 21, 1861, to January, 1863; Case of David J. Brown Appointed October 21, 1861, to Fill Vacancy.

second Tuesday of October, A. D., 1853, and biennially thereafter, who shall hold this office for two years from the first Monday of January next succeeding his election, and until his successor shall be appointed and qualified. By section seven of the act it is provided, that in case such office shall at any time become vacant from any cause whatever, the Court of Common Pleas shall appoint a special prosecuting attorney, who shall give bond, etc., and in case the vacancy is caused by death, resignation, or etc., shall hold his office until the next October election succeeding his appointment, and until his succesor shall be elected and qualified. These are the only provisions of the law applicable to the subject matter under consideration.

Now, when the Court of Common Pleas of Putnam County commenced its regular October session, as provided by law, on the 21st day of October, A. D., 1861, there existed a vacancy in the office of prosecuting attorney for that county, caused by the resignation of James C. Gribben, who had been duly elected, qualified and served part of his term. That resignation being made known to the court in due form, and properly entered, it became its duty, under the statutes, to appoint a proper person to fill the vacancy, which was done on that day by the appointment of David J. Brown, who has qualified and entered upon the discharge of his duties. When does his term expire? The law itself answers the inquiry, by saying "that he shall hold until the October election, next succeeding his appointment, and until," etc. That appointment was made October 21, A. D., 1861, consequently he holds, in the very words of the law, until the first Monday of January, following the first October election, held after the 21st day of October, A. D., 1861; in other words, until the first Monday of January, A. D., 1863. No other construction can be given to the act in question. No election previous to this action of the court could be of any validity; in fact, there was no vacancy to fill, prior to the

Prosecutorship of Putnam County, October 21, 1861, to January, 1863; Case of David J. Brown Appointed October 21, 1861, to Fill Vacancy.

action of the court. Either no vacancy existed on the 21st day of October, A. D., 1861, which the Court of Common Pleas could fill, or the attempted election of Mr. Linn prior thereto was a nullity, for if the court had power to appoint Mr. Brown, then, in the very words of the statute, no successor could be elected until the first October election after his appointment, which would be on the 2d Tuesday of October, A. D., 1862. It is said that Mr. Linn was elected to fill the unexpired position of Mr. Gribben's term. I answer, that even if the election of Mr. Linn had been valid, it must have been for the whole and not part of a term. I find no provision in the law, authorizing the people of a county to fill a vacancy in the office of prosecuting attorney, caused (by) the death or resignation of the incumbent, by an election, for the remainder of the unexpired term. They may only in such case, at the October election, next after an appointment by the Court of Common Pleas to fill a vacancy, elect a successor to such vacant office of prosecuting attorney, who will hold his office under such election for the full term of two years commencing on the first Monday of January after his election. These principles it seems to me are plainly deducible, as well from the express letter of the law itself, as from the reasoning of the Supreme Court in the case of the State ex rel Ellis vs. Muskingum County, 7 Ohio State Reports, 125. I am, therefore, of opinion that election of James R. Linn on the second Tuesday of October, A. D., 1861, was a nullity, and that no election for prosecuting attorney of Putnam County can be held until the second Tuesday of October, A. D., 1862. Consequently, David J. Brown will continue in office, until the first Monday of January thereafter, being the first Monday of January, A. D., 1863.

JAMES MURRAY,
Attorney General of Ohio.

In Regard to Directorship of Southern Ohio Lunatic Asylum.

IN REGARD TO DIRECTORSHIP OF SOUTHERN OHIO LUNATIC ASYLUM.

Attorney General's Office,
Columbus, November 11, 1861.

Richard Gundry, M. D., Superintendent Southern O. L. Ssylum, Dayton, Ohio:

SIR:—In your letter of the 5th instant, you state the following facts for my consideration:

On the 11th of April, A. D., 1856, Mr. Huffman was duly appointed one of the trustees of the Southern Ohio Lunatic Asylum, for the term of six years from that date. At the date of his appointment he was, and still is, a resident of the City of Dayton, but is about to remove his residence to a distance of about a mile and a half outside of the city limits, yet retaining a place of business in the city, and as I understand your letter (though that is a matter of but little consequence) still receiving his mail matter at the city post-office. You inquire, whether under these circumstances, he will vacate his trusteeship.

The third section of the "Act to provide for the uniform government and better regulation of the lunatic asylums of the State and the care of idiots and insane," passed April 7, 1856, requires that "two of the southern board shall reside in the city of Dayton," and inasmuch as the act makes no provision for vacating the trusteeship of a person, who, residing in the city at the date of his appointment, afterwards removes from it, it would seem to me, that a proper construction of the act would not require me to hold that a removal from the corporate limits of the city to the suburbs, the person so removing still retaining a place of business in the city, would vacate his office, nor do I think a strict construction of the law would ever prevent the appointment of a person as trustee, who, having a place of business in that city, resided in the suburb and not within the corporate limits. I am, therefore, of opinion that Mr. Huffman will not by his contemplated removal vacate his office. At pres-

Minors Between Ages of 18 and 21 Years, Enlisting in Military Service, Without Consent of Parents or Guardian, Cannot Be Discharged Upon Application of Such Parent and Guardian Upon Habeas Corpus.

ent, however, the question is of no practical importance, even if the removal vacated the office, as I think it does not; yet all Mr. Huffman's acts as a trustee would be valid, until such time as the governor should attempt to treat the office as vacant, and appoint some one to fill the vacancy; then and then only would it become important to have the question settled. I do not anticipate any action of that kind, and as "sufficient unto the day is the evil thereof," would advise Mr. Huffman to continue the performance of the duties of his trusteeship.

JAMES MURRAY,
Attorney General.

MINORS BETWEEN AGES OF 18 AND 21 YEARS, ENLISTING IN MILITARY SERVICE, WITHOUT CONSENT OF PARENTS OR GUARDIAN, CANNOT BE DISCHARGED UPON APPLICATION OF SUCH PARENT AND GUARDIAN UPON HABEAS CORPUS.

Attorney General's Office,
Columbus, November 11, 1861.

M. H. Kirby, Esq., Probate Judge, Wyandot County:

SIR:—In your letter to me of the 7th instant, you inquire "whether a minor between the ages of 18 and 21, who has volunteered in the military service, can be discharged on the application of his father upon *habeas corpus*.

I suppose you refer to a case where the minor has been enlisted without the consent of his father or guardian. In reply to your inquiry I answer that in my opinion he cannot be so discharged. The act of Congress under which enlistments are made (and that act is applicable to all enlistments regularly made) provides that "each and every commissioned officer, who shall be employed in the recruiting

Entry on Tax Duplicate of Town Lots Where Plat Not Recorded, Etc.

service, shall be and he is hereby authorized to enlist into the army of the United States any free, effective, able bodied men, betwen the ages of eighteen and fifty years, which enlistment shall be absolute and binding upon all persons under the age of twenty-one years as well as upon persons of full age," etc. Vide Laws U. S. approved Dec. 10, 1814, 3 U. S. Laws, 146.

The constitutional power of Congress thus to bind minors between the ages of eighteen and twenty-one, enlisting in the army or navy, without the consent of their parent or guardian, is too well settled to be now called in question. Vide United States vs. Bainbridge, 1 Mass. Rep. 71, Case of Emanuel Roberts 2 Hall Law Journal, 102; United States vs. Stewart, Crabbe Rep., 265; Comth vs. Murray, 4 Riv. Rep., 487; Comth vs. Barker, 5 ib, 423; State vs. Brearly, 2 South Rep., 562; Ex parte Brown, 5 Co. C. C. Rep., 584.

While it is true that such minor cannot be discharged upon *habeas corpus*, yet his discharge may be obtained by appliaction to the secretary of war, who is required to grant it, upon proof that the enlistment was without the consent of his parent or guardian. Sec. 5, Act of Sept. 28, 1850. 9 U. S. Stat., 507. But the discharge can be obtained in no other manner.

JAMES MURRAY,
Attorney General.

ENTRY ON TAX DUPLICATE OF TOWN LOTS, WHERE PLAT NOT RECORDED, ETC.

Attorney General's Office,
Columbus, November 12, 1861.

Hon. R. W. Tayler, Auditor of State:

SIR:—In your note to me of the 30th ult., enclosing a letter from the auditor of Knox County, the following case is stated:

Entry on Tax Duplicate of Town Lots Where Plat Not Recorded, Etc.

That in Union township, in said county, is situated a certain town called Cavallo, the plat of which has never been recorded in the recorder's office, and no title has ever passed from the original owner of the land to any of the purchasers of lots. That the town has been for several years abandoned as a town, and all the lots therein, save one, are forfeited to the State for non-payment of taxes. The auditor of Knox County, stating that the lots are of no more value than the surrounding land, inquires, "whether the lots can properly be placed back on the duplicate, to the land to which they belong, and from which they were originally taken."

The statute of March 3, 1831 (S. & C. Rev. Stat., 1482) provides that when any person desires to lay out a town, he shall cause the same to be surveyed, and a plat or map thereof, made by the county surveyor, which shall be certified, acknowledged and recorded in the office of the recorder of the county. It also imposes a penalty for the sale of any lot or lots therein before the record of such map or plat. The statute in relation to county auditors (S. &. C. Rev. Stat., 99) makes it the duty of the auditor, in all cases of sales of land for taxes, upon execution, order or decree of court, sale or conveyance by deed; or where it becomes necessary by reason of partition, devise or descent, to make a transfer of land to the party entitled to it, by reason thereof. To dispose of lands delinquent, forfeited to the State for non-payment of taxes, the auditor is required to advertise, sell and convey it, as described on the tax duplicate. He is also required to enter all lands on the tax duplicate in the name of the owner of record, the object of the law appearing to be, to place all lands on the duplicate for taxation, in the name of the holder of the legal title, then appear to comprise the various provisions of the statutes applicable to the subject matter under consideration. I am of opinion that the original entry upon the tax duplicate of the lots in the town of Cavallo, no map or plat of the town ever having been recorded, and no titles to any of the lots ever having

Duties of Superintendent of Lunatic Asylums, in Cases of Application for Admission of Patients.

been passed out of the original owner, was erroneous and without warrant of law. I have no doubt as to the power of the auditor of the county to strike these lots *as lots* from the duplicate, attach them to the land from which they were originally taken, and list the whole tract by its original description, in the name of the holder of the legal title; this, however, *cannot* be done, so long as the State asserts a lien on these lots *as lots* for taxes.

So long as back taxes are due upon these lots, payment of which is sought to be enforced by sale of the lots, *eo nomine* they must remain upon the tax duplicate, separately listed, advertised and offered, as well as subject to redemption in the same manner. Only when cleared of back taxes or by treating the original separate listing and all subsequent proceedings thereon as a nullity, can these lots be added to the land from which they were originally taken, and taxed as part and parcel thereof.

JAMES MURRAY,
Attorney General.

DUTIES OF SUPERINTENDENT OF LUNATIC ASYLUMS, IN CASES OF APPLICATION FOR ADMISSION OF PATIENTS.

Attorney General's Office.
Columbus, November 12, 1861.

R. Hills, M. D., Superintendent Central Ohio Lunatic Asylum:

SIR:—Your note to me of the 5th instant, received by me this day, encloses a record from the probate judge of Licking County, showing the following state of facts: November 1st, A. D., 1861, Darwin Humphrey, a citizen of said county, filed with said judge an affidavit in writing that one Zebnia M. Levitt was insane, that his insanity was of less than two years' duration, and that he had a legal settlement

Duties of Superintendent of Lunatic Asylums, in Cases of Application for Admission of Patients.

in Granville township in said county. Leavitt was thereupon brought into court. One Bryan, a respectable physician, with two other witnesses, was sworn and examined, and the probate judge finds that Leavitt is insane, that his insanity is of less than two years' standing, that he removed from Pennsylvania to Licking County, in the fall of 1859, resided there with his family until in the spring of 1860, when he removed to Lancaster, in Fairfield County, where he resided until the 5th of May, A. D., 1861, being more than one year, and then moved back to Licking County, where he has since resided. A certificate of the physician, Bryan, in due form of law, is attached to the record. Under these circumstances you are asked to refuse admission to this lunatic, unless you shall be advised, that at the time of these proceedings, he had "a legal settlement" in Licking County, within the meaning of the statute, and that question you now submit for my consideration and decision.

I do not consider the question one upon which you are called to take any action. To entitle a lunatic to admission into the asylum, he must be a citizen of the State—an inhabitant of the district in which the asylum admitting him is located—a resident within the State at least one year prior to the application. And his insanity or lunacy must have occurred during his residence within the State.

These are all the prerequisites necessary to entitle him to admission to some one of the asylums. To establish them, and to ascertain from where and to where he should be sent, certain proceedings are requisite. What are they? A resident of the proper county, that is, where the alleged lunatic or insane person resides, must file with the probate judge an affidavit that he believes such person to be insane, that his insanity is of less than two year's duration, and that he has a "legal settlement" in a stated township in that county. Thereupon a warrant issues for the alleged lunatic or insane person and witnesses, one of whom must be a respectable physician, are subpoenaed, sworn and examined. If upon

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the hearing the probate judge is satisfied that the person charged is insane, he obtains from the physician a certificate, containing certain statutory requisites, and forthwith makes application to the superintendent of the proper asylum, for the admission of the person so found to be insane, If advised that he can be received, it is his duty forthwith to issue his warrant, for the conveyance of such insane person to the asylum. The papers before you require you to receive this man if you have room, etc. You have *no right* to inquire whether he had a "legal settlement" in the county of Licking or not; it matters not to you, where his legal settlement is, provided he is a resident of the county within your district. The law nowhere requires the probate judge to find anything about the legal settlement of the person charged to be insane. All that he is required to find is, that he is insane. It may be that it was the duty of the probate judge eo have dismissed the proceedings, in case he found that the person charged as insane had *not* a legal settlement in his county, and it *may* be that the only remedy of the county in such case is against the person who falsely swears that the party charged as insane has a legal settlement in the county. In any event these were questions to be settled by the probate judge on the hearing. He had a right to the advice of the prosecuting attorney, as well as the attorney general, to enable him to settle them. He has not chosen to do so, but found all the statute requires, has returned to you his finding, and the papers in the case, which on their face show every requisite of the law to have been complied with, and all that is left for you to do is to receive the patient, leaving the proper construction of the term "legal settlement" to be determined by those whose duty it is to settle it, when a case shall arise requiring its determination. As for the present case, it does not require it, and "sufficient unto the day is the evil thereof."

JAMES MURRAY,
Attorney General of Ohio.

Secretary of State Not Authorized to Inquire as to Legal Sufficiency of a "Certificate" of the Organizing of a Corporation, Submitted According to Law for Filing and Record in His Office.

SECRETARY OF STATE NOT AUTHORIZED TO INQUIRE AS TO LEGAL SUFFICIENCY OF A "CERTIFICATE" OF THE ORGANIZATION OF A CORPORATION, SUBMITTED ACCORDING TO LAW FOR FILING AND RECORD IN HIS OFFICE.

Attorney General's Office,
Columbus, November 13, 1861.

Hon. A. P. Russell, Secretary of State:

SIR:—You have submitted to me a paper, sent you by certain persons and firms, purporting to be an unincorporated company, under the name and style of the "Marion Gas Light Company," who are actually engaged in the manufacture of and furnishing of gas to the residents of the town of Marion, and its vicinity, and who desire by the filing and record of this paper in your office, to become incorporated. You desire to know whether this paper is in due form of law, and whether you have any right to inquire as to its sufficiency, for the purpose of determining whether you will file and record it. If it were necessary to inquire whether this paper contained a substantial compliance with the requirements o fthe statute upon that subject. I admit that I should have great doubt as to its sufficiency, but I do not regard that question as one which you are in any case called upon to decide. The law has nowhere imposed upon you any such duty. You are simply required to file and record the certificate sent. Should it wholly fail to comply with every substantial requirement of the statute, it would not be in any degree your fault. The question as to the validity of the certificate is one to be decided, when it is called in question, by the courts; the filing and record of the certificate in your office does not create the corporation. It is but the evidence of what has been done. To create a

As to Right of County Commissioners to Levy Tax Under Act of May 10, 1861, Subsequently to Their June Session, 1861, and to Appropriate, Temporarily, for Relief of Families of Volnteers, the Surplus of Other Funds in County Treasury.

corporation, there must be a certificate, signed by not less than five natural persons, acknowledged and certified as required by law, filed and recorded in you office; but the certificate must contain in substance certain statutory requisites. Each and all these are required, but you have no more right to inquire into the sufficiency of the certificate, nor of the steps taken to create the corporation, than has the justice of the peace who takes the acknowledgment, or the clerk who certifies it.

JAMES MURRAY,
Attorney General.

AS TO RIGHT OF COUNTY COMMISSIONERS TO LEVY TAX UNDER ACT OF MAY 10, 1861, SUBSEQUENTLY TO THEIR JUNE SESSION, 1861, AND TO APPROPRIATE, TEMPORARILY, FOR RELIEF OF FAMILIES OF VOLUNTEERS, THE SURPLUS OF OTHER FUNDS IN COUNTY TREASURY.

Attorney General's Office,
Columbus, November 15, 1861.

W. L. Blocher, Esq., Celina, Mercer County, Ohio:

SIR:—Your letter of the 12th instant, containing the following statement of facts is at hand, viz.: That the provisions of the act passed May 10th, A. D., 1861 (58 Ohio Laws, 132) for the relief of the families of volunteers, etc., was unknown to the commissioners of your county, at the time of their June session, A. D., 1861. Consequently no levy as authorized by that act was then made, and they now

As to Right of County Commissioners to Levy Tax Under Act of May 10, 1861, Subsequently to Their June Session, 1861, and to Appropriate, Temporarily, for Relief of Families of Volunteers, the Surplus of Other Funds in County Treasury.

desire to know whether a levy can be now made which would be collectible on the tax duplicate for 1862, also whether they have any power to use for the relief of the families of volunteers, as provided in the above cited act, surplus funds now in the county treasury. These inquiries present points of great difficulty, and I have had serious doubt as to the construction to be given to the act in question. I have no doubt, however, that the law of May 10, A. D., 1861, was intended to be taken in connection with the general act in regard to the levy and collection of taxes throughout the State, and that such construction should be given to it as will completely harmonize both acts. The general act requires the commissioners of each county at the March or June session annually, to levy a tax for certain specified objects. The act of May 10th, A. D., 1861, authorizes them, during the year A. D., 1861, in addition to those specified objects, to levy a tax for the relief of the families of volunteers, etc. Now, if the condition of the duplicate is such, that a levy made at this time, for the relief of the families of volunteers, can be added to it, and collected with the other levies made for the present year, then I have no doubt it is competent for your commissioners to make such levy. On the other hand, I do not think it would be competent for them now to make such levy to be placed for the first time for collections, on the duplicate of A. D., 1862. If they can at this time make such levy and have it collected with the other levies for the present year, then I think it is competent for them in case there is in the treasury surplus funds remaining after the purpose for which the same was specifically levied has been accomplished, to use such funds for the relief of the families of volunteers, as authorized by the provisions of the act of May 10th, A. D., 1861, until such time as the levy made for that purpose can be collected.

Auditor of County Not Required to Dispose of the Publication of the List of Lands, Delinquent and Forfeited to the State for Non-Payment of Taxes, by "Public Letting," Etc.

The high and holy nature of the object to which this money is sought to be applied, will justify us in giving at least a liberal interpretation to the act under consideration, and it is hoped that no man will be found in any county in this State who will object even to laxity of construction, where its purpose is to afford relief to the dependent, perhaps suffering families of those who are engaged in fighting the battles of their country, in periling their life's blood to save to us and ours, unimpaired, that government which our fathers gave. He who would insist on the strict letter of the law in such a case would receive, as he would deserve, the execrations and contempt of every true hearted citizen.

JAMES MURRAY,
Attorney General of Ohio.

AUDITOR OF COUNTY NOT REQUIRED TO DISPOSE OF THE PUBLICATION OF THE LIST OF LANDS, DELINQUENT AND FORFEITED TO THE STATE FOR NON-PAYMENT OF TAXES, BY "PUBLIC LETTING," ETC.

Attorney General's Office,
Columbus, November 19, 1861.

Josiah F. Price, Esq., Prosecuting Attorney, Wood County, Ohio:

SIR:—Your letter of the 16th instant is just received, in which you state that "a question has arisen in this county, as to whether it is the duty of the auditor, in publishing the list of lands delinquent and forfeited to the State, for the nonpayment of taxes, to dispose of it at public letting," etc., and that your opinion being asked, you desire as you are authorized to, my advice thereon.

Auditor of County Not Required to Dispose of the Publication of the List of Lands, Delinquent and Forfeited to the State for Non-Payment of Taxes, by "Public Letting," Etc.

I answer that in my opinion, it is *not* the duty of the auditor to let out the publishing of the "tax lists" to the lowest responsible bidder, nor is he required to receive bids therefor at all. Section forty-eight "of an act prescribing the duties of county auditors," passed April 4, 1859, provides "that the auditors of the several counties in this State, etc., shall cause the list of delinquent lands, etc.," to be published, etc., in some newspaper printed in their respective counties, and if none be printed therein, then in some newspaper having *general circulation therein.*" Section one hundred and one of the "act in relation to the assessment, etc., of taxes," passed April 5, 1859, makes similar provision in regard to the publication of a list of lands forfeited to the State for the nonpayment of taxes. Section fifty-three of the first above cited act provides, that there shall not be paid for advertising such lists a greater sum than is therein prescribed. It is claimed, however, that these provisions of the statute are controlled by section two of "an act further to prescribe the duties of county commissioners," passed April 8, 1856, which provides that the county commissioners of any county in this State shall not make, suffer, or cause to be made any contract or purchase for any outlay of money for or on behalf of their county, the estimated value or expenses of which shall exceed $100.00, without first advertising and receiving proposals therefor, etc., such purchase or contract to be made with the lowest responsible bidder, etc. Provided that said section shall not be construed to extend to the purchase of any articles necessary to any of the county officers in the discharge of the duties of their offices, except stationery and printing. I am clearly of opinion that this last act has no applicability to the subject matter under consideration. The object and design of that act was to guard against certain alleged frauds in purchases and contracts made by the county commission-

Auditor of County Not Required to Dispose of the Publication of the List of Lands, Delinquent and Forfeited to the State for Non-Payment of Taxes, by "Public Letting," Etc.

ers of Hamilton County, and the bill was introduced in the Senate by the Hon. Stanley Matthews, at the request of prominent citizens of Cincinnati for the purpose of accomplishing that end. (Vide Journal of Ohio Senate A. D., 1856.) The act of April 8, 1856, was not designed to confer upon the commissioners of counties any powers *additional* to those which they at *that time* possessed; on the contrary, it is in express terms limited to purchases and contracts which *they* then had power to make, and which were then within their control. The county commissioners, at the time of the passage of this act, had no power to regulate or in *any* manner interfere with the publication of the delinquent or forfeited tax list. This act gave them no additional power; consequently they have none now. In fact, the whole matter of the publication of the tax list, then was, and still is, exclusively within the control of the county auditor, and with that control no man or body of men have by law any right whatever to interfere. The statute nowhere requires the auditor to receive bids for, or let the printing of this tax list to the lowest responsible bidder; to hold therefore that he is controlled in this respect by the act of April 8, 1856, is to substitute in that act, without any warrant of law therefor, the word "auditor" for "commissioners of the county," and to hold, that under this act the commissioners are required to regulate that with which the law nowhere else gives them any right to interfere. If the county auditor is required to receive proposals for and let this printing, he could only do so in strict accordance with the letter of the law, and that is to let it to the lowest responsible bidder, and yet he is required to publish the list in some paper having "general circulation in the county." Supposing the lowest responsible bid to be made by the publisher of a paper having no circulation in the county, how can he award the printing to such bidder, and at the same time comply

Auditor of County Not Required to Dispose of the Publication of the List of Lands, Delinquent and Forfeited to the State for Non-Payment of Taxes, by "Public Letting," Etc.

with the law? Again, the law provides that no more than a stated sum shall be paid for the printing. Supposing the lowest responsible bid to be at greater rates than are allowed by the statute to be paid, could he award the printing to such bidder, at rates in direct violation of law? Certainly not, and yet if he were required to receive proposals, and let to the lowest responsible bidder, difficulties such as these would meet him at every step. The law does not require it; it has given to the auditor the right to advertise the list of lands delinquent or forfeited to the State for nonpayment of taxes in such paper of the county, if one be printed therein, or if none, then in an adjoining county having general circulation therein, as he may choose. His right to select the paper in which he will advertise, and the prices which he will pay therefor, is *unlimited,* except in this, that he can pay no greater rates than is provided by law. Those rates were deemed by the legislature to be reasonable prices for the work to be done. They have authorized the auditor to pay at those rates, or below them, but not beyond, and the very fact that the legislature has fixed the maximum rate to be paid for this work, taken in connection with the other provisions of the law, is conclusive evidence of their intention to invest the auditor with full discretion as to his selection of the paper to do the work. In matters of this kind, much must of necessity be left to the discretion of the officer; it is the design of the law to bring advertisements of the kind under consideration, to the notice of all interested, and a paper which would do the job for the lowest sum, might have no such circulation as would justify the auditor in giving it the work to do. The auditor is elected by the people, is responsible to them, and is presumed to act for their best interests. The act of April 8, 1856, was undoubtedly intended, only to apply to that class of contracts and purchases, which it is the duty of the county commissioners to make,

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and not to any of those contracts or purchases, printing or otherwise, which by law devolve upon other officers of the county to make, and certainly includes nothing, which any other officer by *name,* is by law required to do or have done. In the conclusion to which I have arrived in this matter, I am sustained by the opinion of my predecessor in office, as well as by the uniform construction given by the auditors of state, as well before as since the passage of the act of April 8, 1856.

JAMES MURRAY,
Attorney General of Ohio.

AS TO COMPENSATION ALLOWED BY LAW TO MILITARY STAFF OF GOVERNOR, OFFICERS OF STATE MILITIA, ETC., CALLED INTO SERVICE SINCE COMMENCEMENT OF THE WAR AND WHILE ENGAGED IN ACTUAL SERVICE UNDER THE ORDERS OF COMMANDER-IN-CHIEF.

Attorney General's Office,
Columbus, November 19, 1861.

His Excellency, William Dennison, Governor of Ohio:

SIR:—I duly received your note of the 6th instant, in which you submit for my opinion in writing the following inquiries:

"What provisions are made by law for the payment of my military staff, consisting of the adjutant general, quartermaster general and assistant quartermaster general, commissary general of subsistence, asistant commissary of subsistence, aids de camp, judge advocate general, surgeon general, paymaster general, engineer-in-chief and military clerks, and what amount of compenastion is allowed to each of them by the statute?

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"Also, what amount of compensation is allowed by law to the officers of the State militia, and their staff, called into the service of the State since the commencement of the war, and while in actual service under the order of the commander-in-chief?"

I. The act of March 30, 1857, O. L. Vol. 54, page 44, provides as follows:

> "Section 34. Brigade inspectors shall be allowed such compensation by the board of appropriation as they shall decree just and reasonable; and members of brigade courts at the rate of two dollars per day for their services for the period aforesaid. The quartermaster general for the full and prompt discharge of all the duties enjoined upon him, shall receive an annual salary of four hundred dollars, and the adjutant general, for a full discharge of his duty, shall receive an annual salary of three hundred dollars, both to be paid semi-annually out of the state treasury, on the order of the auditor of state, approved by the commander-in-chief."
>
> "Section 41. There shall be attached to the commander-in-chief and to the several divisions, brigades, regiments, squadrons and battalions, the following staff officers, to-wit: the staff of the commander-in-chief shall consist of one adjutant general, who shall discharge the duties of inspector general, one quartermaster general, one paymaster general, two aids-de-camp, one engineer-in-chief, and one judge advocate general, who shall be appointed by the commander-in-chief. To each division there shall be one division inspector, who shall discharge the duties of asistant adjutant general, one assistant quartermaster general, two aids-de-camp, one assistant engineer-in-chief and one assistant judge advocate general, to be appointed by the major general. To each brigade there shall

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be one brigade major, to serve as brigade inspector, two aids-de-camp, one brigade quartermaster, one brigade engineer, one brigade judge advocate, one brigade surgeon and one brigade chaplain, which brigade staff shall be appointed by the brigadier general. To each regiment or battalion of artillery, rifle, infantry or light infantry, there may be one chaplain, and there shall be one adjutant, one quartermaster, one paymaster, one surgeon, one surgeon's mate, one sergeant major, one quartermaster sergeant, one drum major and one fife major, to be appointed by the commander of such regiment or battalion, and it shall be the duty of the drum major and fife major to examine and report to the commandants of regiments or battalions upon all instruments of music which shall be purchased for the use of the regiment or battalion, and no such instruments of music shall be paid for out of the funds of the regiment or battalion until approved by them. To each regiment or squadron of cavalry, there shall be one adjutant, one quartermaster, one paymaster, one surgeon, and one surgeon's mate, one quartermaster sergeant, one sergeant major, and two regimental or squadron buglemen, which shall be appointed by the commandant of such regiment or squadron.

"Section 42. The staff officers herein enumerated shall rank as follows, viz.: the quartermaster general and adjutant general as brigade generals; the paymaster general, engineer-in-chief, judge advocate general and aid-de-camp to the commander-in-chief as colonel."

"Section 65. The commander-in-chief, whenever, in his opinion, it becomes necessary, may organize a subsistence or commissary department by appointing a commissary general, or a general of a subsistance department, with the rank of brigadier general, and such other assistant commissaries as he may think necessary or the good of the service may require, with such rank as is conferred on

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officers of the same station in the army of the United States, and may also appoint such number of storekeepers and other officers as the good of the service may require, and may order any or all such officers in actual service when their services become necessary.

"Section 66. The commander-in-chief, when, in his opinion, it becomes necessary, may complete the organization of the medical department by appointing a surgeon general with the rank of colonel, and for each division a hospital surgeon," etc.

II. The act of April 20, 1861, Ohio Laws, Vol. 58, page 96, Section 1 (p. 98) appropriates as follows, to-wit:

"For the payment of the salary of the adjutant general fifteen hundred dollars.

"For the salary of the quartermaster general, six hundred dollars, and for his services as master armorer five hundred dollars.

"For compensation for services to be rendered by the surgeon general of the State, for one year next ensuing, five hundred dollars."

These provisions fix the salaries of the staff officers named, unless they are superseded by subsequent legislation. They necessarily supersede for the current year the provisions of the thirty-fourth section of the act of March 30, 1857, in respect to the salaries of the adjutant and quartermasters general.

III. The act of Apirl 23, 1861, Ohio Laws, Vol. 58, p. 95, provides:

"Section 4. The governor shall further be authorized to appoint such number of aids-de-camp as in his judgment may be necessary to enable him

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to discharge his duties as commander-in-chief. He shall have authority to appoint such assistant adjutant generals and assistant quartermasters general as may be necessary in his judgment; said officers to rank as lieutenant colonels.

"Section 5. The militia accepted by the governor, and all officers thereof, and staff officers in actual service, shall be entitled to pay and emoluments of the same grades of rank in the United States army, from the time of the acceptance of troops by the State, and from the time of the election and appropriation of officers of the line, or the calling into actual service, and necessary for the defense of the State, and accepted by the governor."

IV. The act of April 18, 1861, O. L., Vol. 58, p. 89, provides:

"Section 1. That there be and hereby is appropriated the sum of four hundred and fifty thousand dollars, for the purchase of arms and equipments for the militia of the State, to be expended under the authority and direction of the governor, and audited and paid upon accounts certified and approved by him.

"Section 2. That there be and hereby is appropriated the further sum of five hundred thousand dollars, to be expended under the direction and authority of the governor, for carrying into effect any requisition of the president of the United States to protect the federal government.

"Section 3. That there be and hereby is appropriated and placed under the control of the governor as an extraordinary contingent fund, the further sum of fifty thousand dollars, to meet the emergencies arising out of the present condition of the coutry."

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I find no other statutory provisions that seem to bear upon the subjects of your communication.

V. Does the term "staff officers" in the fifth section of the act of April 23, 1861, apply to the governor's staff, or to that part of it mentioned in the fourth section of the same act, or is it limited to the "staff officers" serving in the field, with their respective divisions, brigades and regiments?

I am compelled to adopt the last mentioned construction as the true one. The following considerations have brought me to this conclusion:

1st. If the term "staff officers" embraces all the governor's staff, it would by implication repeal the provisions of the act passed three days before, which fixes the salary of the adjutant, quartermaster and surgeon generals. There is no reason to suppose that such was the intention of the legislature. Repeals by implication are not favored; they are only recognized when such a result is inevitable.

In the case of Dodge vs. Gridley, 10 O. Rep., 178, it was held "that when two affirmative statutes exist, one is not construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation." So in Ludlow's Heris vs. Johnson, 3 O. Rep., 553, we find it said that "where the provisions of two statutes are so far inconsistent with each other that both cannot be enforced, the latter must prevail. But if by any fair course of reasoning the two can be reconciled, both shall stand. When the legislature intend to repeal a statute, we may, as a general rule, expect them to do it in express terms, or by the use of words that are equivalent to an express repeal. No court will, if it can consistently be avoided, determine that a statute is repealed by implication. Vide also Ohio ex rel, Dudley vs. Evans, 1 O. S. Rep., 437. Cass vs. Dillon, 2 O. S. Rep., 610-11.

As to Compensation, Allowed By Law, to Military Staff of Governor, Officers of State Militia, Etc., Called Into Service Since Commencement of the War and While Engaged in Actual Service Under the Orders of Commander-in-Chief.

If, in the language of the court, in Dodge vs. Gridley, cited supra, we can reconcile these conflicting statutes by no mode of interpretation, then, not otherwise, are we justified in construing the act of April 23, 1861, as repealing those provisions of the act of April 20, 1861, which are in conflict therewith. It is most clearly in our power thus to reconcile them by construing the term "staff officers" in the fifth section of the act of April 23, 1861, as applicable *alone* to the staff officers in the field, that is, attached to the militia, etc., accepted by the governor and called into actual service and not as in any manner applicable to the staff of the commander-in-chief. As we are thus enabled to give full force and effect to the provisions of both acts, we are not in view of the authority above cited authorized to give to them any other or different construction.

2. If the adjutant, quartermaster and surgeon general be excluded and the other members of the staff be included, then as the compensation allowed to officers of the same grade of rank in the army of the United States is much higher than that allowed by the act of April 20, 1861, to the three staff officers above named, it would follow that the other members of the governor's staff occupying positions much less laborious and responsible than those of the three officers named would receive a much larger compensation out of the treasury. It cannot for a moment be supposed that such was the intention of the legislature and such a consequence shows the proposition from which it is deduced to be wholly untenable.

3d. The context of this fifth section I think shows clearly that it was intended to apply only to staff officers serving in the field with their respective chiefs.

IV. If these views be correct, the following conclusions necessarily result:

As to Compensation, Allowed By Law, to Military Staff of Governor, Officers of State Militia, Etc., Called Into Service Since Commencement of the War and While Engaged in Actual Service Under the Orders of Commander-in-Chief.

The adjutant general is entitled to a salary for the current year of fifteen hundred dollars ($1,500.00).

The quartermaster general is entitled to a salary for the same period of eleven hundred dollars ($1,100.00).

The surgeon general is entitled to a salary for the same period of five hundred dollars ($500.00).

These sums have been appropriated and can be drawn by these gentlemen respectively from the treasury.

VII. As regards the other officers of your staff and the other persons referred to in your communcation, I find no legal provision watever fixing the amount of their compensation or authorizing any payment to be made to them. The legislature on this subject presents a complete *"casus omissus"* in regard to them.

VIII. Can your excellency legally pay them out of the 'extraordinary contingent fund" placed at your disposal by the act of April 18, 1861? I have no doubt you can. The matter rests wholly in your discretion. You can pay them out of this fund or submit the whole subject to the legislature as you may deem best. Any such payment by you will unquestionably be valid.

In such cases there is nowhere any power of reversal or review. For an authority in point, vide People vs. Lewis, 7 John Rep., 73. See also Martin vs. Mott, 12 Wheat. Rep., 31. Crooker vs. Crane, 21 Wend. Rep., 218. People vs. Collins, 19 ib. 60. Wilson vs. Mayor, etc., 1 Denio Rep., 599. Vorhes vs. Bank U. States, 10 Peters Rep., 478, 6 ib. 729.

IX. In regard to your second inquiry as to the compensation allowed to officers of the State militia and other staffs called into the service of the United States, etc., I have to say that I find no appropriation for their payment. That subject must, therefore, necessarily be submitted to the leg-

Liability of County for Costs in "Peace Warrant" Cases, Where Defendants Held to Further Bail; Case in Fulton County.

islature for their action. The rates of compensation are fixed by the fifth section of the act of April 23, 1861, if those officers are within its terms.

All of which is respectfully submitted.

JAMES MURRAY,
Attorney General of Ohio.

In connection with the attorney general I have carefully examined the subject to which the foregoing opinion refers, and fully concur in the views which he has expressed and the conclusions at which he has arrived.

N. H. SWAYNE.

December 21, 1861.

LIABILITY OF COUNTY FOR COSTS IN "PEACE WARRANT" CASES, WHERE DEFENDANTS HELD TO FURTHER BAIL; CASE IN FULTON COUNTY.

Attorney General's Office,
Columbus, November 23, 1861.

H. B. Bayes, Esq., Clerk Fulton County, Ohio:

SIR:—Your communication of the 19th instant is before me, in which you ask my opinion, as to whether a county is holden for costs in "peace warrant" cases, wherein the court hold the party or parties defendant, to further bail. You also state that your prosecuting attorney has decided that the county is not liable in such cases, and has ordered you not to certify the same to the auditor, but at the instance of certain witneses, who think he is wrong in giving to the statute such a construction, you apply for my advice. I should have been glad to have been advised of the course of reasoning which has brought the prosecuting

Liability of County for Costs in "Peace Warrant" Cases, Where Defendants Held to Further Bail; Case in Fulton County.

attorney to such a conclusion. "Peace warrant" cases are, in every sense of the term, criminal cases. They are placed in the statute under the head of criminal jurisdiction. The State of Ohio conducts the prosecution in her own name. The prosecuting attorney is bound to attend to them as to other criminal cases. The defendant cannot, as in all civil cases or quasi criminal cases, such as bastardy, etc., be a witness in his own behalf; in a word, it differs in no respect from any other prosecution in a criminal case. It is true that the statute makes certain special provisions as to costs, such as that in case the party accused, is, on examination by the court, discharged; or, if the party complaining fails to appear and prosecute, the court may, in its discretion, render judgment against the complainant for costs of suit; but suppose the court in the exercise of its discretion does not choose to render such a judgment, by whom are the costs to be paid? Of course in such case the accused is not liable, for he has been discharged. The party complaining is not liable, for the court has rendered no judgment against him; therefore, they must be paid by the county or they are not collectable at all. The consequence that the costs are not recoverable at all show that the proposition from which it is deduced is wholly untenable. The State has the right to guard itself from liability for costs by reason of the failure of the prosecution, by requiring the party complaining, as in other prosecutions for minor offences, to give bail for costs in the first instance, but where judgment is rendered against the accused for costs of suit, and they are not collectable on execution, as well as in cases where the court upon failure of the prosecution, refuses to render judgment against the party complaining for the costs. I hold that, as in other criminal cases, the county is clearly liable. In any event it is not your duty to refuse to certify the costs to the county auditor, because you are so ordered by the prosecuting attorney. On the contrary, you should certify; then

County Commissioners May Appropriate Funds from County Treasury to Repay Expenses Incurred in Pursuit and Apprehension of Thieves, Etc.; Case Arising in Darke County.

the auditor may, if he chooses, refuse to draw orders in pursuance of your certificate, leaving the parties claiming costs to test the liability of the county therefor by the proper legal proceedings. In the case stated by you, I have, however, no doubt as to the liability of the county.

JAMES MURRAY,
Attorney General of Ohio.

COUNTY COMMISSIONERS MAY APPROPRIATE FUNDS FROM COUNTY TREASURY TO REPAY EXPENSES INCURRED IN PURSUIT AND APPREHENSION OF THIEVES, ETC.; CASE ARISING IN DARKE COUNTY.

Attorney General's Office,
Columbus, December 3, 1861.

Thomas I. Larsh, Esq., Auditor Darke County, Ohio:

SIR:—Your letter of the 21st ult. directed to the auditor of state, has just been by him placed in my hands, with request to answer its inquiries. You desire to know whether it is in the power of the county commissioners to appropriate funds from the county treasury to repay expenses incurred in pursuing and apprehending thieves, who had stolen and conveyed away valuable property? It is true that there is no express authority given by the statute to make such an appropriation, yet it is equally true that commissioners of counties aer in the constant habit of doing so. There is hardly a county in this State in which its commissioners of counties are in the constant habit of doing so. often, offered a reward for the arrest of an alleged criminal, or the recapture of a fugitive from justice. The commis-

County Commissioners May Appropriate Funds From County Treasury to Repay Expenses Incurred in Pursuit and Apprehension of Thieves, Etc.—Case Arising in Darke County.

sioners are the representatives of the county. They are the guardians not only of public morals, but also of the property of their constituents. They are bound to use all needed and proper means, not only to preserve and protect property within the county, but also to enhance its value; in a word, they are to promote, as far as possible consistently with their powers under the statute, the public good. I understand them to be permitted by law to, as in fact they always do, levy a tax, and thereby raise a fund for what is designated as general county purposes; and I can see no objection to their appropriating, out of this fund, such amount as may, in their opinion, be necessary to render more perfect and secure that protection which the law is designed, in every case, to the person and property of the citizen. At the same time, it would not do to make such an appropriation in every case of crime against property or person; it would not do to aid from the county treasury, in the arrest of one who had committed an assault and battery on his neighbor, or to assist a citizen to recover back his stolen chickens. Much must of necessity be left to the discretion of the commissioners; but in making appropriations out of the treasury of the county, in the class of cases to which you refer, they must confine themselves to those cases alone, in which the interest of the public is to be in some manner subserved.

Respectfully,

JAMES MURRAY,

Attorney General of Ohio.

Duties of County Auditor, When Collection of a Portion of Taxes Levied on Lot of Land Advertised for Sale for Delinquent Taxes, Etc., Has Been Enjoined.

DUTIES OF COUNTY AUDITOR, WHEN COLLECTION OF A PORTION OF TAXES LEVIED ON LOT OF LAND ADVERTISED FOR SALE FOR DELINQUENT TAXES, ETC., HAS BEEN ENJOINED.

Attorney General's Office,
Columbus, December 3, 1861.

W. Greer, Esq., Auditor Clinton County, Ohio:

SIR:—Your letter of the 30th ult. has just been handed to me by the auditor of state, with request that I should answer its inquiries. You state "that you have advertised for sale the lands and town lots delinquent and forfeited to the State for nonpayment of taxes, but that since the advertisement, the county court has enjoined the collection of a cemetery tax; which levy extends over the whole of Union Township," and inquire "How shall I proceed to sell?"

I answer, that if the injunction simply extends to the collection of a portion of the tax levvied and, does not prohibit the sale, then you may proceed to sell the lands and town lots, as if no injunction had been granted. The effect of such an injunction is to require you to receive the taxes assessed outside of and not including the cemetery tax, in case of a tender. If, however, the injunction forbids a sale of any of the lands or town lots in which the cemetery tax is included, it is your duty to obey it, and you cannot sell. or offer for sale, in any case; but it will be your duty in that event to see that the injunction bond is double the entire amount of tax levied in the whole township, and if it is not sufficient, have it made so by motion to the court prior to the day of sale. In case the injunction only prohibits the sale in one case, then you will proceed to sell in all cases to which it does not apply, taking care to return the tract or tracts of land, the sale whereof is enjoined as not offered by

reason of the allowance of an injunction prohibiting the sale, etc.

As I have said before, in case the injunction does not prohibit the sale, but simply extends to the collection of one item of the tax assessed, you will proceed to offer for sale as though no injunction existed, taking care in case of a tender of the balance of the taxes assessed, to receive it, and return as to that portion of the tax, the collection of which is prohibited, that it is enjoined; and see that you obtain a decree for it with penalty, etc., or are protected as the case may be on the final hearing of the injunction suit.

JAMES MURRAY,
Attorney General of Ohio.

ON APPLICATION OF JESSE JONES, PRISONER IN THE OHIO PENITENTIARY, FOR PARDON; REVIEW OF EVIDENCE ON TRIAL, ETC.

Attorney General's Office,
Columbus, December 4, 1861.

To His Excellency, William Dennison, Governor of Ohio:

In rem Jesse Jones. Application for pardon.

Jesse Jones was indicted at the June term, 1849, of the Court of Common Pleas of Hamilton County, Ohio, for the willful, deliberate and premeditated murder of one John Brashear. He elected to be, and was tried therefor, in the Supreme Court of that county, at its May term, A. D., 1850; convicted of murder in the second degree, and sentenced to confinement in the penitentiary for life. It is claimed that, giving to the evidence its most favorable construction against Jones, it does not clearly show that he was guilty of any higher crime than manslaughter, and as he has already suffered more than the maximum punishment which

could have been inflicted for that crime, he ought to be pardoned.

I have carefully examined the evidence adduced upon the trial of Jones (a copy of which is filed with the papers in the case), and am satisfied that upon that evidence that Jones should not have been convicted of any higher crime than "manslaughter," if, indeed, his act was not, as I am strongly inclined to believe it was, justifiable homicide.

Brashear was a day watchman in the city of Cincinnati, having no police authority after the close of the day. Jones was suspected by him to have been guilty of a larceny of jewelry; on the morning of the 5th of May, 1849, he arrested Jones, took him into a house of ill fame, searched him, and found nothing. During the search, Jones told Brashear that he had a gold watch at a certain jeweler's in the city for repair. Brashear then discharged Jones, went to the jeweler's and got from him the watch, telling him he would soon return it, but in a short time he came back, told him he would not return it, and if Jones came for it "to shoot the d—d rascal." That same evening we again find Brashear and others, without warrant, in pursuit of Jones, and one of the party, without provocation or even flight, shot an innocent man walking along the streets of the city, and their only apology was that they took him for Jones. Brashear then said "that he had arrested Jones that morning, and after searching, *let him go, for a consideration, and now they would have him dead or alive.*"

The next night Brashear and another person, Thomas, who was not an officer of any kind, and neither having a warrant, started again in search of Jones, and went to a house, notorious as of ill fame and for drinking, rioting, etc., kept by one Mrs. Davis, a bitter enemy of Jones, who had made frequent threats against him, forbid him her house, and *that night* had hit him as she swears on the side of his head, for walking with her daughter. These men conceal themselves in the house, Jones comes along by the front

door, and, as the Davis girls swear, "he asked if any officers were there?" They answer "no." These two men, not knowing who it was, but the girls, saying it was Jones, rush out after him. As they pursue, one of them, Thomas, snaps his loaded pistol *twice* at the running man, whom he did not *know*, but *supposed to be* Jones. What Brashear did we cannot know, except from what he had done before, and the fact that he had a pistol with him; but as Brashear headed Jones, and was about to seize him, Jones drew a pistol, shot Brashear, and kept on his way pursued by Thomas, until he distanced him. Why are we to presume that Jones knew those men or that they or either of them were or claimed to be officers? If he relied at all upon the statement of the Davis girls, no officers were in the house; yet two men rushed out after him in hot haste. What could he presume but that they were *bullies*, hired by Mrs. Davis, whose malice and threats he well knew, and who had on that night even, "struck him with a brick bat." This class of men, as we all know, are often hired by keepers of these houses to flog and beat those whom they dislike or are inimical towards, and that these men were bullies, hired by Mrs. Davis for that purpose would be the first thought which would occur to a man in the situation of Jesse Jones. It can hardly be claimed, that after the pursuit commenced, Jones found out who his pursuers were. At no time, as Thomas swears, was he near enough to Jones to recognize who it was, and he was fully as near at any time as it is shown that Brashear was; again Jones was "fleeing in hot haste" for his life. It is hardly probable that in his haste and fear he would stop to inquire who his pursuers were in such a locality. I regard the testimony of the woman Davis and her daughters as wholly unreliable and unworthy of belief in any particular; they were all abandoned, reckless, drunken prostitutes, admitted to bear malice against the defendant, contradicting each other, and contradicted in every material point about which any other witness could or

Concerning Legal Compensation of Officers of Military Staff of Commander-in-chief, Etc.

did know anything, by the testimony of such witness, their evidence so far as uncorroborated should have been disregarded by the jury. The judge also by reason of equal division of opinion, refused to charge that a day watchman had no authority to arrest in the night season, without a warrant, especially for a crime not committed in his presence; and that refusal to charge, by reason of a defect in the bill of exceptions, could not be reviewed by court in bank. I think it should have been given, and if given, we have the evidence of the jurors that it would have resulted in an acquittal.

This view of the law and the evidence, the fact that a pardon is asked for by Judge Caldwell, who tried the case in the Supreme Court, as also by several other ex-judges, and many leading citizens of Cincinnati, together with the fact that Jones has now been confined in the penitentiary over eleven and a half years, in my opinion, warrants your excellency in issuing to Jesse Jones full pardon.

JAMES MURRAY,
Attorney General.

CONCERNING LEGAL COMPENSATION OF OFFICERS OF MILITARY STAFF OF COMMANDER-IN-CHIEF, ETC.

Attorney General's Office,
Columbus, December 6, 1861.

His Excellency, William Dennison, Governor of Ohio:

Your excellency has enclosed to me the following accounts, to-wit:

Concerning Legal Compensation of Officers of Military Staff of Commander-in-chief, Etc.

Brigadier General C. P. Buckingham...	$2,644 10
Brigadier General Columbus Delano....	1,429 86
Surgeon General W. L. McMillen.....	738 27
Assistant Adjt. Genl. Rodney Mason...	770 95
Commissary of Subsistence C. Goddard.	380 70
Quartermaster Gen. D. L. Wood.....	2,061 60
Quartermaster Geo. B. Wright.....	1,450 34
Asst. Com. Subsistence L. Gwynne....	182 73

with a request to know, whether, in my opinion, you have the right to pay them out of your contingent fund.

In answer to that inquiry, I would state that you have, as stated in my former opinion to your excellency upon the same general subject, an undoubted right to pay any or all of the above accounts out of your contingent fund, if in your discretion, you see proper to do so; and no power exists anywhere to review or reverse your decision in the matter.

It would not, of course, be proper for me to advise your excellency in regard to the exercise of the discretion with which you are invested; neither would I be justified in offering an opinion as to the liability of the United States to refund the amount of these accounts, if paid by you. I may be permitted, however, to suggest to your excellency, whether any such liability would exist, as regards certain of these officers, for instance, the surgeon general, an officer created by the legislature of Ohio, whose duties are confined to and cannot extend beyond Ohio troops in the service of Ohio, and whose compensation is fixed in full for the services to be performed by him. As I have already stated, you have the right to pay in any case. The propriety of exercising that right can and ought to be determined by you and you alone.

JAMES MURRAY,
Attorney General.

Regarding Authority of Directors of Ohio Penitentiary to Change Terms of Contract for Hire of Convict Labor, With Consent of Other Contracting Party.

REGARDING AUTHORITY OF DIRECTORS OF OHIO PENITENTIARY TO CHANGE TERMS OF CONTRACT FOR HIRE OF CONVICT LABOR, WITH CONSENT OF OTHER CONTRACTING PARTY.

Attorney General's Office,
Columbus, December 14, 1861.

J. J. Janney, Esq., President Board of Directors Ohio Penitentiary:

SIR:—Your note of the 12th instant, in which you inquire "whether the board of directors of this institution have power with the consent of the other party, to change a contract for the employment of convicts, duly entered into by you with such party," has been duly received and considered, and in answer thereto I beg leave to state, that in my opinion you have no such power. I would gladly have given an opinion in favor of your right to make the change you desire, inasmuch as I fully appreciate the difficulty which will probably exist for the next year or two, in procuring employment for the convicts in the penitentiary; but after very thorough examination and reflection, I am unable to find any legal principle which would justify me in deciding that you have any right to make the change you desire. The contracts for the employment of convicts are made upon public advertisement, asking for bids, and are required to be made with the highest bidder. Now, if after entering into such contract, the board of directors have power to abrogate it and enter into a new contract (for even a modification of the old contract is nothing less than the making a new one), then the policy of the law upon this subject is at once destroyed, and such power once granted, the directors might on one day enter into a contract for the employment of a given number of convicts, for a given period, with the

Authority to Lease Surplus Water of Canals, in Certain Cases Remains Vested in Board of Public Works.

highest bidder, and under the public advertisement, and the next day change the contract by reducing the number of convicts employed, the length of time of their employment or the price paid, so as to make it an entirely new contract, and thus the object of a public letting would be wholly lost and destroyed. In the case to which you refer, it seems to be a hardship to require the company to retain and pay for the full number of convicts contracted for, when by inevitable accident they are deprived of the ability to employ a portion of them; but if the right to change a contract exists in one case, and under one set of circumstances, it must exist in every case, and under all circumstances. The board of directors derive all their power from the statute. They have no power in any case beyond it, except where it is necessary to carry out and perform powers expressly granted. They have power under certain circumstances and in a certain way to enter into contract, but no power to break or change them is given, under any circumstances; as the law at present stands that power exists only in the General Assembly. I am, therefore, reluctantly compelled to answer your inquiry in the negative.

JAMES MURRAY,
Attorney General.

AUTHORITY TO LEASE SURPLUS WATER OF CANALS, IN CERTAIN CASES REMAINS VESTED IN BOARD OF PUBLIC WORKS.

Attorney General's Office,
Columbus, December 20, 1861.

Hon. John I. Martin, President Board of Public Works:

SIR:—Mr. Sargent of your board inquires my opinion as to who is invested by law with power to lease the surplus

Authority to Lease Surplus Water of Canals, in Certain Cases Remains Vested in Board of Public Works.

water power of the canals. The general power has heretofore been vested in the board of public works, and the various leases heretofore made by them, contain a clause authorizing the lessee, or his assignee, to demand and have a renewal; in some cases for ninety-nine, and in all others for thirty years; and in both cases, the lease, by its terms, made renewable forever. The act under which the canals have been leased, however, invests those lessees with all the rights of the State in these leases, and provides, that in case they are forfeited for any cause, or expire, the lessees shall have the same right that the State now has, to re-enter and lease again, with the consent of the board of public works in writing, for any period of time not exceeding the unexpired portion of ten years' time.

The only mode by which I can reconcile this seeming conflict, and preserve the rights of all parties, is to hold that the term "expire" in the lease act, only applies to those cases in which the grant of water power ends at a specified period, without any right of renewal; and in those cases, where a right to renewal exists, but no renewal is asked. In such cases the lessees may lease the water power, with the consent in writing of the board of public works, for the unexpired portion of ten years' time. In *all* other cases, the board of public works has the exclusive right to renew, that is, to extend the lease, upon the same terms and for the same period, as in the original lease. So they may also re-let, or change the terms or conditions of a lease, and raise or reduce the rent in a renewal, but in these cases such re-letting, change of terms or conditions, or increase or reduction of the rent, can only be exercised by the mutual consent in writing, of the board and lessees of the public works.

JAMES MURRAY,
Attorney General.

As to Right of Governor to Discharge Allen Winans, Minor, Etc., Enlisted in 5th O. V. Cavalry.

AS TO RIGHT OF GOVERNOR TO DISCHARGE ALLEN WINANS, MINOR, ETC., ENLISTED IN 5TH O. V. CAVALRY.

Attorney General's Office,
Columbus, December 26, 1861.

His Excellency, William Dennison, Governor of Ohio:

SIR:—There has been submitted to me by your excellency a letter from Messrs. Penn and Keyt, attorneys of Batavia, enclosing a copy of a record of the Probate Court of Clermont County, Ohio, in the matter of Allen Winans, said to be a minor under the age of 18 years, and to be unlawfully detained, under an enlistment in the 5th Ohio cavalry; with a request that I would examine and dispose of it. I am unable to conceive of any right which your excellency has to interfere, even if the alleged matters of grievance were true. The officers and men of the 5th Ohio cavalry are mustered into the service of the United States, and under the circumstances, you have no right to order the discharge or surrender to the civil authorities of any man in the regiment. The only remedy of the parent or guardian of a minor, enlisted under the age of 18, is by application to the secretary of war, for his discharge, which, by virtue of the act of Congress of September 28, 1850, he is bound upon proper proof to grant. The proceedings upon the habeas corpus appear to have been wholly irregular. There was no right to issue the writ upon the petition, because the application was not made by the minor, but by one Benjamin L. Winans, who is not averred to have been either parent or guardian, and who for ought that appears, may have been a *mere volunteer,* acting without consent of any one of the parties in interest. Again, the action of the court, in hearing the case, and rendering a judgment, without the production of the person for whom the writ was issued, was coram non judice, and wholly void. If Allen Winans was forcibly taken from

The Acceptance by a Judge of the Court of Common Pleas in this State, of a Commission as an Officer in Military Service of U. S. Does Not Vacate Office of Judge.

the sheriff after he had taken him in pursuance of the command of the writ, an attachment should have been asked for and issued, against the persons thus interfering. No such attachment was, as appears from the record, either asked for, issued or attempted to be served. In the present state of the case, I see nothing which calls for the interference of your excellency; especially when, as these parties can obtain ample relief for the wrong complained of by them, by application to the secretary of war, as directed by act of Congress, and thereby obviate all necessity of collision between the authority of the State and that of the United States.

The case made in this record shows no cause for any action whatever on the part of your excellency.

JAMES MURRAY,
Attorney General.

THE ACCEPTANCE BY A JUDGE OF THE COURT OF COMMON PLEAS IN THIS STATE, OF A COMMISSION AS AN OFFICER IN MILITARY SERVICE OF U. S. DOES NOT VACATE OFFICE OF JUDGE.

Attorney General's Office,
Columbus, December 26, 1861.

Hon. Wm. Lawrence:

SIR:—You inquire whether, in my opinion, the acceptance by a judge of the Court of Common Pleas of this State, of a commission as a military officer in the service of the United States, would vacate his office as such judge. I have but brief time now to answer your inquiry, but as I have heretofore given this question a very thorough ex-

The Acceptance by a Judge of the Court of Common Pleas in this State, of a Commission as an Officer in Military Service of U. S. Does Not Vacate Office of Judge.

amination, I am able to answer at once, in the negative. The constitution of Ohio, section fourteen, article four, provides, "that a judge," etc., shall not hold "any office of profit or trust, under the authority of this State, nor of the United States." In this respect it differs from the constitutions of alost if not all other States in the Union, the provision in the other States being, that no person holding any office of trust or profit, under the authority of the United States, shall hold or exercise the office of judge, etc., under the authority of the State.

The effect of such provision of course, would be, that in case of the acceptance by a State judge, of an office under the authority of the United States, the office held by him under the authority of the State would be vacated; but under the provisions of the constitution of Ohio the converse of this rule obtains, as the provision is not that if he accept an office of trust or profit under the authority of the United States, he shall not hold or exercise the office of judge, etc., under the authority of the State: but that, as such judge of a State court, he shall not hold, etc., another office of trust or profit, either from the State or the United States. It is very clear then, that by accepting such other office, he would not vacate his office as judge. The one provision allows him to accept an office under the authority of the United States, but if he does so, he shall not continue to hold his office under the authority of the State. The other says that he shall hold his office under the authority of the State, but that he shall not hold any other office, of trust or profit, under the authority of the State or of the United States.

Comth ex rel Bache vs. Binns; 17 Serg & Rawle, 229; Respub. vs. Dallas; 3 Yeates Rep. 300; Dickson vs. People; 17 Illinois Rep. 191; Opinion of Judges; 3 Greenleaf 481; Lindsay vs. Atty. General; 33 Miss. Rep. 409.

I also claim that a commission in the army is not an "office of trust and profit," within the meaning of this clause

The Acceptance by a Judge of the Court of Common Pleas in this State, of a Commission as an Officer in Military Service of U. S. Does Not Vacate Office of Judge.

in the constitution of Ohio. This seems evident from the context, which provides that all votes given for either of them, etc., shall be void. This seems clearly to indicate the intention of the convention, to confine the restriction to civil offices—in fact, if necesary, I should be inclined to limit the clause to elective civil offices alone. The term "office," say the Supreme Court of Maine, cited supra, in construing a similar clause, "implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office." I can hardly imagine that it will be claimed that a person in the military service of the government during the present exigency, whether holding a commission or not, is an "officer," within the meaning of section fourteen, article four of the constitution of Ohio. An officer in the army or navy, is not a person holding an "office" in any sense of the term. He is never so defined. On the contrary, he is a person holding a "certain grade of rank" in the military service.

I have no doubt whatever that the answer I have above given to your inquiry is the correct one.

JAMES MURRAY,
Attorney General.

Duties of County Auditors; in Case of the Reversion of School Lands for Non-payment of Instalments of Purchase Money; a Sale of a Portion Thereof for Non-payment of Taxes Which Had Accrued Prior to Such Reversion, Illegal.

DUTIES OF COUNTY AUDITORS; IN CASE OF THE REVERSION OF SCHOOL LANDS FOR NON-PAYMENT OF INSTALMENTS OF PURCHASE MONEY; A SALE OF A PORTION THEREOF FOR NON-PAYMENT OF TAXES WHICH HAD ACCRUED PRIOR TO SUCH REVERSION, ILLEGAL.

Attorney General's Office,
Columbus, December 26, 1861.

Thomas I. Larsh, Esq., Auditor Preble County:

SIR:—Your letter to the State school commissioner of common schools, in reference to a tract of school land your county, which was sold, assigned by the purchaser, and finally forfeited for non-payment of the installments of the purchase money falling due, reverted to the State for the use of the township, but a portion of which was, subsequent to the reversion, sold for the non-payment of the taxes accruing prior thereto, has been placed in my hands, by Mr. Smythe, for answer. It would save much trouble if questions of this kind were submitted directly to this office, as the attorney general is the only officer by whom they can be officially answered. In relation to a sale of a portion of this school land, after its reversion, for the non-payment of taxes which had accrued prior thereto, I have to say, that the sale was wholly without warrant of law, illegal and void. Under these circumstances, it will be your duty to repay to the purchaser at tax sale, or his assignee, as in other cases of taxes twice or improperly paid, the amount paid by him, without interest or penalty thereon; and cancel his certificate of purchase. The purchaser could not, at law, recover either the land or money paid, as the sale was wholly void; but

justice and good faith would seem to require that the amount paid by him be refunded, which you will proceed to do as above suggested.

JAMES MURRAY,
Attorney General.

RELATIVE TO PAYMENT OF TAXES ON LOTS IN "SCHOOL SECTION 16."

Attorney General's Office,
Columbus, December 26, 1861.

G. W. Hill, Esq., Milton Centre, Ohio:

SIR:—You inquire "whether the purchaser of a lot in school section sixteen is bound to pay taxes on the same before receiving a deed therefor." I answer, that as soon as the purchaser obtains a certificate of purchase, his obligation to pay taxes commences. The certificate entitled him to take possession, to enter, cut timber, and improve generally; and the right of possession, the use of the land carries with it the obligation to pay the taxes. The holder of the certificate has the legal title as against all the world but the State, and even against the State so long as he punctually pays in installments and interest. The tax is a lien upon the land, and the owner, that is, the one having a right of possession, is bound for its payment.

Yours,
JAMES MURRAY,
Attorney General.

Mode of Application for Pardon of Persons Sentenced to Ohio Penitentiary.

MODE OF APPLICATION FOR PARDON OF PERSONS SENTENCED TO OHIO PENITENTIARY.

Attorney General's Office,
Columbus, December 27, 1861.

To His Excellency, Governor Dennison:

SIR:—The law regulating the mode of applying for the pardon of persons sentenced to, and confined in the penitentiary must be strictly followed; and unless the application is in literal compliance with every requirement of the law, your excellency has no right to act upon it. The law requires that the published notice of an application for pardon, shall set forth the name of the person on whose behalf it is made, the crime of which he shall have been convicted, the time of such conviction and the term of sentence. The notice in the case of Peter Gandolpho, which has been submitted to me for examination is defective in this, that it does not set forth the time of his conviction, neither does it contain anything from which the term of conviction can be inferred. I regard this defect in the notice as fatal to the application, at this time. There seem to me to be good and sufficient reasons in the law requiring the time of conviction to be accurately stated in the notice; but were there no such reasons, it would be sufficient to say "ita lex scripta est;" and to that, the notice must strictly conform. We are not at liberty to disregard its express requirements, or fritter it away by mere rules of construction. I refer your excellency to the case of Harbeck vs. Toledo, 11 O. St. Rep., 223, as a decision of the Supreme Court of Ohio, involving the same general principle.

JAMES MURRAY,
Attorney General.