
Application for a Bank at Sandusky City.

APPLICATION FOR A BANK AT SANDUSKY CITY.

Attorney General's Office,
Columbus, January 10, 1850.

SIR:—I have examined the question submitted for my opinion in your note of the 28th of November last touching the application for a new bank at Sandusky City.

The aggregate of capital assigned to the fourth district in which Sandusky City is situate, is \$450,000, and the number of banking companies therein is limited to four.

Gen. Laws, Vol. 43, p. 25.

It appears that in respect to capital and number the provision made for that district has been exhausted, there being already four banks there, with an aggregate capital of \$400,000, but one of these banks, being an independent banking company, with a capital of \$100,000, proposes to relinquish \$50,000 of its capital, which would leave that \$50,000 of unappropriated banking capital in that district.

So far, then, as capital is concerned, there seems [to be] no objection to the new bank, but the difficulty is as to number, and I think it is insurmountable. After an attentive consideration of the eighth section of the amendatory act of February 29, 1848 (Vol. 46, p. 93), I am satisfied it was not intended to repeal or modify so much of the original act as limited the number of banking companies in the respective districts.

It has reference altogether to the limit as to capital and provides for those cases alone in which the only objection to a new bank under the original law is the want of sufficient unappropriated capital in the district. Here, after the relinquishment, is, so far as capital is concerned, a sufficient amount for a new bank, without the aid of this eighth section, and without resort to another district. It is not, then, even as to capital, a case provided for by the amendatory act. But if it were, there is another objection as to the *number*, which is fatal in this case, and not at all provided for.

Deputy Clerk.

That limitation as fixed in the original act remains unchanged.

I am, therefore, of opinion that the application cannot be granted.

Very respectfully,

HENRY STANBERY.

Jno. Woods, Esq., Auditor of State.

DÉPUTY CLERK.

Attorney General's Office,

Columbus, January 14, 1850.

W. P. Byal, Esq., Clerk, etc., Findlay, Ohio:

DEAR SIR:—I have been prevented by an unusual pressure of business from sooner replying to yours of the 20th ult.

Although it is not within the line of my duties as attorney general to give official opinions to clerks of court, yet I am always disposed to give such opinions when there is no special objection to doing so.

I think it very clear that your deputy's appointment will be legal if the appointment is approved of by the three associate judges of your county. The statute contemplates that such an appointment may be approved of either by the court when in session, or when the court is not in session, by the three associate judges.

Yours respectfully,

HENRY STANBERY.

CLAIM OF ENOCH JONES; INDEMNITY.

Attorney General's Office,

Columbus, January 17, 1850.

SIR:—At the request of Mr. Spink, I have carefully examined the pages accompanying the claim heretofore presented to the board of claims by Enoch Jones. It appears by the memorial, which is verified by the affidavit of Mr. Spink,

Claim of Enoch Jones.

and by other papers, that on the 19th day of September, 1842, a contract was entered into between R. Dickinson, as an acting member of the board of public works, and Enoch Jones, by which, among other things, Jones sells and agrees to convey to the State a tract of land at the town of Gilead to be used for the purpose of abutting upon a State dam and for leasing out water power created at that point, and agrees to release to the State, all his right to the water in the Maumee River at Gilead and the further right to flow the water of said river over the adjoining lands of said Jones, "all which Jones agreed to do on or before the 1st of January, 1844." Dickinson agrees in behalf of the State that so soon as Jones shall execute and deliver to the State or their agent the deeds and releases aforesaid, to pay to Jones \$5,000.00.

It appears that Jones had an equitable title to this property at the date of the sale, upon which he had paid \$500.00, and that in consideration of the further payment of \$100.00 the time for the payment of the residue of the money due from him to his vendor, was extended to the month of July, 1844. That prior to that date, Mr. Dickinson notified him that in consequence of the change made by the board of public works in the location of the dam, the State would not require the land so purchased from Jones. In consequence of this notification, Jones forfeited his equitable title, which included other land beside the tract sold to the State, and upon which a less sum was due than the \$5,000.00 to be paid by the State.

Mr. Jones proposes in the way of compromise to receive \$1,000.00 as an indemnity for the \$600.00 so paid by him, the interest upon it and other expenses.

Notwithstanding some doubts which I at first entertained, I incline to the opinion that this is, under all the circumstances, a proper case for indemnity from the State to Mr. Jones.

It does not distinctly appear whether the notification from Mr. Dickinson was given before or after the day fixed for the execution and delivery of the deed. But if the day

Requisition for James M. Winslow.

had passed, it would seem that the notification did not proceed upon that as a ground of rescission, but on a different ground, that the location of the dam had been changed. Until that notification the parties appear to have considered the contract as subsisting.

What should be paid to Mr. Jones in the way of indemnity, I do not know and cannot say. To the extent of the \$600.00 actually paid by him, and lost by the abandonment of the contract, with the interest upon it, I think it right to go. But whether anything, and if anything, how much more should in justice be paid, you can much better determine than myself.

Very respectfully,

HENRY STANBERY.

Samuel Fower, Esq., Acting Commissioner, Dayton, Ohio.

REQUISITION FOR JAMES M. WINSLOW.

Attorney General's Office,

Columbus, January 19, 1850.

SIR:—I have examined the requisition from the Governor of Pennsylvania for the surrender of James M. Winslow, and the accompanying affidavit. The affidavit charges Winslow with the crime of obtaining from Charles Graff, in Philadelphia, Pennsylvania, the promissory notes of Graff for \$6,000.00 for the sale of a machine for cutting plastering laths, and the right to sell the machine in certain territory, upon the false representation by Winslow that as patentee from the United States, he held the exclusive right to make and vend the machine, whereas the machine so sold was not, nor was any part of it, patented to Winslow.

The crime of obtaining money or property by false pretences is one of common law cognizance, and is recognized as a crime not only by the laws of Pennsylvania, but also by the laws of Ohio. Besides all this, it is a crime deeply affecting trade and commercial intercourse. I, therefore, [think] that it may properly be considered as belonging to

Intoxicating Liquors; Spirituous; Beer.

the class of crimes, which according to the constitution of the United States, warrants the reclamation and surrender of fugitives. The papers are all in due form, and the fact of a flight from justice from Pennsylvania to Ohio, appears in the affidavit. The only doubt I have felt is as to the character of the false pretences, relating to the sale of a patent right. Every patentee who makes sale of his right is understood to represent that it is valid, and such nice questions arise upon that description of property, that it would be dangerous in such cases to resort to this proceeding. But in this case it appears that Winslow had no patent, either for the machine or any of its parts, and that the pretence of such a right was without any foundation, or color of truth. I am, therefore, of opinion that a proper foundation is laid for the issuing of your warrant.

Very respectfully,

HENRY STANBERY.

Hon. Seabury Ford, Columbus, Ohio.

INTOXICATING LIQUORS; SPIRITUOUS; BEER.

Attorney General's Office,
Columbus, March 6, 1850.

B. W. P. Merse, Esq., Prosecuting Attorney, Morgan County:

DEAR SIR:—Yours of the 5th instant is received. The case of Markle vs. Town Council of Akron, 14 Ohio 58b, decides that *beer* is an *intoxicating* drink, and that the vendor of it is punishable under the provisions of a town ordinance prohibiting the retailing and vending of intoxicating liquors. Whether it is to be classified as a spirituous liquor may admit of some question, but it is not so much a question of law, as of fact, and to be determined by the opinion of scientific persons. It may be well, however, to refer you to some other statutory provisions, as affording some aid in arriving at the meaning in which the legislature uses the term *spirituous liquor*.

Qualification of Member of Convention to Amend Constitution.

See Swan's Stat. 259, Sec. 10, prohibiting the sale at or near religious meetings of "any spirituous liquor, cider or beer." Also page 260, section prohibiting the sale to Indians "of any spirituous liquor or any other liquor of an intoxicating quality." It would seem from the section first quoted that the legislature were careful to enumerate cider and beer, as something additional to spirituous liquor and not embraced under that general description. So, too, in the last section quoted, a distinction is taken between spirituous, as such, and other liquors of an intoxicating quality. Considering the loose language and the redundancy so common in our statutes, the argument from the statutes as to the true construction of the term *spirituous liquor* is not entitled to much weight. I have an impression that this question has been lately before our court in bank upon a case reserved from Washington County, but have not been able [to find] the case reported.

Very respectfully,
HENRY STANBERY.

QUALIFICATION OF MEMBER OF CONVENTION
TO AMEND CONSTITUTION.

Attorney General's Office,
Columbus, March 6, 1850.

DEAR SIR:—I have received yours of the 4th instant requesting my opinion as to your eligibility to the convention about to be called for amending our constitution.

I entertain no doubt that you are eligible. There is nothing, as you are aware, in the clause of our existing constitution as to the qualifications of members for the convention, and the only qualification fixed in the law, is, that

Recognizance; Discharge.

the member of the convention have all the qualifications of an elector.

Very respectfully yours,

HENRY STANBERY.

Hon. Richard Stillwell, Zanesville, Ohio.

RECOGNIZANCE; DISCHARGE.

Attorney General's Office,

Columbus, March 8, 1850.

Joseph Adams, Esq., Prosecuting Attorney Cuyahoga County:

SIR:—I have examined the questions submitted in yours of the 5th instant and am of opinion:

1st. That the recognizance entered into by Lucius and John Newton at the July term, 1849, was valid.

Indeed, I can see no question which can be made upon it. The condition for the appearance of Lucius Newton, "before the next term of the court," though not in the very words of the statute, that is, "before the court at the next term thereof," is in legal intendment the same, for there can be no appearance "before a term of court" other than before the court itself.

2d. It appears that at the proper term, that is, at the term next after the July term, the recognizance was regularly defaulted, after which upon *capias* under the indictment for the same offence mentioned in the recognizance, Lucius Stedman was arrested and held in custody brought before the court at the same term, and the forfeiture of the recognizance set aside. That the prisoner was then ruled to give additional bail in the sum of \$2,000.00 for his appearance from day to day and failing to give such bail was held in custody until the 10th of the same month, when he gave the additional bail with one Stedman as his surety, and was ordered to be discharged from custody. Without going further in the statement of facts upon this point, I am of opinion that this amounted to a discharge of the first recognizance.

Recognizance; Discharge.

Even if there had been no second recognizance, I should hold that the taking him into custody under the same charge mentioned in the condition of the first recognizance, coupled with the *discharge* of the prior forfeiture, put an end to the obligation of that recognizance. It was equivalent to a surrender of the bail, quite as effectual as if he had been ordered into custody upon the motion of the bail. The holding of the principal in custody after the discharge of the forfeiture, amounted in effect to a taking him out of the control of the bail.

But if there were any doubt as to that, it is certainly removed by the releasing of the prisoner, upon the entering into the second recognizance.

I do not know what is meant by additional bail in a criminal case. This second recognizance is essentially a new and independent bond, and not cumulative of the first recognizance, and the moment the prisoner was released from custody, he was in contemplation of law, in the power and subject to the control of the bail in that recognizance, the giving of which worked his release. How, then, could the bail in the first recognizance be longer held responsible for his appearance when the court not only took the defendant from his custody, but surrendered him to the custody of another person.

3d. It further appears that subsequently and during the same term, the defendant Lucius Newton appeared in court and the trial of his case was had and resulted in a verdict of guilty.

That as the trial was in progress and before the examination of the witnesses had closed, the defendant absconded, no surrender into custody or order into custody having been made. That after his absconding, the counsel for the defendant objected to the further proceeding in the trial, which objection was overruled. That the verdict was in fact rendered on the 15th of October, but not entered upon the journal of the court until the last day of the term,

Recognizance; Discharge.

which was the 29th of October, and appears after other entries of trial day and below the signature of the presiding judge to those prior entries, and that the judge's signature below the entry of the verdict was affixed at the next succeeding term.

I am of opinion that these proceedings and entries were valid, and that there is no objection to the recaption and sentence of the defendant. The signature of the judge at the October term was not at all necessary to the validity of the journal entry. The instant the verdict of the jury was entered on the journal it was in force, notwithstanding the apparent provision to the contrary in the Practice act (Swan's Stat. 674, 675). That provision is confined to "proceedings, orders, judgments, or decrees" and strictly speaking, the verdict of a jury does not come within it. I incline to think from what is said in *Osborn vvs. State*, 7th Ohio, pt. 1st, 214, our Supreme Court would hold the entire section as merely directory, especially in view of the very common practice of signing the minutes at the succeeding term.

I am not aware of any statutory provision requiring the presence of the defendant at the rendition of the verdict when he is voluntarily absent. The common law rule undoubtedly is, that in all cases of felony and in all other cases where the jury must look upon the defendant "he must be present at the verdict." I have not examined the recent cases, but I do not doubt it will be found that they do not extend to cases of voluntary absence like the one under consideration. The rule is to secure to the defendant a *privilege or right*. It is for his benefit, and he may waive it or refuse to exercise. However that may be, I incline to think our courts would allow a verdict to be entered in the absence of the defendant, where he absconds during the trial.

Yours respectfully,

HENRY STANBERY.

Tax Law; Present Value.

TAX LAW; PRESENT VALUE; REBATING INTEREST.

Attorney General's Office,
Columbus, March 11, 1850.

SIR:—It appears from the letter of the auditor of Richland that Mr. V. W. Smith is the owner of six notes, or of a contract payable in six instalments amounting in the aggregate to \$2,800.00, but payable in six equal annual instalments from the 1st of June next without interest.

The question submitted for my opinion is whether Mr. Smith should be assessed upon the nominal amount and prospective value of this credit, or upon its present value. I am of opinion that the assessment should be according to the present value, that is, by rebating the interest until maturity.

It is true that by the strict letter of the 12th section of the tax law of 1846, every credit for a sum certain payable in money shall be valued at the full amount of the sum so payable, but when we recur to the title of the act, which is for taxing all property according to its true value, and to the first section which provides that all credits or the *value thereof* shall be listed for taxation, and consider the objects and equitable scope of the entire law, I do not hesitate to say that a credit like the one under consideration ought not to be listed as its nominal amount, or at a sum which is equal to what will be its value some years hence, but should be listed at its true present value. What makes this construction of the law more evidently just is to consider the converse of this proposition and to suppose that Mr. Smith's credit of \$2,800.00 had been on interest for a series of years.

In such a state of fact, notwithstanding the letter of the twelfth section, he ought to be chargeable not only with the nominal amount of the credit, but also with the accumulated interest.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

Lebanon Reservoir; Water Rent.

LEBANON RESERVOIR; WATER RENT.

Attorney General's Office,
Columbus, March 14, 1850.

Board of Public Works:

GENTLEMEN:—I have examined the question submitted for my opinion as to the liability of Ebed Storrell to pay rent to the State for the use of water furnished by the Lebanon Reservoir, at his grist mill on part of Lot No. 278 of the town of Lebanon.

It appears from the recitals in the award of the appraisers, and of A. F. Hinsch, who was the superintending the sworn statement of James McBride, one of the said appraisers, and of A. F. Hinsch, who was the superintending engineer upon that part of the public works in 1841, that Mr. Storrell, at the time of the construction of the Lebanon Reservoir, was the owner of four small parcels or lots of ground situated upon or in the immediate vicinity of the reservoir, and that there was then appropriated to the use of the State portions of some of said parcels of ground, and a saw mill then belonging to Mr. Storrell was thereby rendered useless.

Mr. Storrell having made a claim for damages by reason of this appropriation and destruction of his property, the board of appraisers, after carefully enumerating the four parcels of land belonging to him, and referring expressly to the fact that there was a grist mill on one of these parcels, decided and so awarded, that the benefits which Mr. Storrell derived from the construction of the reservoir were equal to the damages sustained.

The award does not expressly indicate what particular benefits were in the view of the appraisers, but as it does specify a grist mill, as well as the land itself, it is inferable that the appraisers had in view the additional water supplied to this mill by the reservoir, for it appears from the affidavit of Mr. Hinsch that the water from the reservoir is that which supplies this mill.

Qualification of Member of Convention to Amend Constitution.

In addition to this, it is stated by Mr. McBride that it was understood by the appraisers that Mr. Storrell's grist mill was to be supplied by water from the reservoir free of rent, and if such had not been the understanding, the appraisers would unquestionably have awarded him damages. And it is further stated by Mr. Hinsch that he understood from T. Bates, then acting commissioner of the board of public works, having charge of the Lebanon Reservoir, that there was an agreement between Mr. Storrell and himself that no rent was to be charged to Mr. Storrell for the use of the water at his grist mill.

Besides all this, it appears that Mr. Storrell, since the construction of the reservoir, has been in the constant use of this water, and that neither Mr. Bates, the then acting commissioner, who was acquainted with all the facts, nor his successor, has at any time required Mr. Storrell to take a lease for the water, or to pay any rent for its use.

In this state of facts, I am of opinion that Mr. Storrell's right to the use of this water, free from rent, is to be considered as clear and unquestionable.

Very respectfully,
 HENRY STANBERY,
 Attorney General.

QUALIFICATION OF MEMBER OF CONVENTION
 TO AMEND CONSTITUTION.

Attorney General's Office,
 Columbus, March 15, 1850.

DEAR SIR:—In reply to your note of this date, I have to say, that I am of opinion that a member of this General Assembly is eligible to a seat in the constitutional convention. There is no disqualification mentioned in that clause of the constitution which provides for a convention (Art. 7, Sec. 5), and the act of February 23, 1850, to provide for the calling of a convention, simply requires that its members shall have the qualifications of electors.

Judgment for Costs; Omission; Effect.

The only question which could be raised is upon the true meaning of the twentieth section of the first article of the constitution, which provides, that no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this State, which shall have been created, or the emoluments of which shall have been increased during such time.

The office of member of a convention for amending or changing the constitution is in no sense an office created by this General Assembly. It exists in virtue of the fifth section of the seventh article of the constitution, and is merely called into action by the concurrence of the General Assembly at two distinct sessions and the popular vote.

The twentieth section of the first article clearly refers to the creation of new offices, by the General Assembly itself. It does not extend to any offices created or provided for in the constitution. The manifest object and intent of the clause are to guard against the creation of new and unnecessary offices, to be filled by the men who create them.

It would be a perversion of the letter and spirit of the clause, even to make it apply to the General Assembly which recommended the convention to the people, and yet it is even worse to apply it to this General Assembly which had no option in the matter, but has simply called the convention (not created it) under a positive injunction, and as a mere ministerial agent.

Very respectfully yours,

HENRY STANBERY.

Hon. Wm. Dimmack, of the Senate.

JUDGMENT FOR COSTS; OMISSION; EFFECT.

Attorney General's Office,

Columbus, March 29, 1850.

MY DEAR SIR:—Yours of the 25th instant was received

Judgment for Costs; Omission. Effect.

this morning, and I hasten to comply with your request for an opinion upon the questions submitted.

I am very clear that the omission of a judgment for the costs against the defendant upon a conviction in a capital case does not affect the sentence, and cannot be assigned for error on the part of the defendant. Even if such a judgment were expressly required by the statute (which it is not) the defendant could take no advantage of the omission. If an error in any sense, it is of that sort which works no prejudice to him.

In the present confused state of our decisions as to the power to amend a judgment at a subsequent term, I would doubt the propriety of such an amendment in a case of this character, and I incline to think the mere taxation of the costs by the clerk, would be sufficient without a formal judgment and would have the same efficacy.

You also request my opinion as to the change which will probably be wrought in our Common Pleas part of the judiciary system. I think it very evident that there will be a thorough reorganization of those courts. That the judges of the courts will be made eligible by the people, that the office of associate judge will be abolished, and the jurisdiction be materially changed.

I have no idea that the present judges will retain their seats until their respective terms of service expire. Their offices will be abolished with the present system and will cease so soon as the new judges are elected.

Very truly yours,

HENRY STANBERY.

Hon. George B. Way, Defiance, Ohio.

Secretary of State; Certification of Copies.

SECRETARY OF STATE; CERTIFICATION OF
COPIES.

Attorney General's Office,
Columbus, April 5, 1850.

Henry W. King, Esq.:

DEAR SIR:—I have considered the questions submitted in your note of this date, and am of opinion:

1. That the secretary of state is the proper officer to certify copies of all records and papers on file in his office or in the governor's office, and also to the official character and attestations of all officers, a record of whose appointment is required by law to be kept in his office, and to all such certificates he may attach the great seal of the State. The certificate of the secretary of state so made with the great seal attached, would, in all cases, except where there is a special provision for a further certificate, be a sufficient authentication.

2. I am not aware of any provision of law which requires or authorizes the official signature of the governor to be countersigned by any officer other than the secretary of state. The only provision as to such countersigning which I have been able to find is contained in the fifteenth section of the second article of the constitution of Ohio, and in that section it is the secretary of state who is to countersign.

Very respectfully,

HENRY STANBERY.

LIABILITY OF BANKS.

Attorney General's Office,
Columbus, May 9, 1850.

SIR:—In answer to the question submitted in yours of the 4th instant as to the liability of certain banks to a greater tax than 5 per cent. upon their dividends, I beg leave to call your attention to the opinion furnished you on the 18th of August, 1846, a copy of which I now enclose.

Foreign Insurance Companies; Taxes.

You will perceive that this question was then considered in reference to the Ohio Life Insurance and Trust Company and the opinion given, that 5 per cent. on the amount of the dividend was the maximum of tax that could be imposed. To that opinion I yet adhere.

I am not aware of any distinction to be taken between the Ohio Life Insurance and Trust Company and the other banks referred to in your letter.

Very respectfully,

HENRY STANBERY.

Hon. John Woods, Auditor of State, Columbus.

FOREIGN INSURANCE COMPANIES; TAXES.

Attorney General's Office,
Columbus, May 9, 1858.

SIR:—I have considered the question submitted in yours of the 8th instant in relation to foreign life insurance companies. By the fourth section of the act of March 12, 1831, to tax bank, insurance and bridge companies (Swan's Stat. 918) the agents of foreign insurance companies are required to make out under oath annually, and deliver to the county auditor, "a true and complete account or statement of all the profits derived from premiums received on all policies by them issued or delivered and which have expired during the year next preceding the time such amount or statement is made out, and shall pay to the county treasurer, on the orders of the county auditor, the full amount of tax which may be levied thereon, to be drawn for as hereinafter provided."

The fifth section of same act directs the county auditor, upon receipt of such statement, to draw an order on the agent in favor of the county treasurer for a sum which shall be equal to six per centum on the amount of the profit on premiums stated to have been received by such agent.

Foreign Insurance Companies; Taxes.

On the 13th of March, 1838, certain joint resolutions were passed by the General Assembly (Local Laws, Vol. 36, p. 420) in relations to bank, insurance and bridge companies.

The first of these resolutions requires the auditor of state to make a full list of all the banks, insurance and bridge companies "incorporated in this State."

The second resolution provides that all dividends of profits of the banks, insurance and bridge companies of this State, when applied to payment of stock or stock notes, or when the stockholders shall be in any wise credited with their respective portions of such profits, shall be subject to taxation.

The third resolution requires the auditor of state to prosecute all such banks, insurance and bridge companies as have not complied with the provisions of the act of March 12, 1831, either by totally neglecting to make return of their dividends, or by making incorrect returns.

The foregoing are all the statutory provisions I have been able to find, touching this question.

It would seem from the express language of the fourth section of the act of March 12, 1831, that foreign insurance companies are only compellable to pay taxes on premiums received on *expired policies*, and this applies as well to life policies as to others of shorter duration.

There should be some amendment to reach the case of life policies, for as the law now stands that branch of insurance pays in effect little or no tax.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

State Road; Returns of Survey.

STATE ROAD; RETURNS OF SURVEY.

Attorney General's Office,
Columbus, June 5, 1850.

William P. Cord, Esq., Lancaster, Ohio:

DEAR SIR:—I have received yours of the 3d instant requesting my opinion upon the question whether under the act of March 1, 1850, to lay out and establish a State road in the counties of Fairfield, Perry, Morgan and Monroe, full returns of the survey, etc., must be made on or before the 1st of July next.

If it be possible, I would advise that the returns be made and filed by that day to avoid all difficulty and question, but if this cannot be done, I am nevertheless of opinion that the road will be legally established if the returns are made within one year after the date of the act. That is the time provided in the general laws for *establishing and making complete returns* of State roads. The commissioners under the special act are required to perform the special duties assigned to them by that act on or before the 1st of July, 1850, and in all other matters to conform to the general law. Now, these special duties are confined to the *laying out* and *establishing* the road, and do not relate specially to the making of the returns. I think, therefore, the making of the returns, as to time, etc., are to be governed by the provisions of the general law.

Yours respectfully,
HENRY STANBERY.

WABASH AND ERIE CANAL LAND.

Attorney General's Office,
Columbus, June 22, 1850.

SIR:—I am of opinion, under the act of March 23, 1850, concerning the Wabash and Erie canal land, etc., that the reduction of 50 per cent. below the appraised value, applies

Nuisance; Right to Abate.

as well to the appraised value of the improvement as to the appraised value of the land without the improvements.

Very respectfully,

HENRY STANBERY.

Jno. Woods, Esq., Auditor of State.

NUISANCE; RIGHT TO ABATE.

Attorney General's Office,
Columbus, June 29, 1850.

Wm. White, Esq., Prosecuting Attorney Clark County:

DEAR SIR:—I have received and given as full consideration as the circumstances in which I am placed will allow to yours of the 26th instant. The questions you propound are scarcely of the character which belong to my province to undertake to decide. They do not relate to the structure of the indictment, or to the question whether the act itself is of a criminal character. They relate to matters which will come up on the trial, depending altogether upon the nature of the evidence. So far as your duty is concerned, I apprehend there is but one course for you to pursue, and this is to prosecute the case if the grand jury should find the indictment. It is impossible to say in advance what will be the result, for according to the evidence, the act of obstructing the dam may or may not be a justifiable act.

The questions you submit are of a grave and doubtful nature, and without assuming to decide them, I will endeavor to give you what aid I can in preparing to meet them.

You are very well aware that if the dam were a nuisance to Snyder's mill, or to his land, he had a right to abate it. The exercise of this private remedy is carefully guarded as it properly should be. Any one who takes the law into his own hands must be very careful to proceed exactly according to the law.

Now I see, from what you state of the facts, that several doubtful questions may arise:

Nuisance; Right to Abate.

1st. The effect of the judgment heretofore rendered against Snyder in the action on the case which he prosecuted against Robinson. Does that settle the question of nuisance or no nuisance? And if it settles it *civilly* for all future actions at law between the parties, does it settle it criminally or where the question of nuisance or not, comes up in a criminal prosecution?

So far as the effect of a judgment against the plaintiff in an action on the case is concerned, I apprehend that in this State, even in a subsequent action between the parties, it has never been held to be conclusive of the right. I am aware that it has been held conclusive in Pennsylvania. You will find the case in 17 Serg. & Rawle. The name of the case has escaped me and I have not the book at hand.

But, however this may be, in a civil proceeding, I do not suppose such a judgment can ever be held conclusive, anywhere in a criminal proceeding, for if it operates at all as a conclusion of the fact, it operates as an *estoppel* between the parties and as such cannot prevail in a criminal prosecution.

I incline, therefore, to think that the former judgment against Snyder will not be held to conclude him against showing that the dam was a nuisance at the time of its abatement.

2d. If the dam were not *erected* by Robinson, but only *continued* by him after having been erected by a former owner, it may deserve attention to ascertain whether Snyder could enter to abate it, without a preliminary and reasonable notice to Robinson to abate it himself. You know there is a great difference between the *erection* and the mere *continuance* of a nuisance, and that you cannot even bring a civil suit against the person who merely keeps up or continues a nuisance, without a previous notice to abate.

3d. The exercise of this right to abate the nuisance will not justify an unnecessary excess. If the indictment for riot contains the usual counts, charging not merely a

Requisition; Error in Description of Offense.

prior unlawful agreement, but also an unlawful agreement after a lawful assembly, it may happen that the parties may be convicted of a riot in consequence of the excess. But I apprehend a slight or doubtful excess as the taking down somewhat more of the dam than was absolutely necessary, would hardly involve a criminal liability, especially if there was no *intention* to do more than was supposed to be necessary to make the abatement effectual.

I have filled my sheet and have hardly given you more than mere suggestions, but I hope they may be of service, at least to aid you in the preparation of the case.

Very respectfully,

HENRY STANBERY.

REQUISITION; ERROR IN DESCRIPTION OF OFFENSE.

Attorney General's Office,
Columbus, July 2, 1850.

SIR:—I have examined the affidavit and papers upon which your requisition is asked upon the executive of Kentucky for the surrender of Fieldon Isaacs, Washington Smith, James Sperry and James West. The affidavit, which is in due form, charges these persons with the crime of burglary, committed on the 6th of June last, Lawrence County, Ohio.

There is a further affidavit that these persons have fled from this State to the State of Kentucky. From what is said in the letter of the prosecuting attorney for Lawrence County, it would seem that the house was broken into for the purpose of seizing some colored person, and that they were forcibly taken under the pretence that they were slaves. If these persons were free, and were so seized, and kept for any time in custody, the offence, though not burglary, would amount to kidnapping, a penitentiary offence under our laws.

I do not think this probable error in the description of

Indictment; Joinder of Parties; Proof.

the offence as it is stated in the affidavit, would afford a serious objection to granting the requisition.

I would, therefore, recommend that a requisition be granted. I return the papers.

Very respectfully,

HENRY STANBERY.

Hon. Seabury Ford, Governor of Ohio, Columbus, Ohio.

INDICTMENT; JOINDER OF PARTIES; PROOF.

Attorney General's Office,
Columbus, July 4, 1850.

W. P. Bacon, Esq., Prosecuting Attorney:

DEAR SIR:—I have not found time until today to consider the questions you submit for my opinion, but now proceed to do so.

1st. I am of opinion that several persons may be joined in an indictment for gaming, where they play together. The offence is in its nature a joint one, and although they may be separately prosecuted, and each is answerable for his own act, yet I can see no objection to their joinder in one indictment.

2d. I incline to think that the court was right in holding you to prove that the game was played at by all the parties named in your indictment. The allegation was of such a descriptive character, that you were bound to prove it as laid.

3d. I am further of opinion that under your present indictments, you will not be thrown out by proof that other persons played at the game, besides those you have mentioned. An indictment which charges A with playing at a game with B is so far sustained when it appears that the two persons named did play together at a game. Further proof that other persons, not named in the indictment, also played

Requisition; Foreign Insurance Companies.

at the same game, is not so inconsistent with the indictment as to disprove it.

Upon this point I refer you to 3 Stark Ev. 1558, 9, 60.

Yours respectfully,

HENRY STANBERY.

REQUISITION ON EXECUTIVE OF KENTUCKY.

Attorney General's Office,

Columbus, July 5, 1850.

Prosecuting Attorney of Lawrence County, Burlington, Ohio:

SIR:—Yours of the 27th ult. was not received until yesterday. On the 2d instant application was made to the governor for a requisition on the executive of Kentucky for the arrest and surrender of the persons concerned in the outrage upon our laws, referred to in your letter. The papers were submitted to me and I advised the secretary of the governor (the governor being absent) that I was of opinion it was a proper case for a requisition, and I presume that the requisition was issued accordingly. This is all that can be done here. Should there be any objection made by the executive of Kentucky against complying with the requisition, and issuing his warrant for the arrest of the parties, the matter will receive further attention from our governor.

Yours respectfully,

HENRY STANBERY.

FOREIGN INSURANCE COMPANIES.

Attorney General's Office,

Columbus, July 5, 1850.

Eli Bruce, Esq., Chardon, Ohio:

DEAR SIR:—My attention has been recently called by the auditor of state to the sections of the statute to which you

Requisition; Defective Affidavit.

refer, relating to the agencies of foreign insurance companies in this State. After a careful examination, I could not discover that the sections to which you refer have been amended, or repealed, in so far as foreign insurance companies are concerned.

Yours respectfully,
HENRY STANBERY.

REQUISITION; DEFECTIVE AFFIDAVIT.

Attorney General's Office,
Columbus, July 8, 1850.

SIR:—I have examined the affidavit upon which you are asked to issue a requisition on the executive of Indiana for the surrender of I. H. Beecher.

The affidavit purports to have been made by Joseph F. Mills before a justice of the peace of Hamilton County, Ohio, on the 4th instant, and charges that I. H. Beecher did on the 2d of April last, at the County of Hamilton, obtain merchandise of the value of about seven hundred dollars with intent to cheat and defraud the affiant. There is also a subsequent affidavit of the same affiant, but where it was made or for what purpose does not appear.

I do not think these affidavits will authorize a requisition. The one first made, which is the only one to which reference can be made, does not bring the transaction within our criminal laws. It does not appear what sort of fraud was practised or intended. If the goods were obtained by fraudulent pretences, that fact ought to be set out in the affidavit.

There is besides no affidavit that Beecher has fled from justice and that he has escaped or gone to Indiana.

Very respectfully,
HENRY STANBERY.

Hon. Seabury Ford, Governor of Ohio, Columbus.

Taxes for Building School Houses.

TAXES FOR BUILDING SCHOOL HOUSES.

Attorney General's Office,
Columbus, July 11, 1850.

I. Durbin Ward, Esq., Prosecuting Attorney, Lebanon, Ohio:

DEAR SIR:—I am much behind hand in my office in consequence of my engagements in the convention, and regret that I am so late in replying to yours of the 12th ult.

I find upon inquiry at the auditor of state's office that the practice is quite uniform of placing taxes assessed for the building of school houses on the county duplicate, and I think that the first clause of the thirteenth section of the act of February 22, 1848, necessarily embraces such a tax.

It is difficult to say what is meant by a "special or discriminating tax." A tax to build a school house is undoubtedly in one sense a special tax, but so is every other tax levied in a school district. It must be levied for a special purpose. On the whole, I incline to the opinion that this tax does not come within the proviso, and I proceed upon this view of the matter.

That as this is a tax for the school district purposes and therefore clearly embraced within the first clause of the thirteenth section, it ought not to be taken out of the operation of that clause, unless clearly included in the language of the proviso.

Very respectfully,

HENRY STANBERY.

STATE VS. MOSS, ET AL.

Attorney General's Office,
Columbus, August 30, 1850.

Prosecuting Attorney Richland County, Ohio:

SIR:—I have examined the Sic. fa. in the case of the State vs. Moss et al, enclosed to me in yours of the 24th instant, and am of opinion that it is sufficient, and that the demurrer cannot be sustained. The only question which

Water Leases; Duty of State.

could be made is whether it sufficiently appears that [Moss] was in custody upon an accusation for some offence, for if this does not appear in the cognizance, then a declaration containing that averment would be necessary. It is, however, recited in the condition of the recognizance that Moss was in custody under "an indictment pending against him for shooting with intent to kill." I think this sufficient. However, to obviate all doubts, I would advise you to file a declaration (which may be filed now) alleging more specifically the offence charged in the indictment, and averring that the indictment is pending in the Common Pleas of Richland.

Yours respectfully,

HENRY STANBERY.

WATER LEASES. DUTY OF STATE.

Lancaster, August 30, 1850.

Geo. W. Manypenny, Esq.:

SIR:—Yours of the 24th instant has been forwarded to me at this place. In answer I have to say:

As to the deed for the lot in Cleveland, you do not state the terms of the contract for the purchase. If it was not one of the terms of the contract, that the deed should contain a covenant of warranty, and if the title is reported by counsel, as unquestionable, I see no objection to taking a deed without such a covenant.

As to the question between the State and McConnell's heirs, I would recommend that the State, or the other parties reconstruct the race under an agreement that the cost should be paid by the State, or the other parties, according as the question may be hereafter judicially settled. A question very nearly similar arises between the State and another lessee in the Muskingum improvement, which is in train for judicial decision. The decision of that case will, I think, settle this question. I consider it as a question of no little

Escape of Prisoner.

difficulty. The agreement on the part of the State to guaranty water to McConnell to be used at his mills, is somewhat obscure, and in reference to such an obscure agreement, the fact that the State proceeded to make the race, and to deliver the water at the mills, might be taken as settling the intention of the contract by the contemporaneous construction of the parties.

You are right in saying that the uniform practice of the State in all the regular leases of water, is to require the lessees to erect and keep in repair, the fixtures by which the water is conveyed from the canals to the mills, but as this arrangement was made by a special written contract, or by a written proposition, duly accented, it must receive its own construction, which cannot be helped out by reference to the other leases.

You will see that the inclination of my opinion is that the duty of keeping up the race devolves upon the State, and that the agreement to guaranty the water to McConnell at his mills is tantamount to an agreement to furnish the water at the mills. I am certainly strongly inclined to give that construction to this contract, especially in view of the erection of the first race by the State.

However, it is a question of so much doubt that it ought to be settled by a judicial decision.

Yours respectfully,

HENRY STANBERY.

ESCAPE OF PRISONER.

Lancaster, Ohio, September 2, 1850.

R. C. Spear, Esq., Prosecuting Attorney, Van Wert, Ohio:

SIR:—I have been absent from Columbus during the prevalence of the cholera and have received your letter at this place. I will answer your questions in the order in which they are stated.

Larceny; Description of Coin.

1st. In the case you put of an escape of a prisoner from the county jail after conviction for a penitentiary offence, the county is not liable for the fees of the sheriff and clerk. The fees of these officers must stand upon the same footing as in cases where the prosecution fails.

2d. If the escape be in consequence of the negligence of the sheriff, he is liable to an action in favor of the county commissioners, the county having paid, or being liable to pay the fees of the witnesses, and of the justice of peace and constable, and witnesses before the justice of the peace, if there has been any preliminary trial before such an officer, and consequently suffering a loss by reason of the escape in not being able to obtain repayment from the State treasury. The action should be an action on the case, against the sheriff alone. It may be also that a similar action would lie against the sheriff in favor of the clerk for the loss of his fees by reason of the escape.

3d. As to the remedy against the sheriff. This is by action on the case, as before stated.

4th. I do not see that there is any statutory provision making it your duty to prosecute the suits in behalf of the county for these costs.

5th. It is not the duty of the county auditor to issue orders on the county treasurer for the fees of the clerk and sheriff in the case before stated.

Yours respectfully,

HENRY STANBERY.

LARCENY; DESCRIPTION OF COIN; ACCESSORY.

Attorney General's Office,
Columbus, September 13, 1850.

SIR:—Yours of the 3d instant has been received. The following will answer for the description of the coin in the count for larceny:

Larceny; Description of Coin; Accessory.

“—— pieces of the current gold coin of the United States, currently passing in the said State of Ohio, called eagles of the value of —— dollars, —— pieces of the current gold coin of the United States, currently passing in the said State of Ohio called half eagles of the value of —— dollars, —— pieces of the current gold coin of the United States currently passing in the said State of Ohio called quarter eagles of the value of —— dollars, —— pieces of silver coin currently passing in the said State of Ohio called half dollars of the value of —— dollars, —— pieces of silver coin currently passing in the said State of Ohio called five francs of the value of —— dollars, of the moneys and property of A. B. then and there being found, etc.”

You will fill the blanks of the number of pieces of each description of coin, and for the respective values, but you will not be held to strict proof of the number as set out, or of the value as set out. As to the indictment against Simpson, who is an accessory after the fact, after framing the indictment against the principals you will proceed as follows:

“And the jurors aforesaid, upon their oath aforesaid, do further present that —— Simpson, late of the county aforesaid, well knowing the said A. B. and C. D. to have done and committed the said larceny and felony aforesaid, in form aforesaid, afterward, to-wit: on the —— with force and arms at the county aforesaid, the said A. B. and C. D. did feloniously harbor, and conceal, against the peace, etc., and contrary to the statistics, etc.”

Add another count charging Simpson with aiding and assisting the principals to escape.

Yours respectfully,

HENRY STANBERY.

Prosecuting Attorney of Erie County, Sandusky City, Ohio.

Leases; Mill Creek Township.

LEASES; SECTION 29, MILL CREEK TOWNSHIP,
HAMILTON COUNTY.

Attorney General's Office,
Columbus, September 17, 1850.

SIR:—I have examined the question submitted for my opinion in your note of the 15th instant.

By the act relating to Sec. 29 in Mill Creek Township, Hamilton County, passed March 7, 1850 (48 Vol. Local Laws, p. 680) lessees of the Sec. 29 in that township are authorized to pay to the treasurer of the trustees of the section the price per acre at which their land is valued in their respective leases, and upon presentation to the governor of the treasurer's certificate of such payment, the governor is required to make to such lessee a deed in fee simple for his lot. It appears that Daniel G. Goodhue has presented to your excellency the treasurer's certificate that Goodhue has paid to him the full sum at which 80 acres of said section was appraised, and that Goodhue is the holder of the original lease. It further appears that one Henry Blue claims 20 acres of the same lot by assignment from Goodhue and insists that he is entitled to the deed of the governor for the part to which he shows title. In this state of the case, I am of opinion that your deed for the entire 80 acres should be made to Goodhue. He produces the very evidence and the only evidence of title, according to which your deed is required to be made. The contest as to the title of the 20 acres must be referred to the judicial tribunal, and cannot be determined by your excellency.

Very respectfully,

HENRY STANBERY.

His Excellency Seabury Ford, Columbus, Ohio.

Collusion of Defendant.

COLLUSION OF DEFENDANT; EFFECT OF DISCHARGE OF JURY; SELLING LIQUORS; FORM OF INDICTMENT.

Attorney General's Office,
Columbus, November 20, 1850.

W. P. Bacon, Esq., Prosecuting Attorney, Defiance, Ohio:

SIR:—In consequence of absence from home and press of business, I have not found an earlier opportunity of replying to yours of the 20th of September.

1. In the case put by you of the discharge of the jury and continuance on the ground that by collusion with the defendant the witness for the State had suddenly gone off, I incline to the opinion that such discharge would not be a bar to another trial. The point, however, is very well settled, and for further information upon it, I refer you to 1 Chitty's Crime Law 630, 631.

2. The form of indictment which you have drawn for selling liquors by less quantity than one quart, is defective for want of the averment that the defendant was not duly licensed as a tavern keeper. The exception or qualification of being a licensed tavern keeper, is contained in the very clause prohibiting the selling by less quantity than a quart, and where such is the case, it must always be negatived by averment.

Yours respectfully,

HENRY STANBERY.

INSANITY; VACANCY IN OFFICE OF ASSOCIATE JUDGE.

Attorney General's Office,
Columbus, December 4, 1850.

SIR:—I have received your note of this date asking my opinion as to a vacancy in the office of the associate judge in Preble County, and if such vacancy exists, in what way it should be brought to the notice of the General Assembly.

It appears from your statement that Judge Neal, an associate judge from Preble County, became insane some time

Insanity of Official; Vacancy.

last spring and was brought to the lunatic asylum of the State in this city, from which he escaped about four weeks ago, since which he has not been heard from.

It does not appear from this statement that Judge Neal was upon inquisition found to be a lunatic, or whether he was brought to the asylum as a pay patient upon the certificate of lunacy by two physicians. But, however, that may be, I am of opinion that this office is to be considered vacant.

By the third section of the act declaring offices vacant in certain cases (Swan's Stat. 611) it is provided that if an associate judge shall remove his residence out of his county he shall be considered as having resigned and vacated his office.

Judge Neal was removed to the lunatic asylum by authority of law, for whether he was taken there upon inquisition of lunacy or upon a physician's certificate, he was lawfully taken there and was to remain in custody until regularly discharged.

Although this was not a voluntary removal, yet it was such a change of residence as may well be considered a vacation of his office.

But it further appears that he has since escaped from the asylum and has gone to parts unknown. It does not appear that he has returned to Preble County, for if he had returned there, according to the existing statute regulating the lunatic asylum, he might be retaken and brought back to the asylum (Vol. 48 Stat. p. 84).

If, then, the removal under authority of law to the lunatic asylum should not be considered such a removal out of the county as would vacate his office, his escape from the asylum to parts unknown, amounts to a sufficient removal. I think, therefore, upon the footing of a removal out of the county, even without considering the question of insanity, this office is vacant.

Secondly, as to the mode of bringing the matter before the General Assembly. The usual mode, when a vacancy

Sale of Canal Lands; Fees.

occurs in any office, the appointment to which devolves upon the General Assembly, is that the governor reports the vacancy. This, however, is not the uniform practice, and it is a mere practice, for I do not find any constitutional or statutory provision which requires it. I do not doubt that the General Assembly may be advised of a vacancy in any other mode which will properly certify them of the fact. In this case, I suppose a call upon the superintendent of the lunatic asylum would officially advise the General Assembly of the facts with relation to Judge Neal.

Very respectfully,

HENRY STANBERY,

Attorney General.

Hon. B. H. Alexander, Columbus, Ohio.

SALE OF CANAL LANDS; FEES; TURNPIKE COMPANIES.

Attorney General's Office,
Columbus, December 4, 1850.

SIR:—I am of opinion that the sixth section of the act of March 23, 1850, for the sale of canal lands (48 Vol. Statutes, page 93) is to be so construed as to allow to the register and receiver two per cent. each on the sales.

I am further of opinion that turnpike companies in which the State is a stockholder in setting off to the State its dividend upon tolls cannot first deduct from the tolls the taxes paid on the stock of the individual stockholders. This is in effect the same question which arose under the sixtieth section of the act to create the state bank of Ohio, and as to which it was held by the Supreme Court, that the banks could not deduct taxes paid as *expenses* before setting off to the State its six per cent. on the profits.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

Taxes; Little Miami Railroad Company.

TAXES; LITTLE MIAMI RAILROAD COMPANY.

Attorney General's Office,
Columbus, December 20, 1850.

SIR:—I have examined the question submitted in yours of the 7th instant as to the liability of the Little Miami Railroad Company, to pay a tax upon its dividends for the year 1850. According to your statement, the dividends declared by the company for the year 1850 exceed the rate of six per cent. payable in stock instead of cash, but inasmuch as the total of dividends declared by the company do not exceed 6 per cent. for each year since the organization of the company, it is claimed by the company that the liability to taxation has not attached. I do not think that the nineteenth section of the charter of this company can receive such a construction as to postpone the liability to taxation until such dividends are made as to equal the rate of 6 per cent. for every year. The language is very explicit "that *when-ever* the dividends of the company shall exceed the rate of 6 per cent." the liability to taxation "on the amount of such dividends" shall attach. All this has reference to annual taxation and annual dividends and each year must furnish the rule for the rate of dividends and for the tax. Whenever in any year the dividends for that year exceed the rate of 6 per cent., a tax may be levied. That, I think, is the true meaning of this section, and I would so hold even if the act of 1849 (Vol. 47, page 181) had not been passed.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State, Ohio.