
Fugitive from Justice.

such labor unless upon report by them made to the legislature of the proposed contract or renewal they shall be specially authorized by the legislature so to do.

There is no room to suppose that the legislature did not intend the prohibition to extend to such contracts as contained the clause for renewal. You are prohibited from renewing any existing contract. Besides all the existing contracts contain that clause of which the legislature were fully advised. Whether the clause for renewal is valid and obligatory is not now the question. It is simply a question of the exercise of power by the directors, agents of the State, and whatever power you may have had to renew an existing contract or make a new one, is expressly taken away as a general power and is limited to cases in which after a report to the legislature of the proposed contract or renewal, you may be specially authorized to contract or renew.

I would therefore suggest to you the making of such report to the legislature of any contract or renewal of a contract which you may deem expedient, but that you abstain from anything further, until the special authority is granted.

Yours respectfully,

HENRY STANBERY.

FUGITIVE FROM JUSTICE.

Attorney General's Office,
Columbus, January 18, 1849.

SIR:—I have examined the requisition from the Governor of Michigan, and the accompanying affidavits, in the matter of Solomon Heymans and am of opinion that they do not make a proper case for the issuing of your warrant.

It appears that Heyman was in custody in Michigan in virtue of proceedings commenced under the Michigan stat-

Fugitive from Justice.

ute for the punishment of fraudulent debtors., Revised Statutes of Michigan, chapter 141, page 604, and that he escaped from jail and is now in Ohio. I am not able to see that he is such a criminal as is contemplated by the constitution and of the act of Congress. The proceeding against him under which he was imprisoned was not in the nature of a criminal prosecution, but rather for the collection of a debt. It was commenced and carried on by the attorney of one Dittenhoefer, the creditor of Heyman, who caused him to be arrested and imprisoned upon his affidavit of a debt due from Heyman to Dittenhoefer, and that Heyman had property which he fraudulently concealed, and that he had assigned and disposed of property to defraud his creditors. The Michigan statute provides that the party so imprisoned may at any time be discharged from custody by payment of the debts and costs, or by giving security for such payment, or under the act for the relief of insolvent debtors. All this shows that there is no crime—nothing which concerns the public—but that it is a coercive measure to compel the payment of a debt and a limitation upon the absolute abolition of imprisonment for debt. It further appears from the eighteenth section of the act above quoted that if it shall appear who may entertain the proceedings that any misdemeanor or prying has been committed by any party or witness it shall be his duty to take measures to cause the offender to appear at the property court having jurisdiction of the offence to answer for the same.

No proceedings had been commenced against Heyman under this section. The seventeenth section of the same act provides that the fraudulent removal, secretion or assignment of property by a debtor shall be a misdemeanor. The proceeding against Heyman was not under that section. He was imprisoned under the provisions of previous sections by a proceeding carried on exclusively at the instance and for the benefit of his creditor. This relieves us of the necessity of inquiring how far such a misdemeanor as is provided for in the eighteenth section is to be considered

Ohio Railroad Company; Sale of Property.

a crime within the meaning of the act of Congress and constitution as to fugitives from justice. It has been suggested that the escape of Heyman from jail is in itself an offence under the twenty-eighth and twenty-ninth sections of the Michigan statute in relation to county jails. (Revised Stat. of Michigan, p. 715.) The sort of escape contemplated by those sections is of persons under sentence for a specific time, for such section provides that the penalty for such escape shall be additional imprisonment of three years in some cases, and one year in others, beyond the term for which the prisoner was originally sentenced or imprisoned. Neither of these sections can apply to Heyman, for he was not under sentence for any fixed term, nor indeed under any sentence at all. He was to remain until he paid the debt, gave security or should be discharged as an insolvent.

Very respectfully yours,

HENRY STANBERY.

His Excellency William Bebb, Columbus, Ohio.

OHIO RAILROAD COMPANY; SALE OF PROPERTY.

Attorney General's Office,
Columbus, January 23, 1849.

GENTLEMEN:—I have examined the joint resolution in relation to the sale of the personal property, etc., of the Ohio Railroad Company, and am of opinion that as the property has been once advertised and offered at public sale, you have now the power to dispose of it at private sale, at not less than one-half its appraised value. The fact that it was struck off to a purchaser at public sale who failed to comply with the terms of sale does not make a new advertisement or another public sale necessary.

Very respectfully,

HENRY STANBERY.

The Board of Public Works, Columbus, Ohio.

Water Lease; Liability of Lessee after Assignment; Liability of Assignee; Lien of the State for Rents.

WATER LEASE; LIABILITY OF LESSEE AFTER
ASSIGNMENT; LIABILITY OF ASSIGNEE;
LIEN OF THE STATE FOR RENTS.

Attorney General's Office,
Columbus, January 23, 1849.

GENTLEMEN:—I have considered the questions submitted in your letter of the 7th ult. upon the lease of water power to Francis Cunningham.

1st. The purchaser at sheriff's sale, of Cunningham's interest in the land, mill and lease is not liable for rent in arrear at the time of the purchase. Cunningham, the original lessee, is the only party personally liable for such rent. He also in virtue of his express covenant to pay the rent, continues liable to an action as well for the rent which has accrued *since* the purchase at sheriff's sale. The purchase at such sale is liable upon the footing of his possession, and he is to be considered as the assignee of Cunningham.

2d. I do not think the State has any lien on the mill or land connected with it, for the rent in arrear. It appears that the State did not own any land at the place where the water is used at the time of the lease. There is a covenant in the lease by Cunningham to convey to the State two acres of land, to be laid off by the acting commissioner or resident engineer in such manner that the hydraulic power at said locks may be advantageously used thereon, &c. I understand this tract of land has neither been laid off or conveyed. Before anything further is done the State should insist upon a conveyance of these two acres. If that is made, and the rents which have accrued since the purchase at sheriff's sale are paid, it is all that can be insisted upon. If the purchaser at sheriff's sale refuses to make the conveyance it will require consideration whether proceedings shall be commenced

Salaries of Boards of Public Works—Swan's Stat. 760; Vol. 38, 81; Vol. 39, p. 44; Vol. 40, p. 62; Vol. 42, p. 22; Vol. 43, p. 60; Vol. 46, p. 36.

to enforce the conveyance or to shut off the water and declare the lease forfeited.

Very respectfully,

HENRY STANBERY.

The Board of Public Works, Columbus, Ohio.

SALARIES OF BOARDS OF PUBLIC WORKS—
Swan's Stat. 760; Vol. 38, 81; Vol. 39, p. 44; Vol. 40, p. 62; Vol. 42, p. 22; Vol. 43, p. 60; Vol. 46, p. 36.

Attorney General's Office,
Columbus, February 1, 1849.

The Board of Public Works:

GENTLEMEN:—I have examined the question touching your salaries, and submit for your consideration the following opinion:

On the 5th of March, 1839, an act was passed to abolish the board of canal commissioners and to revive the board of public works, which constitutes a board of five members, one of whom shall be elected president and the other four, or a less number, are to be acting commissioners. The thirteenth section of this act fixes the annual salary of each acting commissioner at \$1,500.00 and allows the president \$3 per day while engaged in the duties of his office.

March 23, 1840, the board was reduced to four members. On the 29th of March, 1841, the foregoing act was amended in several particulars, and among others by reducing the annual salary of an acting commissioner to \$1,200.00.

By the tenth section of the act making appropriations for the year 1842, the [office] of president of the board was

Salaries of Boards of Public Works—Swan's Stat. 760; Vol. 38, 81; Vol. 39, p. 44; Vol. 40, p. 62; Vol. 42, p. 22; Vol. 43, p. 60; Vol. 46, p. 36.

abolished and the board by the ninth section of the same act was reduced to three members only.

By the thirteenth section of the act to reduce the compensation of members of the General Assembly, etc., passed January 27, 1844, the annual salary of the acting members of the board was reduced to \$730.00.

On the sixth of March, 1845, an act was passed to amend the act of March 5, 1839, and the several acts supplemental and amendatory thereto, etc.

This act provides that the board of public works shall consist of one president and two acting commissioners to take the place of the old board on the 1st of April, 1845. The ninth section fixes the salaries of the acting commissioners at \$1,000.00 each and allows the president a per diem compensation of \$2.50 whilst engaged in the duties of his office.

On the 7th of February, 1848, an act was passed which repeals all the retrenchment act, then in force (the act of January 27, 1844), except the clause abolishing docket fees, with a proviso that nothing therein contained should change the compensation of certain State officers as fixed by the act of March 2, 1846, nor increase the compensation then allowed by law to the judges of any of the courts of the State. It also specially revives all laws and parts of laws repealed by the passage of the retrenchment act.

The question submitted for my opinion is whether this last act of February 7, 1848, revives so much of the act of March 29, 1848, as fixed the salary of the acting commissioners at \$1,200 per annum.

There is no question the salary clause of the act of March 29, 1841, is a part of that act which was repealed by the retrenchment law, and that if there had [been] no intermediate legislation, it would have been revived by the act of February 7, 1848.

But what are we to do with the act of March 6, 1845?

Salaries of Boards of Public Works—Swan's Stat. 760; Vol. 38, 81; Vol. 39, p. 44; Vol. 40, p. 62; Vol. 42, p. 22; Vol. 43, p. 60; Vol. 46, p. 36.

That act repealed so much of the retrenchment law as applied to salaries of the board of public works and fixed the salary at \$1,000.

The act of February, 1848, in the first place repealed so much of the retrenchment law as was *then in force*. This repealing clause did not affect so much of the retrenchment law as related to the salaries of the board of public works, for that was *not in force* when the act of 1848 was passed. Then follows a clause in the act of 1848 which revives all law and parts of laws repealed by the retrenchment law.

I think the true construction of this clause of revival is to make it just coextensive with the clause of repeal, and to apply only to such officers and salaries as yet stood under the operation of the retrenchment law. In this view of the meaning of the act of 1848, the two provisos were unnecessary, and it often happens that out of abundant caution such unnecessary clauses are enacted.

But there is another and peculiar reason why this clause of revival should not be construed to repeal the salary clause as to the board of public works in the act of 1845, and to revive the salary clause in the act of 1841. And that is, that the board to which the salary clause of 1841 applied was abolished by the act of 1845, and another board created, differing in members and in some respects in the duties to be performed, from the old board. The salary of \$1,000 to each acting member, and the per diem of the president, we must suppose to have been fixed according to the new adjustment of the board, as to members and duties.

The board of public works of 1841, when the salary was \$1,200, and in 1844, when the salary was reduced to \$730, is not the *same board* as that which was created in 1845 with a salary of \$1,000, and which was in existence in 1848. I do not mean merely that it was not composed of the same individuals, but the identity of *the office* was gone. The act

Habeas Corpus; Recognizance.

of 1845 not only discharged the former officers, but abolished the office, and created a new office and new officers.

I think it quite out of the question, upon any idea of implied repeal, to say that the salary fixed for the new officers by the act of 1845 is abrogated, and that these officers are to take the salary fixed in the law of 1841 for other officers.

I am, therefore, of opinion that the act of 1848 has no effect upon the officers of the board of public works and that their [salaries] remain as established by the act of 1845.

Very respectfully,

HENRY STANBERY.

HABEAS CORPUS; RECOGNIZANCE; UNCONSTITUTIONAL LAWS TO BE OBEYED UNTIL DECLARED SO BY COURT.

Attorney General's Office,
Columbus, February 3, 1849.

Ino. Clarke, Esq., Prosecuting Attorney, New Lisbon, Ohio:

SIR:—I have been so fully occupied with my other official duties, that I have not found time until now to consider the questions submitted in your letters of the 22d of December and 11th instant.

First, as to the validity of the recognizance entered into by Silver before one of your associate judges. It appears that Silver had been convicted in your Common Pleas for perjury, that his case was taken upon writ of error to your Supreme Court, and reserved for decision to the last term of court in bank. That the judgment and sentence of the Common Pleas was reversed by the court in bank, a certified copy of the reversal was sent to the Supreme Court of your county, and that the clerk of that court made out a mandate to the Common Pleas showing the reversal, which was filed by the clerk of the Common Pleas, and thereupon, Silver,

Habeas Corpus; Recognizance.

upon proceedings by habeas corpus, was brought before one of your associate judges and let to bail.

I entertain no doubt that the judgment of reversal took effect immediately. So soon as it was entered upon the journal of the court in bank, the conviction was gone and Silver was no longer a person *convicted* of any crime. He was, therefore, bailable, being neither convicted of a crime nor imprisoned on a charge punishable capitally. It was undoubtedly proper that the associate judge who let him to bail, should have been first well advised of the reversal of the sentence and this it seems was the case. I think the recognizance is valid.

Nor will it avail the obligors in this bond, that the sheriff's return to the writ of habeas corpus, fails to show all the facts. If the facts existed, which authorized the letting to bail, they may be shown *dehors* that return.

Next as to the question arising under the act of February 14, 1848 (46 Vol. Stat. 48), extending the provisions of the act for the regulation of schools in the town of Akron, to the cities and incorporated towns of the State.

It appears that the town council refuse to act under the idea that the law is unconstitutional. It seems to me this manner of passing upon the validity of our laws, by the parties required to execute them is a growing evil, and if tolerated, will lead to great mischief. The law ought to be executed until its unconstitutionality is declared by the courts, and should therefore advise you in the performance of your duties as prosecuting attorney, to see that the law is obeyed. The question as to the constitutionality of a law is always one of grave importance. I do not feel that in the present state of matters, it is at all necessary that I should give any opinion upon the constitutionality of this law. All I need say is, that it ought to be obeyed until it is declared to be unconstitutional by the proper tribunal.

Very respectfully yours,

HENRY STANBERY.

School Law; Election of Directors; Taxes; Term of Clerk.

SCHOOL LAW; ELECTION OF DIRECTORS;
TAXES; TERM OF CLERK.

Attorney General's Office,
Columbus, February 3, 1849.

W. Hance, Esq., Circleville, Ohio:

SIR:—Yours of the 8th of December was duly received, and although it does not come within the range of my official duties, yet I have, at your request, taken the first leisure to examine the questions submitted to me, and am of opinion:

1. That the election of directors, at the annual meeting in September was legal, although no notice of the time and place was posted up by the district clerk. As this meeting was held at the school house, the time and place were fixed by law. The provisions as to posting up notice of the time and place rather applies to districts without a school house, as to which there is a necessity for notice as to the place. However that may be, I think where the meeting is held at the very time and place designated by law that it is to be considered a legal meeting notwithstanding the district clerk may have omitted to post the notice.

2. I am also of opinion that the tax levied by the directors after the meeting in May, 1848, was strictly legal. The notice preliminary to the meeting in May specified that it was to be held for the purpose of levying a tax to build a school house. The meeting voted a tax of two cents on the dollar, for that purpose and that the directors should change the location of the (then) school house and build the new one on another site, which they should purchase. I think a tax voted to build a school house necessarily includes a power to purchase a site for its erection. Without a site the house cannot be erected. The selection of a site is the proper business of the directors (Sec. 9 of the School Law). When, therefore, a tax is voted to erect a school house, the directors may apply it to the purchase of a site and the erection of the house.

But if this were not so, the tax levied in this instance

Fugitive From Justice; Requisition.

was well levied, for the vote of the tax is strictly in conformity with the notice. It was for the erection of a school house. The tax must be paid, even though it were granted that the subsequent vote as to the purchase of a site was not justified by the notice.

3. As to the authority of Mr. Ellsworth to act as district clerk and treasurer. The statute does not provide that the office shall terminate in one year or before a successor is elected. The clerk is elected from among the directors, and it would appear that the law contemplated the continuance of his office so long as the directors should continue.

Again, the payment of the tax cannot successfully be resisted on the supposed want of authority of the district clerk or treasurer.

He is at least exercising the office by *color* of law. He is the officer *de facto* and is sufficient to protect third persons in the payment of the tax to him.

Very respectfully,

HENRY STANBERRY.

FUGITIVE FROM JUSTICE; REQUISITION;
FACTS; CHARACTER OF OFFENSE.

Attorney General's Office,
Columbus, February 9, 1849.

SIR:—I have examined the requisition from the Governor of Pennsylvania for the surrender of Charles Wilson.

It appears by a copy of the indictment annexed to the requisition that Wilson was indicted at the December session, 1848, of the court of oyer and terminer for the city of Philadelphia for conspiring with one Wood to cheat and defraud one James Wilson. No offence is alleged except the mere agreement or conspiracy to defraud unaccompanied with any overt act. The requisition states that it has been represented to the Governor of Pennsylvania that

Fugitive From Justice; Requisition.

Wilson had fled from the justice of that State, and had taken refuge in Ohio.

Two objections occur to me against the granting of a warrant upon this requisition, viz.: that the important fact of a flight from justice is in no way established, and that the offence charged is not of the character of crime to which the constitution of the United States refers.

1. The jurisdiction is a special one. It can only be exercised in the case of a *fugitive* from justice. Every officer or person concerned in its existence should be well certified as to the facts. No affidavit accompanied the papers to show that Wilson has fled from justice. The Governor of Pennsylvania does not say so, but only certified that it has been so represented to him. Now, where, or by whom the representation is made, does not appear. The representation seems to have been sufficient to induce the Governor of Pennsylvania to make the requisition of the warrant, for the arrest by the executive to whom the requisition is made is not a matter of course; on the contrary, it is, or should be, well considered. I am aware that this requisition is in a form much in use, yet it seems to me the important fact of a flight from justice ought not to stand upon such a foundation.

2. But I principally rely upon the second objection—the character of the offence. The reclamation of fugitives from justice, as it stood before the adoption of our constitution, or the articles of confederation, either upon the comity of nations or in virtue of treaty stipulations, was always confined to the higher grade of crimes. Some have agreed that the provision in the second section of the fourth article of the constitution of the United States was intended to enlarge the right of reclamation and to apply as between the States constituting the Union, a larger remedy than was recognized by the law of nations or treaty stipulations. This may be so, but the language used and the nature and

Recognizance; Presence of Prisoner.

summary character of the remedy, would hardly justify the exercise of the power in a case like the present. The fugitive must be charged with treason, felony or other crime, not with any crime, offence or misdemeanor. So far as crimes are specifically mentioned, treason or felony, they are of the highest class, and the additional term other crime instead of being construed to embrace the entire circle of offences provided for in the criminal code of the State from which the person may have fled, ought to be rather limited by the enumeration which precedes it to crimes of general cognizance and of serious grade.

It has grown into a common thing to make this international power in cases of a comparatively trivial character, and especially in pursuit of individual redress than of public justice. I think this abuse needs correction.

The offence charged in this indictment is an agreement to defraud a third person. Our criminal code recognizes no such offence, nor can it be said to belong to the class of crimes which are *mala in se*. This being so, I am of opinion that the case is not a proper one for an executive warrant.

Very respectfully,

HENRY STANBERY.

The Governor of Ohio.

RECOGNIZANCE; PRESENCE OF PRISONER.

Attorney General's Office,
Columbus, February 19, 1849.

Ino. W. Ayres, Esq., Prosecuting Attorney, etc.:

SIR:—I have taken the first opportunity since the receipt of yours of the 30th ult. to consider the questions submitted by you for my opinion.

1st. There can be no doubt that where a person is imprisoned under the circumstances stated by you, that is,

Public Printing; Paper.

imprisoned upon indictment found, and the amount of bail fixed by the Common Pleas, a single judge of the court may, during the vacation, let him to bail, without resort to proceedings under the habeas corpus act.

6 Ohio Rep. 251.

15 Ohio Rep. 579.

2d. The prisoner must undoubtedly appear before the judge, but I incline to think it is not necessary that the bail should. The taking of the bond or recognizance is not a matter of record. It only becomes a matter of record when returned into court and the memorandum thereof made on the minute book. 16 Ohio 267.

The twentieth section of the criminal practice act, of 1831 (Swan's Collated Stat. 727) and the other statutory provisions as to recognizance taken before single judges, seem to contemplate only the presence of the prisoner. I am, therefore, of opinion that the bond is good notwithstanding the securities did not personally appear before the judge.

3d. If not good as a statutory recognizance or bond it seems it would not be good as a common law obligation.

Yours respectfully,

HENRY STANBERY.

PUBLIC PRINTING. PAPER.

Attorney General's Office,

Columbus, March 7, 1849.

SIR:—In answer to yours of the 6th instant in relation to the resolution of the House of Representatives directing you to give to the clerk of the house sufficient paper for the printing of the house, I beg to refer you to my letter of December 23, 1846. The resolution presents the same question with the resolution of the Senate of December 23, 1846.

Commission of Associate Justice.

I adhere to the opinion then given and think that you cannot comply with the resolution.

Very respectfully yours,
HENRY STANBERY.

Samuel Galloway, Esq., Secretary of State, Columbus, Ohio.

COMMISSION OF ASSOCIATE JUDGE; CERTIFICATE OF ELECTION.

Attorney General's Office,
Columbus, March 9, 1849.

SIR:—In answer to your inquiry as to the sort of evidence upon which you are authorized to issue a commission to an associate judge, I am of opinion that you can only act upon the certificate of election, signed by the speakers of both houses. The matter is sufficiently clear by the express language of the act of February 26, 1816, to provide for commissioning certain officers (Swan's Stat. 610). The very question has, however, been settled by our Supreme Court in the State on the relation of Loomis vs. Moffitt, 5 Ohio Reports, 362. Judge Hitchcock delivering the opinion of the court in that case, says:

“Upon the production of this certificate the governor will issue a commission. Without it he does not possess the power.”

Very respectfully,
HENRY STANBERY.

His Excellency Seabury Ford, Columbus, Ohio.

COMMISSION OF OFFICERS; CERTIFICATE.

Attorney General's Office,
Columbus, March 9, 1849.

DEAR SIR:—I have attentively examined the facts stated

Commission of Officers; Certificate.

in your note of this day, and proceed to give you my opinion on the questions raised :

1st. I do not think the governor can act upon any other evidence of the election of an associate judge than the certificate of the speakers.

The language of the act of February 26, 1846, is very explicit. It empowers the governor to issue the commission provided that the election of all officers elected or appointed by the legislature shall be certified by the speakers of both houses. The governor is in no sense a judge of the election, but simply performs a ministerial duty. The law provides only one mode by which he can be advised of the election. The very question is decided by our Supreme Court in the *State vs. Moffitt*, 5 Ohio Reports, 362. That case was upon the election of an associate judge. The court, referring to the certificate of the speakers, hold the following language :

“Upon the production of this certificate the governor will issue a commission.” Without it he does not possess the power.

2d. Although the speakers might certify falsely, that is, contrary to the journals, yet the governor would not resort to the journal and take that as evidence instead of the certificates, so as to commission another person than the one named in the certificate. I am not prepared to say in the case of a clearly false certificate expressly contradicted by the journals the governor might not be justified in declining to issue a commission to the person certified to be elected, but he certainly in that state of the case would not be authorized to issue a commission to another individual upon evidence in the journals showing his election. In such a case the remedy would be by mandamus to the speakers to compel them to certify the truth according to the journals.

3d. If a commission issues to A upon the certificate of the speakers that he was elected, and yet the journals show

Title of State to Lands Given for Government.

that B was elected, a mandamus would still lie in favor of B to compel the speakers to certify for him and the governor to commission him.

The journals impart absolute verity in a legal point of view, and no evidence can be allowed in a court of justice to contradict them, but yet proof by the journals that B was elected would not vest him with the office. He must besides have a commission. Neither an election without a commission, nor a commission without an election is sufficient. Both must concur to give an indefeasible right to the office.

Very respectfully,

HENRY STANBERY.

The Hon. Samuel Bigger, House of Representatives.

SEAT OF GOVERNMENT AT COLUMBUS; TITLE
OF STATE TO PENITENTIARY LOT; POWER
TO SELL.

Attorney General's Office,
Columbus, March 8, 1849.

The Senate of Ohio:

GENTLEMEN:—In obedience to your resolution passed on the 2d instant, I have examined the title of the State to the old penitentiary lot in the city of Columbus with reference to the power of sale and to lay out and permanently establish streets and alleys in the same.

This lot contains an area of ten acres, nearly in the form of a parallelogram, and is situate in that part of the original plat of Columbus which lies within half section No. 26, Township 5, Range 22, Refugee lands.

The act of the General Assembly of Ohio fixing the permanent seat of government passed February 14, 1812, provides in its first section that the proposals made to that General Assembly by Alexander McLaughlin, John Kerr, Lynn Starling and James Johnston (to lay out a town on

Title of State to Lands.

their lands, situate on the east bank of the Scioto River opposite Franklinton on parts of half sections Nos. 9, 10, 11, 25 and 26 for the purpose of having the permanent seat of government thereon established and also to convey to the State a square of ten acres and a lot of ten acres and to erect a State house, such offices and a penitentiary as should be directed by the legislature) are thereby accepted, and the same and their penal bond annexed thereto, dated February 10, 1812, conditioned for their faithful performance of said proposals should be valid and should remain in the office of the treasurer of state, there to be kept for the use of the State.

The second section of this act establishes the permanent seat of government on the lands mentioned in the first section. The third and fourth sections provide for the appointment of a director to superintend the laying out of the town and to select the square for public building and the lot for the penitentiary and dependencies according to the proposals aforesaid.

The fifth section requires the said McLaughlin, Kerr, Starling and Johnston by the 1st of July then next to lay out the town and record the plat distinguishing therein the square and lot to be by them conveyed to the State.

Upon inquiry at the office of treasurer of state, I am informed that the proposals and bonds referred to in the foregoing act are not to be found in that office.

I find upon record in the recorder's office of Franklin County, articles of agreement made between Starling, McLaughlin, Kerr and Johnston, and dated February 19, 1812. These articles recite that the legislature had established by law the permanent seat of government on half sections 9, 10, 11, 25 and 26, agreeable to the proposals of the parties aforesaid made to the legislature, and the parties agree to put the said lands into a common stock to be sold for the common benefit and to be laid out into a town agreeably to

Title of State to Lands.

the proposals to the State. Kerr and McLaughlin agree to bring the said half section No. 26 into the common stock. This agreement contains no terms of conveyance which would alter the condition of the title to the land as it stood before the agreement.

The plat of the town of Columbus as laid out by the four proprietors was recorded on the 29th of June, 1812. A square of ten acres is designated on the plat by the words *Public Square* and a lot of 10 acres in $\frac{1}{2}$ section 26, by the words *penitentiary lot*.

Deeds were made on the State by Alexander McLaughlin on the 1st of February, 1813, and by John Kerr on the 20th of November, 1812, for undivided moieties of the ten acres called the penitentiary lot. These deeds recite the passage of the act of February 14, 1812, establishing the seat of government in conformity with the proposals of McLaughlin, Kerr, Starling and Johnston, and that it was among other things provided for by that act that a square of ten acres and a lot of ten acres should be conveyed to the State by the said proposing parties on which to erect a state house, public offices and a penitentiary. The grantors, then, in consideration of the permanent location of the seat of government by the said act, and in compliance with the provisions of the act, convey to the State the ten acres by metes and bounds to hold to the State forever, for the only proper use of the State, with covenants of general warranty. These deeds are executed and acknowledged in due form and were recorded on the 4th of March, 1814.

I am of opinion upon the premises that the title of the State to this ten acres is absolute. The designation upon the plat cannot under the circumstances be considered a dedication to a special public use. At the time the plat was made and recorded, the proprietors were bound to convey ten acres to the State. This designation was not intended to stand in lieu of the conveyance, but simply to mark out

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the specific tract to be so conveyed. Afterwards, when the conveyance is made the words of the grant are free from all conditions or qualifications and the *habendum* is in the most general form without restriction to any particular use.

Nor do I find anything in the recitals in this deed or in the recitals in the act establishing the seat of government, which could be held even in a court of equity to control the State in the use of this lot.

The State acquired its title to the lot not in the way of donation, but for a full consideration, the establishment of the seat of government, on the adjoining lands of the grantors. The use referred to in the act and in the deeds was the particular use to which the State then intended to apply its own land so acquired, and not a use fastened upon the land by the grantors forming the consideration of the grant.

I am therefore of opinion that the State has the power to sell this lot or to lay out and establish streets and alleys in the same.

Respectfully submitted,

HENRY STANBERY.

MILITIA; VARIOUS LAWS IN FORCE.

Attorney General's Office,
Columbus, March 7, 1849.

The House of Representatives:

GENTLEMEN:—In obedience to the resolution of the house passed on the 2d instant requesting the attorney general to report forthwith to the house his opinion as to what laws are now in force in the State regulating the militia, I submit the following report:

The act to organize and discipline the militia passed March 4, 1837, repeals all former laws, and may, therefore, be taken as a starting point in the inquiry. Since that act eight other acts upon this subject have been passed of the

Militia; Laws in Force.

following dates, March 10, 1838; March 27, 1841; March 29, 1841; March 13, 1843; March 12, 1844; February 25, 1845; February 8, 1847, and February 24, 1848. Two of these acts have been fully repealed.

After a careful examination of these laws, I find it a difficult matter to say what part of them are now in force, owing to the very loose language in which they are drawn and the repugnancy in their provisions.

The act of March 12, 1844, introduced a new system, and in effect, so far as organization is concerned, substituted volunteers for the old militia. The militia at large no longer exists as an organized body. It would seem from the first section of the act of March 12, 1844, that as the training of the militia is only dispensed with in time of peace, the legislature meant not to annul, but simply to suspend the provisions of the act of March 4, 1837, relating to the militia as contradistinguished from the volunteers, and that they should come in vigor during a state of war. The act of 1837 not being unconditionally repealed by the act of 1844, there would be no difficulty in considering the old law as now in force, in so far as the training of the militia is concerned, but a careful examination of the provisions of the two acts will show that the entire organization of the militia is broken up. There are no longer any companies, nor any officers below the brigadier general and staff, except such of the officers of companies or regiments as may choose to hold their commissions and attend brigade musters for five years with a view to exemption.

It would seem, therefore, that there can be no training of the militia without a reorganization and the only provision for a new organization into companies to be found in the act of 1844 has reference altogether to a call into actual service. The act of February 8, 1849, provides that so much of the act of March 12, 1844, as limits the operation

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of that act, or any act amendatory thereto, to a time of peace is repealed.

The meaning of this repealing act is not clear, but I suppose it was intended to dispense with the training of the militia in time of war. That was the special thing which by the act of 1844, was limited to a time of peace.

As our laws on the subject of the militia now stand all the provisions as to the organization and training of the militia contained in the act of 1837 are annulled. Under the act of 1844 there is to be simply an enrollment of persons subject to military duty, except members of volunteer companies, to be made by the township assessors annually and returned through various officers to the adjutant general.

The fifth section of the act of 1844 left it optional with any person so enrolled to become a member of a volunteer company, or pay annually as a commutation for military duty the sum of fifty cents, or perform two days' extra labor on the highways.

The first section of the act of February 25, 1845, fixes the commutation at fifty cents or one day's labor on the highways, and the act of February 24 repeals that first section and so much of said act of March 12, 1844, as requires the township assessors to collect the commutation money. There is, therefore, no existing law requiring the performance of military duty or the payment of any commutation either by work on the highways or in money. The boundaries of brigades and divisions as they existed on the 12th of March, 1844, yet continue. The generals of brigades are to be elected by the commissioned officers of the volunteers and the adjutant and quartermaster general are yet required to perform such of their duties as may be practicable under the new system.

All the provisions of the act of March 12, 1844, in relation to the volunteer militia remain in force, except the following:

County Commissioners; Power to Loan Money.

The company muster on the first Friday in August annually is dispensed with by the act of February 25, 1845. The fines of two dollars for non-attendance on company muster, and three dollars for brigade muster are reduced to one dollar for each muster by the same act. The annual brigade muster and encampment on the third Tuesday in August to continue not more than five nor less than three days, was reduced to not more than three nor less than one day by the act of February 25, 1845, and entirely abolished by the act of February 24, 1848.

Respectfully submitted,
HENRY STANBERY.

COUNTY COMMISSIONERS; POWER TO LOAN
MONEY.

Attorney General's Office,
Columbus, March 10, 1849.

Messrs. C. W. O'Neal and Jno. Ewing, Findlay, Ohio:

GENTLEMEN:—In answer to yours of the 6th instant, I have to say that the loaning of the money by you as agents for your county commissioners in order to meet the July interest on the railroad bonds is not an offence in the act of March 2, 1846, to punish the embezzlement of public moneys.

It is made the duty of the commissioners to provide for the payment of the annual interest. Local Laws, 43 Vol. p. 109. This gives them the exclusive management of the fund intended for that purpose. If moneys are on hand intended for the payment of the interest, but short of the required amount, and there is no other way or now so practicable as to raise the fund to the necessary sum by putting it at interest until the day of payment, I see no want of power in their doing so. It is implied in their power to pro-

Act Defining Crimes and Misdemeanors.

vide for the payment of the annual interest and is one mode of performing that duty.

Very respectfully,
HENRY STANBERY.

ACT DEFINING CRIMES AND MISDEMEANORS;
INDORSEMENT REQUIRED.

Attorney General's Office,
Columbus, May 18, 1849.

SIR:—In answer to yours of the 15th instant, I am of opinion that the indorsement required by the fifty-fifth section of the act defining crimes and misdemeanors of the second class is not such a defect as can be taken advantage of by the defendant after verdict. The provision is directory in its nature and intended altogether for the protection of the county against the costs of prosecution carried on without reasonable grounds. The defendant is in no way concerned in the indorsement, for in the event of a conviction he must pay the costs and in the event of acquittal they are paid by the county. I doubt very much whether upon his motion the court would quash the indictment before trial, though I am aware there have been decisions sustaining such a motion. But certainly if the defendant can take advantage of the omission it must be done before the trial, and the objection is to be considered as waived if he pleads and goes to trial. After the trial the costs are incurred, and the very evil which the statute was intended to prevent can no longer be remedied and the motion would be out of time.

Again the indictment in this case contains a count for rape as well as for an assault and battery. This count for the higher offence gives the character to the indictment, and makes the indorsement wholly unnecessary. It is all one indictment, and one prosecution, and it was never intended that where it embraced a crime of the first class, there should

Associate Judge; Compensation.

be such an indorsement, even though a minor offence was joined with it, for that would be to require an indorsement upon an indictment charging an offence of the first class, which was never contemplated. It is an error in reference to this question to say that after an acquittal for the higher offence and conviction of the minor one, the indictment stands simply as an indictment for the assault and battery. For some purposes that is undoubtedly correct, but not to give a character to the indictment as it stood before the trial. The question is what sort of an indictment was it in the beginning at the time it was found, for that is the time when, if at all, the question of the indorsement arises.

In answer to the question whether upon an indictment containing a count for rape alone the defendant may be found guilty of a simple assault, I have to say that without doubt he may, for every charge of rape includes a charge of an unlawful assault.

Very respectfully yours,

HENRY STANBERY.

S. I. Kirkwood, Prosecuting Attorney, Mansfield, Ohio.

ASSOCIATE JUDGE; COMPENSATION.

Attorney General's Office,
Columbus, September 19, 1849.

N. Shepard, Esq., McConnellsville, Ohio:

SIR:—In consequence of absence, yours of the 8th instant has not been sooner answered. It does not come within the range of my official duties to give an opinion under the circumstances requested by you. I have, however, examined the statutes and am of opinion that the compensation of associate judges remains at \$2 per day as fixed by the twenty-seventh section of the act of January 7, 27, 1844. (Vol. 42, p. 22).

Offense; Mode of Prosecution.

The repealing act of February 7, 1848 (Vol. 46, p. 36), specially provides that nothing therein contained shall be construed as to increase the compensation now allowed by law to the judges of any of the courts of this State. Although there may be ground to suppose that the legislature had reference only to Supreme judges and president judges, whose compensation was fixed subsequent to the retrenchment law, yet the express language is too clear to allow of such a construction.

At the date of the act of February 7, 1848, \$2 per day was allowed by law to associate judges. That being so, we are not at liberty so to construe this act, as to increase their compensation to \$2.50 per day.

Yours respectfully,

HENRY STANBERY.

OFFENSE; MODE OF PROSECUTION.

Attorney General's Office,
Columbus, September 20, 1849.

A. W. Hendree, Esq., Prosecuting Attorney, etc.:

SIR:—In answer to yours of the 12th instant, I am of opinion that the mode of prosecution for offences under the act to secure the inviolability of places of human sepulture should be by indictment. The rule is that where an offence is provided for and punished under a penalty such as fine or imprisonment and nothing is said as to the mode of prosecution an indictment will lie, and is the proper mode of proceeding.

Yours respectfully,

HENRY STANBERY.

Requisition; Board of Education of Bucyrus.

REQUISITION FOR JAMES M. WINSLOW.

Attorney General's Office,
Columbus, October 13, 1849.

SIR:—I have examined the requisition from the Governor of Pennsylvania for James M. Winslow and am of opinion that a proper case is not made for the issuing of your warrant.

The affidavit on which the requisition is founded, does not make out the offence of obtaining money by false pretences, which is the crime alleged in the requisition. It is not denied that Winslow was, in fact, the patentee of a machine for cutting laths, and the statement relied on as false pretences, seem to be nothing more than affirmations of the value and goodness of the machine.

Very respectfully,

HENRY STANBERY.

Hon. Seabury Ford, Governor of Ohio, Columbus.

BOARD OF EDUCATION OF BUCYRUS.

Attorney General's Office,
Columbus, October 30, 1849.

Samuel Galloway, Esq., Secretary of State:

SIR:—I have examined the question submitted in your note of this date, and am of opinion that the six directors last elected, who have organized and entered upon the duties of their office, are the legal directors of the board of education in Bucyrus.

I think if the first election were not void in consequence of the election of a board of *five* instead of *six* members, that yet the failure of the five so elected to organize within ten days after the election, or since, is tantamount to a resignation or refusal to accept the office.

Indictment for Making a Lottery.

It stands, therefore, as if there were no election at the first attempt.

The only question that remains is as to the time of the second election. It was not within *twenty days* from the time of the adoption of the act by the freeholders in their town meeting.

I think that clause of the statute which fixes that time for the election is merely directory. The power of election was incident to the qualified electors of the town, and the affirmation power to elect within the 20 days does not take away the implied power and so are the authorities. (People vs. Bunnells, 9 Johns, Rep. 158.)

Very respectfully,

HENRY STANBERY.

 INDICTMENT FOR MAKING A LOTTERY.

Attorney General's Office,

Columbus, November 2, 1849.

A. C. Turner, Esq., Prosecuting Attorney, Cadiz, Ohio:

SIR:—In consequence of a pressure of other engagements, I have not found time heretofore to reply to yours of the 15th ult. I trust, however, as your court does not commence until the 6th instant that my answer will come in time. I think the draft you sent me of your first count, that is, for making a lottery, is substantially good. Your county for drawing a lottery is subject to an objection for duplicity, as it alleges two offences, viz.: the making the lottery and the drawing of the lottery. I would suggest the following as an amendment: That A. B., late of, etc., on the, etc., at, etc., did unlawfully set to sale and expose certain goods and chattels, to-wit, one iron buggy of great value, to-wit, of the value of one hundred dollars, by means of a certain illegal lottery and scheme of chance then and there publicly set on foot by the said A. B. and called the splendid prize lottery,

Columbiana Bank of New Lisbon.

contrary, etc. I would also suggest the following form for vending:

That A. B., late of, etc., on, etc., at, etc., did unlawfully sell and vend to one C. D. eleven lottery tickets the same being for eleven shares in a certain illegal lottery or scheme of chance called the Splendid Prize Lottery, the said Splendid Prize Lottery, the same not being authorized by any law of the State either as to the lottery itself or the drawing or sale of any tickets therein, contrary, etc. All these counts are very general, and if they are subject to any objection it is by reason of their generality, but as you have furnished me with no information as to the particular nature of the lottery, nor any description of the tickets, it is not in my power to draw any count with more special averments.

Yours truly,

HENRY STANBERY.

COLUMBIANA BANK OF NEW LISBON.

Attorney General's Office,
Columbus, November 23, 1849.

The Board of Control of The State Bank of Ohio:

GENTLEMEN:—I have in conformity with your resolution of the 22d instant examined the questions which upon the application of the stockholders of the Columbian Bank of New Lisbon to resume the business of banking.

This application is made under the sixty-eighth section of the banking act of February 24, 1845. The charter of this bank expired on the 1st of January, 1843, and at the time of the passage of the banking act of February, 1845, the assets of the corporation were in the hands of assignees in virtue of an assignment made by order of the directors on the 31st of December, 1842. These assignees proceeded to the execution of their trust to collect the debts and pay

Columbiana Bank of New Lisbon.

the liabilities of the corporation until the 13th of August, 1849, on which day, it appearing that all the stock not surrendered in payment of debts had been transferred to and was then held by two persons, Messrs. Snodgrass and McClymonds, whereby they became the owners of all the assets, the assignees, at the instance of Snodgrass and McClymonds, and with a view of putting an end to their trust, transferred and delivered all the remaining assets to Snodgrass and McClymonds, taking from them a bond to redeem and pay the outstanding circulation and other liabilities of the bank.

After all this on the 22d of September, 1849, the assignees undertake to revive the bank under the sixty-eighth section of the banking law before referred to.

I am of opinion that in the condition of things as to this bank at that time, no action could be taken under the provisions of that section. The bank as to its stockholders and its trustees was wholly different in September, 1849, from what it was in February, 1845.

The stockholders contemplated by the sixty-eighth section had ceased to exist, for all the stock was either commenced and extinguished or assigned to two individuals and these individuals by their own act put an end to the trust and the power of the trustees and took the assets into their own hands. This worked a change from a body of stockholders, unrepresented by trustees, to a mere matter of individual property under the sole management of its owners. I am, therefore, of opinion that in the two essential particulars of stockholders and trustees both were wanting when the attempt was made in September, 1849, to resuscitate the bank.

In coming to this conclusion, I have not found it necessary to consider whether the lapse of time since the passage of the act of 1845 would not under any circumstances prevent the resumption of banking under the sixty-eighth section.

Very respectfully,

HENRY STANBERY.

Fugitives from Justice.

FUGITIVES FROM JUSTICE.

Attorney General's Office,
Columbus, December 3, 1849.

SIR:—I have examined the requisition from the Governor of Virginia for the surrender of Buck, alias Oliver, a free man of color, together with the accompanying documents, and am of opinion that a case is not made for the issuing of your warrant.

The alleged fugitive stands indicted in the county court of Hampshire County, Virginia, with the offense of advising and assisting a slave to escape from his master.

The reclamation of fugitives from justice as it stood before the adoption of our constitution or the articles of confederation, either upon the comity of nations or treaty stipulations, was always confined to the higher grade of crimes. Some have agreed that the provision in the second section of the fourth article of the constitution of the United States was intended to enlarge the right of reclamation and to apply, as between the States constituting the Union, a larger remedy than was recognized by the law of nations or treaty stipulations. This may be so, but the language used and the nature and summary character of the remedy would hardly justify the exercise of this power in a case like the present. The fugitive must be charged with treason, felony or other crime. This language was not intended to embrace all offenses created by the criminal code of each of the States, but rather the crimes of general cognizance and serious grade.

The offence charged in this indictment is unknown to our criminal code and to the common law. I cannot think that it belongs to the class of crimes intended by the constitution.

The rule, as I understand it, which has prevailed in this is not to surrender a fugitive whose offence is neither

Damages for Injury to Mill.

recognized as a crime by the common law and by our own criminal code.

HENRY STANBERY,

Attorney General.

Hon. Seabury Ford, Columbus.

DAMAGES FOR INJURY TO MILL; MODE OF CONSTRUCTION.

Attorney General's Office,

Columbus, December 15, 1849.

Board of Public Works:

GENTLEMEN:—It appears from the statement of facts furnished to me by Mr. Blickensderfer, that Mr. E. Sackett claims damages for an injury to his mill seat on the Little Cuyahoga River, below Akron, near Lock No. 19, Ohio Canal. That some time in 1843 or 1844, Mr. Sackett erected a dam across the Little Cuyahoga near Lock No. 19, one end of which dam abutted against the towing path bank of the canal. This dam raised the water in the channel of the river about two feet higher than the level of the water in the canal, and thereby endangered the canal bank, and made the river at high water liable to plow over the towing path into the canal to its manifest injury.

That in the winter of 1847-48 a freshet occurred in the river which, in consequence of this dam and other fixtures of Mr. Sackett, caused much injury to the canal, washing away a large portion of the embankment. That owing to the great injury sustained at this time, and the liability of its recurrence as long as Mr. Sackett's water power should be used on the same plan, the agents of the State prevented the repair or reconstruction of the dam at its former location, and notified Mr. Sackett that he would not be permitted in future to use his power in such a manner as to endanger the public works. In consequence of this refusal and notice Mr. Sackett will be compelled to abandon the water privilege altogether, or incur an extra expense in so arranging

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his dam and fixtures for its use as to prevent injury to the canal. That Sackett purchased the site of the water power long after the construction of the canal. That no consent was at any time given by any agent of the State to Mr. Sackett for the particular mode of construction which he adopted in so improving the privilege, but on the contrary, the resident engineer frequently remonstrated against the improvement, and as soon as there was no longer any question as to its injurious results, positive notice was given to Mr. Sackett not to rebuild the dam. It does not appear from Mr. Blickensderfer's statement whether or not the former owner of the site ever had an award of damages, or set up a claim for damages in consequence of the injury to the water power, by the construction of the canal. In this state of facts my opinion is requested as to the right of Mr. Sackett to claim damages, either for the total loss of the water privilege and his improvements, or for the additional expense he must incur in so constructing his dam and fixtures as not to endanger the canal. I am not of the opinion that his claim, either for total loss or additional expense, cannot be allowed. So far as any claim for damages in consequence of the injury to the water privilege is concerned, that arose at the time the canal was constructed and many years before Mr. Sackett became interested in the property. Without going into the question as to how far in any case, the right to claim damages would follow a transfer conveyance of the premises, it is sufficient to say that this claim was long ago barred by lapse of time. The eighth section of the act to provide for the internal improvement of the State by navigable canals, which gives the right to claim damages, contains the following proviso: "Provided, however, that all such applications to the board of canal commissioners, for compensation for any waters, lands, streams, or materials so appropriated, shall be made within one year after such lands, streams, waters or materials shall have been taken possession of by said commissioners for the purposes afore-

Damages for Injury to Mill.

said." Swan's Stat. 148. It must, therefore, be conceded that at the time Mr. Sackett purchased the site of this water power, and when he began to improve it, the State had well appropriated the land occupied by the canal and its banks, and that no claim for damages in consequence of any injury to the water power then existed in favor of any one. In this condition of things, Mr. Sackett, upon his own motion and without any license or consent from any agent of the State, and against the remonstrances of the resident engineer, undertook to abut a dam against the bank of the towing path, and thereby raised the water on the outside and against the bank, to a higher level than that of the water in the canal, so as to endanger the safety of the canal. This erection was suffered to remain until in a time of high water, great injury was sustained by the canal in consequence of this dam, and the dam itself or that part of it which abutted against the towpath bank was washed out.

Now, I am not able to see on what ground Mr. Sackett can rest any claim of damages against the State. He never acquired any right to use the tow path bank as an abutment for a dam, either as original owner, or by any grant from the State, or any such acquiescence as would bind an individual, much less the public. I am, therefore, of opinion that his claims for damages cannot be sustained.

HENRY STANBERY,

Attorney General.

TAXES ON LAND; TAXES ON PURCHASE
MONEY.

Attorney General's Office,

Columbus, December 26, 1849.

SIR:—I have considered the question submitted for my opinion in your letter of the 22d instant, in relation to the case of A. Symmes. It appears that on the 15th day of January, 1849, Mr. Symmes sold a tract of land in Butler County containing 100 acres at the rate of \$125.00 per acre,

Taxes on Land and Purchase Money.

payable in deferred instalments with interest from the date of the sale. The contract of sale, which is in writing, signed and sealed by Mr. Symmes and by the purchasers, Wright and Woodruff, contains the usual covenants on the part of the purchasers for the payment of the purchase money, and on the part of the vendor for the making of a warranty deed upon full payment. It is further stipulated that Mr. Symmes may obtain possession of all the ground which is under cultivation, or so much as the parties do not require to be surrendered, he paying for the same, the taxes, and \$2.50 per annum for the use of said ground, the rent to commence from the date of the agreement, so that he does not in any way retard the division, etc. The only question which I understand to be made is whether Mr. Symmes is, under the circumstances, taxable for the moneys payable under the contract, he at the same time being bound to pay the taxes on the land. I am very clear that he is chargeable with taxation upon these deferred payments. By the sale he ceased to be the owner, in fact, of the land, for although the legal title is still in him, he holds that simply as security for the unpaid purchase money. This property, by the sale, was changed from land into "*credit*," that is, into a claim or demand for money, and such credits at once become subject to taxation. Nor does it make any difference that he continues bound to pay the tax on the land, for that liability arises out of his contract with the purchasers, and is part of the consideration under which they lease the land to him. After a sale of land, a new subject for taxation arises, that is to say, the price or purchase money, and this is not in lieu of the land, but in addition to it. The land continues as a specific thing, just as much subject to taxation after the sale, as before. Some one must continue to pay taxes upon it, and some one must begin to pay taxes on its price. If the vendor of the land chooses, by the contract of purchase, to continue to pay the tax on the land, that does not in the least with-

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draw from taxation the price which he has received, or is entitled to receive for it.

HENRY STANBERY.

John Wood, Esq., Auditor of State, Columbus.

CINCINNATI COLLEGE. TAXES.

Attorney General's Office,
Columbus, December 26, 1849.

SIR:—I have examined the question submitted for my opinion in your note of the 21st instant in relation to the Cincinnati College. It appears that in the year 1848 the lot and buildings erected thereon belonging to the college were brought upon the duplicate at a valuation of \$65,000.00 and the taxes thereon, amounting to \$650.00, were charged to the college. That in 1849 the value as fixed by the county board of equalization was \$58,500.00 and that the college now stands charged with the taxes, interest, and penalties for 1848 and the simple tax for 1849, amounting in the aggregate to the sum of \$1,626.62½.

The question is whether these taxes have been legally assessed.

On the 27th of August, 1846, the question as to the liability of this property to taxation in the name of the college was presented for my opinion by your official letter of that date. The following is a copy of the opinion then given, which embodies the facts in reference to this property: (vide ante page 24).

Upon further reflection, I adhere to the opinion so given and have now only to consider how far the sixteenth section of the amendatory law passed February 22, 1848 (Ohio Law, Vol. 46, p. 72), has worked a change in the law in force when that opinion was given.

That section is in these words:

“The auditor of state be and he is hereby authorized to review his instructions with reference

Cincinnati College; Taxes.

to the first, second and third clauses of the third section of the act entitled 'an act for levying taxes on all property in this State according to its true value' with a view to bring upon the grand duplicate for taxation all property held by scientific, literary, religious or benevolent societies or corporations, and leased or otherwise used with a view to profit; and the said auditor of state be and he is hereby directed and authorized to take all steps necessary to carry out more fully and fairly the true intent and object of the provisions of the act already referred to."

The three clauses of the third section of the act referred to in this sixteenth section, are the clauses declaring the exemption of buildings used for public schools, places of public worship, lands occupied as graveyards, and buildings belonging to scientific, literary or benevolent societies not leased or otherwise used with a view to profit.

At the same session of the General Assembly a resolution of the amendatory act which contains the sixteenth section before quoted directing the township assessor to ascertain so that the same be reported to the next General Assembly—

1st. The amount and value of any land or lot, and the buildings thereon held by any scientific, literary, religious or benevolent society, and occupied and used by such society exclusively for the purpose of such society, and not used with a view to profit.

2d. The amount and value of all other property of whatever kind, held by any such societies specially for each and the income if any derived from such property (46 Vol. 312).

I do not see that this resolution will assist us in giving a construction to the sixteenth section of the amendatory law. It provides for a statistical of the amount and value of such property as is beyond all question exempted from taxation by the act of 1846; that is, of property held and used by religious, literary and benevolent societies exclu-

Cincinnati College; Taxes.

sively, and not used with a view to profit. It does not provide that such property is to be brought on the duplicate for taxation. What the object was in requiring such statistics to be made up does not appear, nor has any subsequent legislative action been laid in the matter.

Then, as to the sixteenth section, it is not readily perceived what is its true meaning or what effect is due to it, in arriving at the true meaning of the act of 1846.

It does not, so far as the three sections or clauses of the original law are concerned, purport in any respect to repeal, alter or amend them. But it directs the auditor to *review* his instructions respecting them with a *view* to subject to taxation all property held by scientific, literary, religious or benevolent societies or corporations, *and leased* or otherwise used with a view to profit, and to take all steps necessary to carry out more fully and fairly the true intent and object of the original act.

It is clear from this that the General Assembly had in contemplation certain instructions given by the auditor of state to the county auditors under the provisions of the sixty-fifth section of the original act (Vol. 44, p. 110.

What these instructions were does not appear, but I am advised by you that in conformity with the opinion from this office so given on the 26th of August, 1846, you had issued instructions to the auditor of Hamilton County, not to tax to the Cincinnati College either the lot or buildings thereon belonging to the college, but as to such parts of it as were under lease; to tax the leasehold to the particular lessees, and I am further advised by you, that these instructions were undoubtedly in contemplation of the committee who reported the sixteenth section.

It would seem that the General Assembly was not satisfied that the instructions fulfilled the object of the original act, and that the ground of dissatisfaction was, in the extent of the exemption as declared by the instructions. The direction given to the auditor is to *review* those instructions for the purpose of *enlarging* the subject for taxation, and there-

Equalization Boards; Power to Alter Tax Returns.

by to carry out more fully and fairly the true intent and object of the original act.

In conformity with what you supposed to be the meaning of this section, I am advised that you have reviewed your instructions in reference to the property of this college, and have caused the lot and the buildings upon it to be valued and taxed to the college.

I confess I do not see that the question as to the true meaning of the original act is distinctly affected by the sixteenth section. I repeat that the original act is in no way repealed or amended in respect of this peculiar property by this section. The auditor is still to look for the meaning of the original law in the law itself. He is instructed to carry out that law, not any subsequent one.

Nor can the sixteenth section be considered as a law *declaratory of the meaning* of the original act, for there is not specific declaration to that effect. Notwithstanding all this, it cannot be denied that the instructions exempting this property from taxation to the college were not satisfactory to the General Assembly.

This being so, I do not feel warranted in advising you to recede from your last instructions, and to direct the tax to be remitted. It is a question which ought, under the circumstances, to be submitted to the Supreme Court, and as this can only be accomplished by a refusal to remit the tax, I would advise that course.

Very respectfully,

HENRY STANBERY.

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

EQUALIZATION BOARDS; POWER TO ALTER
TAX RETURN.

Attorney General's Office,

Columbus, December 27, 1849.

SIR:—I have examined the petitions and accompanying documents of Jno. M. Woolsey, of Cleveland, referred to me in your note of the 28th ult.

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Mr. Woolsey presents two petitions for relief against taxes with which he stands charged on the duplicates for 1848 and 1849. In the petition as to the duplicate of 1848, he states that about the 10th of March, 1848, the township assessor for the second ward of Cleveland, in which ward Mr. Woolsey resides, a notice (which is appended to the petition and is in the usual form) requiring him to make out his statement of personal property, moneys and credits, with the valuation thereof. That in conformity with the notice he, on the 16th day of the same month, made out his statement, and on the same day verified the same by his affidavit before the assessor, which statement, so verified, was accepted by the assessor and was returned, as made, by the assessor. The statement and affidavit, and return of the assessor are appended to the petition, from which it appears that the valuation of personal property comprising enumerated and non-enumerated articles was sworn to at \$2,958.00 and that as to moneys and credits none were returned or stated, Mr. Woolsey swearing to the fact that the balance owing by him exceeded the balance due to him. The return of the assessor followed the statement, and gave the sum of \$2,958.00 as the total valuation of personal property, other than moneys and credits, and contained no charge or valuation under the head of moneys and credits.

The petition proceeds to state that the return as to his moneys and credits, was true, but that the county board of equalization at its April session, 1848, assuming that the petitioner had moneys and credits liable to taxation which he had not disclosed in his statement, without any notice to him, and without authority, added to the sworn statement and the assessor's return the sum of \$30,000.00 for moneys and credits and ordered the county auditor to add that amount and assess taxes thereon, and in the record of their proceedings made the following entry: "Jno. M. Woolsey, city, personal property, moneys and credits, \$30,000.00 addition."

The extract referred to from the records of the board

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of equalization is also attached to the petition, which confirms the statement made in the petition.

The petitioner further alleges that the county auditor in pursuance of said order, and without further action, in making out the duplicate, added the \$30,000.00 to the moneys and credits of the petitioner and assessed the regular tax thereon equal to 11 15-100 mills on the dollar.

That the petition within the time allowed by law, tendered to the county treasurer the taxes with which he was assessed, exclusive of the tax upon the said \$30,000.00. The tender being refused, the petitioner filed a bill in the Common Pleas of Cuyahoga County to enjoin the collection of the tax assessed on the \$30,000.00 and claimed a provisional injunction. This case was taken by appeal on the Supreme Court, and at the August term, 1849, of that court, the bill was dismissed for want of jurisdiction. The tax remains uncollected and the prayer of the petition is that it be remitted.

The petition as to the duplicate of 1849 with respect to the sworn statement for that year, the return of the assessor, the proceedings and order of the board of equalization and the addition as made on the duplicate is precisely similar in its allegations and in the exhibits, to the petition for 1848, except in one particular, to-wit: That in the sworn statement for 1849 the petitioner swore to the valuation of his moneys and credits as amounting to the sum of \$2,127.00, whereas in the statement for 1848, he swore that he had no moneys and credits subject to taxation. I do not refer to this in the light of a discrepancy, for it may very well happen that both statements are true, but in another point of view, which will be noticed in the sequel. I am instructed to consider the facts as correctly stated in the petition and accompanying documents for the purpose of this examination.

The question which arises is as to the validity of the orders so made by the board of equalization.

In order to a proper determination of this question, it is

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necessary to refer to several statutory provisions, which are supposed to bear upon it.

So far as I have had opportunity for examination, I find the first provision for a county board of equalization in the tax act for 1831 (Stat. 29, Vol. 278). The nineteenth section of that act provides that "the county commissioners, auditor and assessor, shall meet at the county seat on the first Monday of June annually, and shall have power to hear and determine the complaint of any owner of property listed and valued by the assessor subsequent to the preceding first day of March; and shall correct any list or valuation as they shall deem proper, and shall have power to equalize the valuation made by the assessor, either by adding to or deducting from his valuation, such sum as to them, or a majority of them, shall appear just and reasonable."

The fifteenth section of the same act (p. 276) provides that if the owner of property refuses to give a list of it when called upon by the assessor, or fraudulently omits to give in any part of his capital or property, required to be listed, the assessor shall take a list of such person's property thus refused or omitted to be listed from the best information he can obtain "and shall notify such person to attend the board of equalization and if such person shall fail to satisfy the board of his innocence in the premises, they shall order the property so refused or fraudulently omitted to be listed to be taxed threefold, the proper taxes to be collected as other taxes, but if the refusal is excused for good cause, or the fraudulent intention in omission is removed, they shall order the property to be taxed as other property of like description."

It will be found that this tax act of 1831 is not only a law upon the same subject matter with the tax laws now in force, but that the present system is in a great measure modeled after its provisions. It subjects to taxation many new items of property, such as money at interest, and various articles of personal property. It provides for a list and valuation of personalty by the owner, which list must be

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verified by the oath of the party if required by the assessor, and it employs very much the same agency by assessors and boards of equalization, with the present system.

Upon the settled rules for the constructions of statutes, it is therefore very proper in the construction of our existing tax acts, to look at similar provisions in this former law.

The board of equalization under the act of 1831 was to hear and determine the complaint of the owner or person taxed, and to correct any test or valuation as they might deem proper, and had the additional power of equalizing the valuation made by the assessor either by adding to or deducting from his valuation, such sum as should appear just and reasonable.

These are the powers as fixed by the nineteenth section, and they fall under two heads. First, as a board to hear and redress complaints by the person taxed, and under that power to correct any list or valuation. Second, as a board to equalize the valuation of the assessor. This implies the bringing of the valuations to a standard of equality and necessarily supposes a comparison of different items, a very different thing from what is intended by the redress of a single complaint, or the correction of a single item.

I think it quite clear that no power is given to the board by this nineteenth section to change the valuation as to an individual case, unless upon the complaint of the owner, except in the exercise of the power of equalization in their general power over the whole list of assessments, they might change any item so as to make it conform to equality with the residue.

The section accordingly provides with great reason, that when the power to change is to be applied to an individual case, there shall be a hearing, whereas when they are in the exercise of the general power of equalization, which necessarily extends over the whole body of taxpayers, no such hearing is to be had, for it would be impracticable.

But what conclusively shows this construction of the nineteenth section to be correct, is that the specific power to

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change or add to the valuation in a single case and upon the merits of a single case, without a complaint from the owner, is conferred by the fifteenth section. According to that section, upon the complaint of the assessor, that an individual has refused to list his property, or has fraudulently omitted to list all his property and upon notice to the person to attend the board have the power to order the property to be listed at threefold its value, in case the party does not make good his defences.

The nineteenth section of the act of 1831 was repealed by the eighteenth section of the act of March 11, 1840 (Swan's Stat. 906), which eighteenth section is as follows:

“The county commissioners, county auditor and county assessor, shall constitute a county board of equalization in their respective counties, and they or a majority of them shall meet on the first Monday of June, 1841, and annually thereafter, for the purpose of hearing complaints and equalizing the assessments and revaluation of all real and personal property within such county, provided that said board shall in no case reduce the aggregate value of real property within such county, as originally assessed by the state board of equalization.”

This section is substantially the same as the nineteenth section of the act of 1831, but the slight change of phraseology makes it still more manifest that the power to change the list in an individual case is limited to the case of a complaint made, and the use of the term assessments, in the plural, indicates that the power of equalization is to correct something more than a single error.

Furthermore, the proviso that the equalization as to real property shall not reduce the general aggregate, shows that it is to be made by adding to one what is taken from another.

Next in order is the act now in force, passed on the 2d of March, 1846, entitled an “act for levying taxes on all

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property in this State according to its true value." (Stat. Vol. 44, 85.)

The forty-fourth section of this law provides for a new county board of equalization, as follows:

"The county auditor, the county surveyor, the county commissioners and the district assessors, or a majority of them, shall form a board of equalization. They shall meet on the first Monday of August (then) next, at the court house in their county, if the court be not in session, but if in session, at some other convenient place at the county seat, when the county auditor shall lay before them the returns of the real property, made by the several district assessors of such county, with the additions he shall have made thereto, and having each taken an oath fairly and impartially to equalize the value of the real estate of such county agreeably to the provisions of this act, they shall immediately proceed to equalize such valuation, so that each parcel shall be entered on the tax list at its true value, etc."

Then follow the rules to be observed in the equalization one of which is that the aggregate is not to be reduced.

This is the only section of the act of 1846 which provides for a county board of equalization, and as to this board it is to be remarked, that it is only to meet once and then to cease, and that its powers are strictly confined to *equalization*, and to real property alone.

Where, as in the case under consideration, a sworn list is made out and delivered to the assessor, I do not find any provision made in the act of March 2, 1846, giving to any officer or board the power to revise or alter it. It is only in case of a refusal to make out the list, or a refusal to swear to it, that the assessor has power to enter into any inquiry, or do any act in the premises.

(Sec. 31, 32, 33. p. 98.)

The forty-third section, p. 102, gives to the county auditor authority, upon receiving the return of the assessor, if he

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(the auditor) is satisfied that the assessor has omitted any property, moneys or credits, "*which he was bound to return*" to require the assessor to correct the error. It would seem that this section does not give the county auditor power to correct a *sworn list*, for if there is any error or omission of any property, moneys or credits, it is not an omission of the assessor, or property which he was "*bound to return.*" The section appears to be confined to the correction of errors or omissions made by the assessor.

Next in order is the act of February 8, 1847, to amend the tax act of March 2, 1846.

(45 Vol. Stat. 60.)

This act contains two important sections bearing upon the question in this case.

The first is section four, which is as follows:

"The county commissioners and county auditor shall be a county board of equalization; and said board, or a majority of them, shall meet on the first Monday of June, annually, for the purpose of hearing complaints, and equalizing the assessments of all personal property, moneys and credits, new entries and new structures returned by the township assessors, within their respective counties; and said board shall have power to add to, or deduct from the valuation of the personal property, or moneys or credits of any person, returned by the assessor, upon such evidence as shall be satisfactory to said board, whether said return be made upon the oath of such person, or upon the valuation of the assessor, provided that the said board shall not reduce the aggregate amount of the personal property, moneys and credits and new entries and new structures returned by the assessors of their counties."

Next is the fourteenth section (p. 63), which gives to the county auditor at any time before final settlement with the county treasurer, the power to correct the return of the assessor, even in cases where there has been a sworn list, if

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he shall be satisfied of its falsity, but he cannot make a correction which shall add to the list, without a notice to the party interested and affording to such party an opportunity of showing the correctness of his sworn statement or list.

The last mentioned act was amended by the act of February 22, 1848 (Vol. 46, p. 69).

The first section creates an annual county board for the equalization of *real property*, to be composed of the county commissioners, county auditor and county surveyor, who are to meet at the auditor's office on the second Monday of April annually.

The fourteenth section of this act (p. 72) confers on this last mentioned board, at their annual session, the power to "hear complaints and equalize the assessments of all personal property, moneys and credits, new entries and new structures returned for the current year by the assessor, being governed by the provisions of the fourth section of the amendatory tax law, passed February 8, 1847."

Although there is no express repeal of the county board of equalization provided for in the act of 1847 by the repealing clause of the act of 1848, yet I conclude the board provided for in the act of 1848 takes the place of the board provided for in the act of 1847.

However that may be, the decisions now under consideration were made by the board constituted under the act of 1848, as they were made in the month of April of 1848 and 1849, which is the time fixed for the session of the board in the act of 1848, and not in the month of June, the time fixed for the session of the board in the act of 1847.

Having now abstracted the various statutory provisions, bearing upon the question, we are to consider, whether the orders made in 1848 and 1849 by the board of equalization adding \$30,000.00 of moneys and credits to Mr. Woolsey for each year are warranted by law.

Upon full consideration, I am of opinion that both the orders are illegal and ought to be set aside. It stands admitted that Mr. Woolsey complied with every requisition of the law. He made out and swore to his lists and delivered

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them to the assessor, in proper form and in due time. It further appears that, without complaint from any quarter, without notice to Mr. Woolsey or opportunity to be heard, and without any evidence, the board upon their assumption that his oath was false, added in each year, \$30,000.00 to his lists.

Such a proceeding is so manifestly contrary to all our ideas of propriety and fair dealing that we are not to suppose, without the clearest enactments, that the legislature intended to sanction it.

Now, I cannot but think that the power vested in the board by the fourth section of the act of 1847, to act upon an individual case, is limited to the *hearing of a complaint*.

The board is to meet "for the *purpose of hearing complaints* and equalizing the assessments" and being so met, they have power to add to or deduct from the respective lists or valuations returned by the assessors, upon such *evidence* as shall be satisfactory to the board. All this carries with it the idea of a *hearing*, and of the introduction of *testimony*, and is quite foreign to an *ex parte* order, made without evidence, upon a naked assumption of fact.

It seems to me this construction is clear enough upon the language of the fourth section alone, but it is greatly fortified by reference to the other statutory provisions, on the same subject.

Throughout all our laws upon the matter of the list made out by the party, there has always been a power to correct any fraudulent omission, but always with a fair opportunity to the party concerned to be heard before the decision. This was so from the beginning, as we see by the act of 1831, even when the list was not necessarily to be verified by the oath of the party. Under that act the board could not touch a list, though not under oath, without complaint made by the assessor and notice to the party with full opportunity for hearing.

It will be seen that by the act of 1831, one section provided for a hearing before the board on the complaint of the *owner*; the other upon the complaint of the assessor.

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The act of 1840 changes the phraseology, and in one section provides for the hearing of *complaints* generally and is not limited to a hearing of the complaint of the *owner*.

This change of phraseology has been since carefully followed, and we find that in the act of 1846 the board is to hear *complaints*, so too in the act of 1847, and in the act of 1848, which is the last one in the series.

This hearing of *complaints* covers the whole ground. If the list or return of the assessor is too large, it may be reduced on the complaint of the owner, if too small, it may be added to on the complaint of the assessor or any other person, but it must always be upon a *hearing* and on *evidence*.

Again, in all the other provisions of these statutes, a proper regard is shown to the sworn list of the party. It is so required that perjury may be assigned upon it if false and it is considered entitled to so much respect, that the assessor is bound to receive it. By a special section in the same act of 1847, which contains the section under consideration, power is for the first time given to the county auditor, to question a sworn statement. That section, conferring this power, contains very guarded provisions, requiring notice to the party interested "that he may have an opportunity of showing that his statement is correct" and that all the evidence be preserved upon which the correction is made.

With such unmistakable evidence of the light in which the legislature regarded a sworn statement with such reasonable provisions for a fair hearing, in all the other acts and in other sections of the very act now in question, I cannot think that we are to understand that this fourth section authorized a change of the list, without a complaint, hearing or evidence.

I am, therefore, of opinion that the orders so made in 1848 and 1849 are against law and ought not to be sustained.

HENRY STANBERY,

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