

Validity of Proceedings of Montgomery County Grand Jury.
—Foreign Insurance Companies; Act Concerning.

VALIDITY OF PROCEEDINGS OF MONTGOMERY
 COUNTY GRAND JURY.

The State of Ohio,
 Office of the Attorney General,
 Columbus, January 7, 1869.

Geo. V. Nauwerth, Esq., Prosecuting Attorney, Dayton, Ohio:

DEAR SIR:—On my return to the city I find your favor of the 29th ult.

My impression is that the proceedings of the grand jury are valid, but it would be the safest to enter a nolle and re-indict.

Very respectfully,
 W. H. WEST,
 Attorney General.

FOREIGN INSURANCE COMPANIES; ACT CON-
 CERNING.

The State of Ohio,
 Office of the Attorney General,
 Columbus, January 14, 1869.

Hon. Jas. H. Godman, Auditor of State:

SIR:—The provisions of the act of May 15, 1868, relating to foreign insurance companies are reasonable and just, and no well disposed company will object to complying therewith. There is nothing in the act to prevent writs of error to the Federal Courts, on exceptions to any matter but the validity or sufficiency of the service. The transfer of such cases to the Federal Courts for trial on the facts should not be insisted on, as it would operate oppressively.

*Arson of a Bridge; Not Necessary to Allege Ownership in
Indictment for.*

But without expressing any opinion as to the constitutionality of the act, I am clear that it is your official duty to enforce it until abrogated or repealed.

Yours, etc.,

W. H. WEST,
Attorney General.

INTEREST ON TAXES.

The State of Ohio,
Office of the Attorney General,
Columbus, January 28, 1869

J. B. Newton, Esq., County Auditor, Perrysburg, Ohio:

DEAR SIR:—In reply to your favor of the 16th instant, which I found on my return to the city, I have to say that interest should be computed at six per cent. on the amount up to the time the tax is collectible.

Very respectfully,

W. H. WEST,
Attorney General.

ARSON OF A BRIDGE: NOT NECESSARY TO AL-
LEGE OWNERSHIP IN INDICTMENT FOR.

The State of Ohio,
Office of the Attorney General,
Columbus, January 28, 1869.

C. H. Blackburn, Esq., Prosecuting Attorney, Cincinnati, Ohio:

DEAR SIR:—In reply to your favor of the 19th instant, I have to say that in indictments under the clause: "or any bridge of the value of fifty dollars erected across any

Ice Companies; No Law Authorizing Their Incorporation.

waters within this State" (Sec. 12, p. 406, S. & C. Stat.) it is not necessary (to) allege ownership; and that the word "waters" therein, includes canals.

Very respectfully,

W. H. WEST,

Attorney General.

ICE COMPANIES; NO LAW AUTHORIZING THEIR
INCORPORATION.

Office of the Attorney General,

Columbus, January 30, 1869.

Hon. Isaac R. Sherwood, Secretary State, Etc.:

SIR:—I have the honor to acknowledge the receipt of (your) favor of the 29th instant, asking whether there be any law for incorporating companies for putting away and vending ice, and stating that certain applicants claim authority therefor under section sixty-three of the act of 1852, etc.

That section authorizes the incorporation of "manufacturing companies." I am not able to discover how this section can be made applicable to the case without giving an unwarranted latitude to the term "manufacturing," inconsistent with the popular meaning of the word.

The twelfth section of the tax law, S. & C., 1444, defines what shall be deemed a "manufacturer." I have never understood that ice dealers came under this section. If they do not then, if the company were organized, under what section of the law would it be taxed? This, I think, sufficiently answers the question you propound. You should decline issuing certificate until compelled by mandamus.

Truly, etc.,

W. H. WEST,

Attorney General.

*Taxes on Lands Sold in May, 1868, for 1868; Vendor Liable
—Morgan Raid Claim Bill; Two-thirds Vote Necessary
to Its Passage.*

TAXES ON LANDS SOLD IN MAY, 1868, FOR 1868;
VENDOR LIABLE.

The State of Ohio,
Office of the Attorney General,
Columbus, February 19, 1869.

C. E. Reynolds, Esq., Napoleon, Ohio:

DEAR SIR:—On my return to the city, I find your favor of the 4th instant, asking who should pay the taxes for 1868 on land sold in May, 1868.

In reply I have to say, that the vendor is liable unless there is an agreement between him and the purchaser that the latter should pay the taxes.

Very respectfully,
W. H. WEST,
Attorney General.

MORGAN RAID CLAIM BILL; TWO-THIRDS VOTE
NECESSARY TO ITS PASSAGE.

The State of Ohio,
Office of the Attorney General,
Columbus, March 27, 1869.

*Hon. F. W. Thornhill, Speaker of House of Representatives,
Columbus, Ohio:*

SIR:—I have the honor to acknowledge the receipt of your communication of the 21st instant, transmitting substitute for H. B. No. 34, and inquiring if the bill requires a vote of two-thirds of all the members elected to pass it, and if not, whether the appropriation bill containing an

*A Person Can Be a Justice of the Peace and Whiskey Gauger
at the Same Time.*

appropriation to pay the claims covered by said bill, would require the same number of votes for its passage.

The constitution provides that no money shall be "paid on any claim the subject matter of which shall not have been provided for by pre-existing law, unless such claims be allowed by two-thirds of the members elected to each branch of the General Assembly."

If these claims have been heretofore allowed by two-thirds of the members elected to each branch of the General Assembly, the usual majority will be sufficient to pass the bill. But if these claims have not been heretofore allowed by a two-thirds vote the concurrence of two-thirds will be necessary to pass the bill.

I have the honor to be,

Very respectfully,

W. H. WEST,

Attorney General.

A PERSON CAN BE A JUSTICE OF THE PEACE
AND WHISKEY GAUGER AT THE SAME TIME.

The State of Ohio,
Office of the Attorney General,
Columbus, March 27, 1869.

J. Pritt, Esq., New Richmond, Ohio:

DEAR SIR:—Upon my return to the city I find your favor of the 16th instant, asking if the same person can hold, at the same time, the office of justice of the peace and that of whiskey gauger under the general government.

In reply I would say that I can find nothing in the constitution to disqualify him from holding both offices.

Very respectfully,

W. H. WEST,

Attorney General.

Indictment for Riot in Warren County; Sufficiency of.

INDICTMENT FOR RIOT IN WARREN COUNTY;
SUFFICIENCY OF.

The State of Ohio,
Office of the Attorney General,
Columbus, March 29, 1869.

Collin Ford, Esq., Prosecuting Attorney, Lebanon, Ohio:

SIR:—I find, upon my return to the city, your favor of the 18th instant, submitting for my examination and opinion, an indictment for riot which was quashed at the last term of your court.

I think that "intent" is sufficiently stated in the first count. "Did meet together to disturb" has the same meaning as "did meet together with intent to disturb."

I doubt the sufficiency of the description of the character of the assembly set forth in the second count to make it good under the act of 1864. If at the *, made with a pencil, the following words were inserted, "and to unlawfully riotously, routously and with force of arms to assault and beat Isaac Sellers, Albert Stacey, Jacob Lamb and Wm. H. Duke, then and there being members of said assembly," the count would be good under the general act.

Very respectfully,

W. H. WEST.
Attorney General.

*The Marietta & Cincinnati Railroad Company; Its Rights
as to Charges for Freights and Passenger Fares.*

THE MARIETTA & CINCINNATI RAILROAD COM-
PANY; ITS RIGHTS AS TO CHARGES FOR
FREIGHTS AND PASSENGER FARES.

The State of Ohio,
Office of the Attorney General,
Columbus, March 31, 1869.

*Hon. F. W. Thornhill, Speaker of the House of Represen-
tatives:*

SIR:—I have the honor to acknowledge the receipt of H. R. No. 256, and in obedience to its directions, beg to submit to the House the following report:

The Marietta & Cincinnati Railroad Company was originally chartered March 8, 1845, under the name of the Belpre & Cincinnati Railroad Company. A history of its organization, together with that of its branches, will be found on page 237 of the annual report of the commissioner of railroads and telegraphs for 1867.

The Hillsboro branch, by its original charter, was unrestricted in its rates of charges. Afterwards, it accepted the twelfth section of the general railroad act of 1848, which thereby became a part of its charter and under which it was restricted to the rates therein prescribed, to-wit: For the transportation of passengers not exceeding three and one half cents per mile, and of property not exceeding five cents per ton per mile for distances of thirty miles or more, etc.

The Union Railroad was chartered in 1858 under the general law of 1852, and is subject to the provisions thereof.

Prior to 1860, the Marietta & Cincinnati Railroad Company became the purchaser of the Union Railroad, the Hillsboro branch and the Portsmouth branch, by which purchases these branches became parts of the M. & C. Railroad.

In 1859 proceedings were instituted by mortgagees of

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the road, in the Ross Common Pleas, under which on the 7th January, 1860, a decree of foreclosure and sale was entered. Under this decree a sale could not operate to transfer the franchise or invest the purchasers with corporate existence. (Coe vs. C. P. & I. R. R. Co., 10 Ohio State Reports, 372). For the purpose of effecting such transfer the General Assembly, on the 23d of February, 1860, passed a special law the first section of which provides:

“Section 1. That if a sale of said road shall be made and confirmed as provided for in said decree, all the franchises of said company shall thereby pass to and vest in the purchaser or purchasers, and such purchaser or purchasers shall become invested with said charter, and be entitled to reorganize thereunder,” etc.

On the 25th of February, 1860, a sale was made under said decree to certain trustees, who, with others, organized a new company under the name of the “Marietta & Cincinnati Railroad Company, as reorganized,” assuming to derive their powers to effect such reorganization, under said special act. To this reorganized company the purchasers transferred all the interest which they acquired under said sale.

Afterwards the Supreme Court, in the case of Atkinson et al. vs. The M. & C. R. R. Co., as reorganized (15th Ohio State Reports, 21), decided that the said special act was unconstitutional, and that said reorganized company was without any corporate existence or powers. The court, however, remarked that under the tenth section of the general law of April 11th, 1861, said company might put itself on a perfect equality with all other companies similarly situated.

I do not find that the said company has ever availed itself of the provisions of said tenth section. It would seem, therefore, that the said company attempted to assume and exercise corporate powers without legal corporate existence.

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I am informed that in 1865, after the decision of the Atkinson case, the company reorganized under the act of April 4, 1863 (60 Ohio Laws, 54). Without expressing any opinion as to the constitutionality of said act or the validity of the reorganization under it, I think it quite clear that the rights, liberties, faculties and franchises of the reorganized company are subject and subordinate to the authority of the General Assembly, in all respects whatever.

Article thirteen of the constitution ordains that:

“Section 1. The General Assembly shall pass no special act conferring corporate powers.

“Section 2. Corporations may be formed under general laws, but all such laws may from time to time be altered or repealed.”

The act of 1863 can be sustained only as a general law. If it be not a general law it is unconstitutional and must fall under the decision of the Atkinson case.

The reorganized company can have valid corporate existence only as a corporation formed under a general law.

It follows, then, as a necessary consequence, that the act of 1863, being a general law, may be altered or repealed. It may, therefore, be so altered as to limit and prescribe the rates of fare to be demanded and received by any company organized under it.

If it be contended that the Marietta & Cincinnati Company, as reorganized, succeeded by force of the act of 1863, to all the rights, liberties, faculties and franchises of the original corporation, under its special charter, among which was the franchise to charge discretionary rates; and that as the original franchise was a contract, the obligation of which could not be impaired, therefore the legislature cannot now limit or restrict their discretion, the proposition is untenable.

The reorganized company did not succeed to the franchise of the original corporation. It is a new creation of

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corporate existence, and the franchises conferred upon it are as clearly original as are the franchises of any other new corporation, created or organized, under any general law of the State. This would be palpable, if the act of 1863 contained a specific enumeration of the powers conferred upon the reorganized company instead of conferring them by reference to former special laws in which they are enumerated. The failure to observe this has misled the advocates of succession to erroneous conclusions. *The franchises* conferred by the act of 1863, on the reorganized company are not the franchises possessed by the original corporation, but are only *similar* franchises.

This mode of conferring powers by reference to former laws, in which they are specifically enumerated, is not unusual in legislation. The jurisdiction, similar in all respects to that possessed by the Probate Courts of certain counties, is often conferred upon the Probate Courts of other counties, without any specific enumeration of the powers so conferred, other than by mere reference to the act containing them. But this is not a succession to, but the creation of, original powers in the courts upon which they are conferred.

It seems, then, entirely clear that this reorganized company did not succeed to the identical franchises of the original corporation, but had conferred upon it, by general law, franchises in all respects similar.

The same conclusion results from another view. The reorganized company could only be formed under a general law. In the nature of things, then, it must be a new creation under and of such law. But a corporation can have no existence apart from its franchises. They are its essence, its vital parts, its animating soul. They must therefore be created and conferred with and by the creation of the corporation. They give it being; without them it can have no existence. It follows, then, that as a corporation can be formed only under a general law, that essence with-

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out which it can have no existence, viz.: its franchises, can only be created and conferred by general law, and, hence, must, in the nature of things, be to it as original and new as the body which they animate and vitalize.

Conceding, then, that the act of 1863 is constitutional, and that the reorganization of the company under it is valid, it nevertheless results as an irresistible conclusion that its franchises, being the creation of general law, may be constitutionally altered, limited or restricted by general law at the pleasure of the General Assembly.

The accompanying report of, and evidence taken by your committee, appointed under the same resolution, very fully discloses that said company is discharging and receiving rates of freight and passenger fare greatly in excess of the rates authorized by the general laws of this State. It is, therefore, a question to be considered by the General Assembly whether as a company engaged in the business of a common carrier, it should not be restricted by legislation in its rates of charges, and whether public policy and fair dealing with the other companies in the State which are restricted, do not require such limitation.

The reasoning employed in the attorney general's opinion found on page 372, of the annual report of the commissioner of railroads and telegraphs for 1867, is applicable to the rates of local freights and fare charged by the company.

I can suggest no penal legislation which will not suggest itself to members of the House, viz.: Fix the rates of compensation to be charged alike by all incorporated and unincorporated companies operating railroads within this State, and annex adequate penalties for their violation.

Very respectfully,

W. H. WEST,
Attorney General.

No Law for Paying Assistant Prosecuting Attorneys More Than \$25; Prosecuting Attorneys Not Obligated to Attend to County Infirmary Business—Petroleum, Etc., Sold to Any One in the State Must be Inspected; Otherwise Not.

NO LAW FOR PAYING ASSISTANT PROSECUTING ATTORNEYS MORE THAN \$25; PROSECUTING ATTORNEYS NOT OBLIGED TO ATTEND TO COUNTY INFIRMARY BUSINESS.

The State of Ohio,
Office of the Attorney General,
Columbus, April 21, 1869.

A. J. Rebstock, Esq., Prosecuting Attorney, Sidney, Ohio:

SIR:—In reply to your favor of the 13th instant, I have to say that I know of no law by which an assistant prosecuting attorney can be paid more than twenty-five dollars. The county commissioners, however, may take the risk and pay more than that amount.

I will also say, in answer to your second query, that you are not bound as prosecuting attorney to attend to the business of the county infirmary.

Very respectfully,
W. H. WEST,
Attorney General.

PEROLEUM, ETC., SOLD TO ANY ONE IN THE STATE MUST BE INSPECTED; OTHERWISE NOT.

The State of Ohio,
Office of the Attorney General,
Columbus, April 21, 1869.

G. W. Durgin, Esq., Cleveland, Ohio:

DEAR SIR:—Your favor of the 14th instant is received. If the oil is sold to any person in this State, no matter

No Vacancies in Terms of Justices of Peace; Terms Three Years From Date of Commissions—A Minor Cannot Be Appointed an Assistant Assessor.

what its destination may be, it must be inspected, but not if sold to any one outside of the State.

Very respectfully,
W. H. WEST.

NO VACANCIES IN TERMS OF JUSTICES OF PEACE; TERMS THREE YEARS FROM DATE OF COMMISSIONS.

The State of Ohio,
Office of the Attorney General,
Columbus, April 21, 1869.

Charles T. Sedam, Esq., Sedamville, Ohio:

SIR:—Justices of the peace hold their offices for three years from the date of their commissions. There is no such thing as a vacancy in their term of office.

Very respectfully,
W. H. WEST,
Attorney General.

A MINOR CANNOT BE APPOINTED AN ASSISTANT ASSESSOR.

The State of Ohio,
Office of the Attorney General,
Columbus, April 21, 1869.

Walter S. Thomas, Esq., Prosecuting Attorney, Troy, Ohio:

DEAR SIR:—In reply to your favor of the 14th instant, I have to say in my opinion, a minor cannot be appointed

Justices of Peace; Election of in Portsmouth.

an assistant assessor, for the reason that the law requires such officer to give a bond, and a minor cannot bind himself by a bond.

Very respectfully,

W. H. WEST,

Attorney General.

JUSTICES OF PEACE; ELECTION OF IN PORTSMOUTH.

The State of Ohio,
Office of the Attorney General,
Columbus, April 23, 1869.

S. B. Drouillard, Esq., Clerk Common Pleas, Portsmouth, Ohio:

DEAR SIR:—Your favor of the 23d instant, relative to the recent election of justices of the peace in Portsmouth, is received.

I am persuaded that a new election for justices will have to be ordered. I do not see how it can be avoided. Your attention is called to 1 Swan & Critchfield, 765, Sec. 14, and 532, Sec. 15 to 32, inclusive, and especially to the last section; also, p. 766, Sec. 19 and 20.

Very respectfully,

W. H. WEST,

Attorney General.

*Baldwin Trust Fund; School District No. 5; Champaign
County.*

BALDWIN TRUST FUND; SCHOOL DISTRICT NO.
5; CHAMPAIGN COUNTY.

The State of Ohio,
Office of the Attorney General,
Columbus, April 28, 1869.

Mr. Hiram McClellan, Cable, Champaign County, Ohio:

DEAR SIR:—In reply to your favor without date, I have to say, that I understand that the proceeds of the sale of the Baldwin farm were divided between two school districts, No. 5 and the one in which the testator resided; that the portion devised to No. 5 is invested and the proceeds applied to the support of schools therein; and that district No. 5 has been subdivided, and the question is, whether each division is entitled to a portion of said fund.

I think it is entirely clear that said fund should be divided between each division of said original district No. 5, in proportion to the number of youth of school age in each of said divisions, residing upon the territory included within said district No. 5 as the boundaries thereof existed at the date of said will.

The board is bound to execute the trust according to its terms, and if the members thereof refuse to do so, proceedings may be instituted against them by any person aggrieved.

The papers enclosed with your communication are herewith returned, as desired.

Very respectfully,
W. H. WEST,
Attorney General.

*Clerk's Bond; Prosecuting Attorney to Collect on Only
When State is Defrauded of Fines, Etc.—Mayors; Can
They Solemnize the Marriage Ceremonics?*

CLERK'S BOND; PROSECUTING ATTORNEY TO
COLLECT ON ONLY WHEN STATE IS DE-
FRAUDED OF FINES, ETC.

The State of Ohio,
Office of the Attorney General,
Columbus, May 7, 1869.

*John W. oseborough, Esq., Prosecuting Attorney, Elmira,
Fulton County, Ohio:*

SIR:—In reply to your favor of the 29th ult., I will say, that individuals defrauded may commence an action on the clerk's bond. You have nothing to do with it, unless the State has been defrauded of fines or penalties, in which case it is your duty to collect on the bond, and you would be entitled to the fee.

Very respectfully,
W. H. WEST,
Attorney General.

MAYORS; CAN THEY SOLEMNIZE THE MAR-
RIAGE CEREMONY?

The State of Ohio,
Office of the Attorney General,
Columbus, May 14, 1869.

Henry Wilson, Esq., Mayor, Ironton, Ohio:

SIR:—I doubt whether you have authority to solemnize the marriage ceremony although S. & C., 1510, confers upon mayors all the powers and jurisdiction of justices of the peace, both civil and criminal, within the city or village

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limits. Nevertheless, I think they are limited to powers and jurisdiction in legal proceedings, and not empowered to solemnize the marriage ceremony.

Very respectfully,
W. H. WEST,
Attorney General.

MORGAN RAID CLAIM ACTS; CONSTITUTION-
ALITY OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 21, 1869.

Hon. James H. Godman, Auditor of State, Columbus, Ohio:

SIR:—I have the honor to acknowledge the receipt of your letter of the 13th instant, enclosing “a copy of an act purporting to have been passed by the General Assembly of the State of Ohio, on the 30th of April, 1869, entitled ‘An act to provide for the payment of claims for damages growing out of the military expedition of John Morgan, in the State of Ohio, A. D., 1863,’” and also “a copy of that part of the act of May 5, 1869, making appropriations for the year 1869 and the first quarter of the year 1870, which relates to the subject of paying the claims for damages growing out of the military expedition aforesaid.” You state that “the *subject matter* of these claims was not provided for by any law of the State prior to April 30, 1869, and that the journals of the Senate and House of Representatives show that *neither the act of April 30, 1869, nor the act of May 5, 1869, above referred to received on its passage the votes of two-thirds of the members elected to either House.*” The opinion of the attorney general is then asked as to whether

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"1. The acts of April 30 and May 5, 1869 (so far as they relate to the payment of the claims referred to in the first of said acts) are constitutional and valid laws, or unconstitutional and void.

"2. If said act of April 30 and the part of said act of May 5, 1869, are unconstitutional, are they so plainly so as to require an executive officer to refuse to execute their provisions."

You then add that:

"These are grave and important questions, and as they are presented for the first time, under that clause of the Constitution under which they arise, I am compelled to act without the aid of judicial interpretation, and therefore the most careful and deliberate consideration of the subject by the attorney general is invol.ed."

In reply I have to say that the consideration asked has been bestowed, with what care and research the attorney general has been able to bring to the inquiry, and the conclusion reached, together with the reasoning in support of it, is herein respectfully submitted.

The question presented is one of purely constitutional interpretation, of legislative power on the one hand, and executive duty on the other. It is not whether the claims under consideration are meritorious, not whether the legislature ought to order their allowance and payment, but whether it has done so; whether it has enacted any law in pursuance of which the financial officers of this State, acting under their official oaths to support the constitution, can legally apply the public funds to their payment. In this aspect alone has the subject been considered.

Section twenty-nine, article two, of the constitution, in substance ordains as follows:

"No money shall be paid on any claim, the *subject matter* of which shall not have been provided for by *pre-existing law*, unless such claims be

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allowed by two-thirds of the members elected to each branch of the General Assembly."

The constitution is paramount to all legislation. "No money can be drawn from the treasury except in pursuance of a specific appropriation made *by law*." (Constitution, Art. 2, Sec. 20) and "no bill can become *a law* without receiving on its passage the number of votes required by the constitution," (per Thurman, Justice, in Miller and Gibson's case, 3 O. S. R., 475). Can a bill to authorize the payment of claims of the character described in the constitution become *a law* without receiving the votes of two-thirds of the members elected to each House? Is it the duty of the financial officers of the State to execute what in the statute book purports to be a law ordering the payment of such claims, which in point of fact did not, and the legislative journals show that it did not, on its passage receive the number of votes required by the constitution to constitute it *a law*?

This is believed to be a full and fair statement of the propositions involved. As the question is practically presented, for the first time, under the constitution, it is of the gravest importance that it be correctly decided at the threshold, although apparent injustice to meritorious demands may seem to result. The decision must in some measure, it may be in a controlling degree, constitute a precedent for the future. Hence, by all who hold sacred the inviolability of the constitution, any seeming injustice done to merit in its preservation, will be acquiesced in as infinitely preferable to relief obtained through its infraction, and the throwing open of the door of precedent to the admission and payment of all future claims which a mere majority shall decide to be meritorious, however destitute of that equality they may be in fact. "I prefer to sacrifice my own personal demands, whatever be the measure of justice on which they rest, rather than secure them by an infraction of the fundamental law," was the remark of an

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eminent statesman as he cast his vote for their sacrifice. This sentiment contains the whole doctrine of constitutional interpretation and official duty.

The history of the Morgan raid claims, and of the legislation affecting them, is brief. The expedition of John Morgan invaded the State in 1863. It was broken up and repelled by the co-operation of government troops acting under national authority, and local militia acting under State authority. Much damage was done to citizens by the acts of the contending forces, out of which arose the claims under consideration.

On the 30th of March, 1864, the legislature, by an act of that date, raised a commission to examine and classify said claims, and to "report the nature and amount thereof," distinctly reserving, by express terms of the act, "the question of the liability of the State to pay the same open and undetermined for future action." This commission performed its duty, and examined, classified, and reported claims as follows:

1. For property taken or destroyed by the enemy, \$430,969.
2. For property taken or destroyed by the national forces, \$143,611.
3. For property taken or destroyed by the State militia, \$6,257.

No further legislation was had on the subject except to transfer said commission to certain of the State officers by act of May 5, 1868, until the assumed legislation of April 30, 1869, took place. The provisions of this latter legislation are carefully framed with an apparent view to obviate the prohibition of section twenty-nine, of article two, of the constitution, above quoted. The act of April 30, 1869, is preceded by a preamble, part of which, with the first clause of the act, reads as follows:

Whereas, the commissioners under the act of March 30, 1864, and an act supplementary there-

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to, passed May 5, 1868, to examine claims growing out of the military expedition of John Morgan, having investigated and *allowed* claims for damages sustained by citizens of the State of Ohio, to the amount of \$580,837; * * * therefore,

"Section I. *Be it enacted by the General Assembly of the State of Ohio*, that there may be appropriated from any money that may hereafter be in the treasury belonging to the general revenue," etc.

It is apparent that this act, in its terms, does not purport to allow said claims, but, as erroneously recited in the preamble, proceeds upon the incorrect assumption that they had been previously allowed by the act of March 30, 1864, when in point of fact, the legislature had, in express terms declared in said act of 1864, that its intention was not thereby to allow said claims, but "to leave the question of the liability of the State *open and undetermined* for future action."

Nor does the said act of April 30, 1869, make any direct or present appropriation. It only purports to authorize an appropriation to be made by the General Assembly at some subsequent period. It does not enact, as usual in such bills, that "there is hereby appropriated," but only that "there *may be* appropriated," thus purporting to grant authority by one act to make an appropriation by some future act.

This act then does not allow these claims, for nowhere in it is there an allowance declared; nor is it an act of appropriation, for no present appropriation is made by it.

The legislature seems to have recognized the fact that the act of April 30, 1869, did not make any appropriation, otherwise it would not have, as it has, substantially incorporated it into the general appropriation bill of May 5, 1869, only changing its terms so far as to make the appropriation present and positive. This would have been wholly unnecessary if the act of April 30th had been regarded as constituting an appropriation.

These two acts of April 30 and May 5, 1869, seem to

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have been passed on the assumption that the clause of the constitution which requires the concurrence of two-thirds for the allowance and payment of these claims might be satisfied by a series or succession of acts concurred in by a less number, the first being treated as the "pre-existing law" required by that clause.

The sense of the constitution is too palpable for such interpretation. It is so obvious and self-evident as to be incapable of doubt or greater clearness of exposition. It recognizes two classes of claims, one the subject matter of which shall have been provided for by pre-existing law; the other, the subject matter of which shall not have been so provided for. For the payment of the former class no *allowance* is necessary other than an act of appropriation, concurred in by a mere majority. As to the latter class, no payment thereof can be legally made until they be allowed by the concurring votes, not of a majority merely, but of two-thirds of the members elected to each House. About this, doubt is impossible.

The only room for controversy is as to what, in the sense of the constitution, is meant by "pre-existing law," as applied to the "subject matter" of a claim. Those who advocate the validity of the acts under consideration evidently assume that it means a law allowing the claim passed at any time anterior to the act making appropriation for its payment.

Under this interpretation, the concurrence of two-thirds might, in every case, be dispensed with, and the constitutional clause requiring it, rendered nugatory; for the same majority that might concur in the antecedent allowance could make the subsequent appropriation, and both within the same hour.

The authors of the constitution could not have intended this. They must have contemplated a class of claims which they intended should not be paid in any event, no matter how just or meritorious they might be, until their allowance shall have been concurred in, and the obligation

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of the State fixed, by the votes of two-thirds, as prescribed. Any other interpretation of this clause renders it an unmeaning nullity.

If the constitution provided that no money shall be paid on any claim which shall not have been provided for by pre-existing law, unless allowed by two-thirds, etc., there might have been a possible question in regard to its meaning. But such is not the provision. It is the subject matter of the claim, and not the claim itself; that must have been provided for by pre-existing law. A claim and its subject matter must, therefore, not be confounded, but carefully distinguished. A claim, in the constitutional sense, is any subsisting pecuniary demand for reward or remuneration on account of something previously done or suffered. Its subject matter is that something so previously done or suffered, out of which the claim has arisen. The latter is the producing cause; the claim is its result. In the very nature of things, then, the subject matter of a claim, the act previously done or suffered out of which it arose, ceases to have being upon the instant the claim originates. Therefore, the subject matter of a claim is anterior in point of existence to the origin of the claim itself.

But to provide for by pre-existing law, of necessity implies a law enacted anterior to the existence of the matter provided for. Hence, the very idea of providing for a matter by a pre-existing law, enacted after the matter to be provided for has ceased to exist, is a self-evident absurdity. It is, therefore, impossible that a law enacted after a claim has originated, can make provision for the subject matter of such claim, which has necessarily and forever ceased to exist. The authors of the constitution cannot be supposed, in the employment of language, to have meant what in the nature of things, is an impossibility. Therefore, by the term "pre-existing law," they cannot be presumed to have intended a law enacted after the matter upon which it was designed to operate has ceased to be a possible subject of legislation.

Morgan Raid Claim Acts; Constitutionality of.

The conclusion is, therefore, irresistible that the authors of the constitution intended that no claim should be paid which shall not have arisen under and in pursuance of some law enacted anterior to its origin, authorizing or providing for the matter, circumstance, or event out of which it arose unless such claims be allowed by two-thirds of the members elected to each House. The act of April 30, 1869, was not passed anterior to the original matter of claims under consideration. As to the subject matter of these claims, it is, therefore, not a "pre-existing law," in the sense of the constitution. Hence, to constitute it a valid law, the two-thirds required by the constitution must have concurred in its passage, unless the subject matter of these claims was, in point of fact, authorized or provided for by some law enacted anterior to their origin. Is such the fact?

It will hardly be contended that the acts, seizures, and destruction which were the subject matter of the Morgan raid claims, and out of which they arose, were authorized or provided for by any law enacted prior to their commission, unless it were a law of the Confederacy. Nor were the acts, seizures and destruction of the national troops provided for by any law of this State enacted prior thereto. Therefore, these claims fall within the class which the constitution declares shall not be paid, unless allowed by two-thirds of the members elected to each branch of the General Assembly; and hence, until the concurrence of such number shall authorize and direct it, no money can be lawfully applied to their payment.

This conclusion is necessarily reached, unless the provisions of that clause of the constitution under review are merely directory. Are they?

As a general rule the mandatory provisions of the constitution, which affect legislation, have respect to substantive results, and must be strictly observed; while the directory provisions have respect to the mode, or preliminary steps, by which these results are attained, and need not be

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literally observed. Its requirements in regard to the ultimate expression of the legislative will in the enactment of a law are peremptory, and their literal observance essential to its passage and validity. This was distinctly held in Miller and Gibson's case, *supra*, in which Thurman, Justice, announcing the opinion of the court, said :

“No bill can become a law without receiving the number of votes required by the constitution for its passage.”

Interpreting the clause of the constitution under review in the light of this judicial decision, its terms are clearly mandatory. Hence, no bill for the payment of claims, the subject matter of which shall not have been provided for by some statute enacted prior to their origin, can become a law unless it be concurred in, or the claims allowed by two-thirds of the members elected to each House. The subject matter of the Morgan raid claims was not provided for by any such pre-enacted law. No act for their allowance or payment has been passed since their origin, prior to the legislation of April 30th and May 5, 1869. Neither one of these acts was concurred in by two-thirds of the members elected to either House. Therefore, not having received the number of votes required by the constitution, the act of April 30th and the part of the act of May 5, 1869, in question never became and are not laws.

But the General Assembly has declared this act and part of act duly passed, and caused them to be published in the statute-book. Are the executive officers of the State, acting under their official oaths to support the constitution, bound to execute these pretended acts, notwithstanding their palpable invalidity? The commands of the constitution are general, and address themselves to every department and officers of the State government, embracing therein the whole administration of the public finances.

The provision above quoted which directs that “no money shall be drawn from the treasury except in pursuance

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of a specific appropriation made by law," is clearly addressed to the financial officers of the State. No money can be paid out by them unless authorized by some valid law. But the twenty-ninth section of article two, in substance and effect, declares that no valid law, making a specific appropriation for the payment of claims of the class under consideration, can be passed unless two-thirds of the members elected to each House shall concur in their allowance. The required two-thirds have never so concurred. Hence, no law making a specific appropriation for their payment has ever been constitutionally passed; and, consequently, no law exists in pursuance of which money can be drawn from the treasury by the financial officers for such purpose. These officers are, therefore, not only justified in refusing, but by the express terms of the constitution are required to refuse payment of these claims, unless they are bound to execute whatever in the statute-book purports to be a law, and are prohibited from looking into and inspecting the legislative journals to ascertain whether any such law has been passed. Are they so prohibited?

The constitution of 1802, article one, section nine, ordained that "each House should keep a journal of its proceedings and publish them." In Loomis's case (5 Q. R., 363) the Supreme Court said:

"This journal, when taken in connection with the laws and resolutions, would seem to be the appropriate evidence of the action of the General Assembly."

The authority of the courts to go behind the volume of published laws and inspect the legislative journals was thus early recognized.

But as the constitution of 1802 did not require the yeas and nays to be taken on the passage of a bill, all acts appearing in the statute-book were presumed to have received the number of votes required for their passage, unless the contrary affirmatively appeared in the journals. To

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enable the judicial and executive officers to guard against the abuses incident to this presumption, the present constitution has changed the rule, and provides that the evidence of the passage of all acts shall affirmatively appear upon the journals. Hence, it ordains (Article 2, Section 9) that "each House shall keep a correct journal of its proceedings, which shall be published; * * and on the passage of every bill in either House, the vote shall be taken by yeas and nays, and entered upon the journals; and no law shall be passed, in either House, without the concurrence of a majority of all the members elected thereto," and by section 29 of the same article it is further ordained in substance, that no law for the payment of claims of the character therein described shall be passed in either House, unless their allowance be concurred in, not by a majority merely, but by two-thirds of all members elected thereto.

It cannot be doubted that these provisions were intended to have operative and controlling influence, as well on the execution as in the enactment of laws; but they would be rendered quite nugatory, and the journals a very useless and expensive surplusage, if those whose duty it is to expound or execute the laws may not inspect these journals to ascertain their validity. If they cannot, the majority of a quorum might, at the close of a session, in thin Houses, declare the passage and order the publication of acts of the greatest importance which had not received the number of votes required by the constitution, and against the enforcement of which, although totally invalid, the people would be without redress or remedy. It would seem, therefore, that the keeping of journals, certainly the entering of the yeas and nays therein, can have no other object, than to enable the executive and judicial officers, by an inspection thereof, to remedy the mistakes, accidents, frauds it may be, that may have crept into the statute-books. That the journals may be thus inspected was strongly intimated in Miller and Gibson's case, *supra*. The point was not directly raised by the case, and hence the opinion expressed was not

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intended to be authoritative; but it clearly discloses the views entertained by the court. In their opinion, they say:

“If it were found by an inspection of the legislative journals that what purports to be a law upon the statute book, was not passed by the requisite number of votes, it might possibly be the duty of the courts to treat it as a nullity.”

The soundness of the view thus expressed, though not authoritative, is unquestionable. But what the courts may do, the executive officers may also do, subject, however, to be controlled by the courts in case they err.

They administer the public finances at their peril. No money can be drawn from the treasury by them except in pursuance of law. They are, therefore, bound to inquire what in the Statute-book are valid laws. For this purpose they may inspect the legislative journals to inquire as to their passage. If they cannot do this, laws for the appropriation and paying out of the public moneys could never be brought under review before the courts.

For the passage of the acts in question, the constitution requires the concurrence of two-thirds of the members elected to each House. An inspection of the legislative journals shows that they did not receive this number of votes in either branch of the General Assembly. They, therefore, never became a substantive constitutional expression of legislative will, never became, and are not laws; and hence no money can be drawn from the treasury in pursuance of them. They must be treated as nullities.

To this conclusion the claims for damages by the acts of the State militia are possible exceptions. The bill of rights, section nineteen, provides that:

“Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war, or other public exigency requiring its immediate seizure * * * a compensation shall be made to the owner thereof in money.”

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The "pre-existing law" of April 11, 1863, authorized the governor, "in case of the invasion of the State, or danger thereof, to take measures, to call into active service such members of the militia as in his opinion, might be necessary to defend the State and repel such invasion." From this grant of power may reasonably be implied the sanction of the legislature to whatever acts the laws of war might justify the militia in doing whilst in the execution of their service. Their acts will be presumed to have been necessary to, and done in furtherance of such service, unless the contrary be affirmatively shown. Hence, the acts under consideration may be sufficient to authorize the payment of this class of claims, although even this admits of a doubt.

But the other claims growing out of the Morgan expedition rest upon a different basis. As to them the duty of the financial officers is so plain that doubt is scarcely possible.

It has been suggested, however, that the attorney general might enjoin the payment of these claims, and thus raise the question of the validity of the statutes under consideration. But the attorney general has no part in administering the general revenue. He could only act in the premises when ordered to do so by the proper executive department or officer. If there be no valid law in pursuance of which money can be drawn from the treasury, it is much more the duty of the financial officers to withhold than it is of the attorney general to enjoin payment.

The opinion herein rendered is, of course, not conclusive. It may be received, and, if found to be erroneous, overruled and reversed by the proper court. The claimants, whom it affects, have an easy and a speedy remedy by *mandamus*, to which they may resort, if not satisfied with its reasoning and the conclusion reached.

I have the honor to be,

Very respectfully,

W. H. WEST,

Attorney General.

County Clerks; Parties Interested in Having Records of Brought Up May Prosecute the Bond of—County Recorders Cannot Record a Deed Until the Auditor Makes the Transfer.

COUNTY CLERKS; PARTIES INTERESTED IN
HAVING RECORDS OF BROUGHT UP MAY
PROSECUTE THE BOND OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 25, 1869.

D. N. Poe, Esq., County Clerk, Ottokee, Ohio:

DEAR SIR:—In reply to your favor of the 20th instant, I have to say that the questions you ask are fully answered by section five hundred and sixty-six of the code of civil procedure. Some of the parties interested in having the records made up may prosecute the bond.

Very respectfully,
W. H. WEST,
Attorney General.

COUNTY RECORDERS CANNOT RECORD A DEED
UNTIL THE AUDITOR MAKES THE TRANSFER.

The State of Ohio,
Office of the Attorney General,
Columbus, May 25, 1869.

Charles Hakes, Esq., County Recorder, Paulding, Ohio:

DEAR SIR:—Your favor of the 20th instant is received. The duties of the recorder are prescribed in section seventeen, S. & C., 99. He cannot be required to record a deed until the transfer is made by the auditor, or the reason for not so doing endorsed upon the deed.

Very respectfully,
W. H. WEST,
Attorney General.

County Auditors Entitled to Pro Rata Proportion for Fractions Above 200—Official Oaths; Meaning of.

COUNTY AUDITORS ENTITLED TO *PRO RATA*
PROPORTION FOR FRACTIONS ABOVE 200.

The State of Ohio,
Office of the Attorney General,
Columbus, May 25, 1869.

DEAR SIR:—Your favor of the 17th instant came to hand during my absence from the city.

County auditors are entitled to *pro rata* proportion for fractions above 200.

Very respectfully,
W. H. WEST,
Attorney General.

OFFICIAL OATHS; MEANING OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 31, 1869.

Mr. Jacob Mishler, Mogadore, Ohio:

SIR:—Every citizen of the United States, and of this State, is bound by law to support their respective constitutions, without taking any oath or affirmation. That oath taken by a petty or subordinate officer does not vary or increase his legal obligation to support the constitution, but being required, is essential to qualifying him for holding the office.

It is generally interpreted as a personal pledge that, whilst he holds the office, he will discharge all and singular the *official duties* thereof, as required by the constitution and laws.

*School Territory Covered in Part by a Municipal Corporation
Becomes Annexed for School Purposes.*

This opinion, of course, is not official, as I have no power to render an official opinion except solicited by the proper officers. Nevertheless, in compliance with your letter, I give you my opinion as an attorney.

Very respectfully,
W. H. WEST,
Attorney General.

SCHOOL TERRITORY COVERED IN PART BY A
MUNICIPAL CORPORATION BECOMES AN-
NEXED FOR SCHOOL PURPOSES.

The State of Ohio,
Office of the Attorney General,
Columbus, May 31, 1869.

*Hon. John A. Norris, Commissioner of Common Schools,
Columbus, Ohio:*

SIR:—I see nothing in the statements of the enclosed letter of Mr. Shouter, to distinguish the case he mentions or make it an exception to the ordinary and general rule stated in the opinion given you last winter. School territory covered in part by a municipal corporation becomes annexed thereto for school purposes, unless the territory be in a different township and is only attached, etc.

Very respectfully,
W. H. WEST,
Attorney General.

Purity of Elections; Act of May 6, 1869, Concerning; Construction of.

PURITY OF ELECTIONS; ACT OF MAY 6, 1869,
CONCERNING; CONSTRUCTION OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 31, 1869.

Mr. William P. West, Cincinnati, Ohio:

SIR:—Your letter of the 26th instant is received and contents noted. You desire my opinion as to whether, under the act passed by the General Assembly, at its last session, electors having a visible admixture of Indian or African blood, but a preponderance of white blood, are punishable for voting, or offering to vote, or whether any person is liable to be prosecuted under it, for receiving or inducing the votes of such electors.

I am clear in the opinion that they are not. The act in terms is as follows:

“Section 1. *Be it enacted by the General Assembly of the State of Ohio*, that any person who shall vote at any election held under the laws of this State, not being a white male citizen of the United States, on conviction thereof, be imprisoned in the penitentiary and kept at hard labor not more than five years nor less than one year.

“Section 2. Any person who shall procure, aid, assist, counsel or advise any person not being a white male citizen of the United States, to vote at any election held under the laws of this State shall, on conviction thereof, be imprisoned in the county jail of the proper county, not more than six months nor less than one month; and shall also be liable to a civil action for a penalty in the sum of one thousand dollars, which may be brought against him by any elector of the county or district in which the vote was received, in the Court of Common Pleas of any county where process can be served upon him; provided, that there shall

Purity of Elections; Act of May 6, 1869, Concerning; Construction of.

be but one recovery for each violation of this act; and a failure to prosecute or convict shall not in any manner affect the right to proceed for the recovery of such penalty.

“Section 3. If any judge of the election shall receive or sanction the reception of a vote from a person not being a white male citizen of the United States, on conviction thereof shall be imprisoned in the jail of the proper county, not more than six months nor less than three months, and shall also be liable to a civil action for a penalty in the sum of one thousand dollars, which may be brought against him by any elector of the county or district in which the vote was received, in the Court of Common Pleas of any county where process can be served upon him; provided, that there shall be but one recovery for each violation of this act, and a failure to prosecute or convict shall not in any manner affect the right to proceed for the recovery of such penalty.

“Section 4. All prosecutions under the provisions of this act shall be by indictment before the Court of Common Pleas in the county where the offense was committed; and this act shall be given in charge to the grand jury at each term of the Court of Common Pleas, by the presiding judge thereof.

“Section 5. This act shall be in force from and after its passage.”

You will observe that the penalties of the act are directed against those who are “*not* white male citizens of the United States.” The voting or offering to vote by, or the receiving or inducing the votes of, this class of persons only, is made punishable by the act.

But article five of the constitution prohibits all persons from voting who are not “white male citizens of the United States.”

Therefore, the act of last session reaches and affects only the voting by those whom the constitution already excluded from the ballot box, and no others. Its penalties

Purity of Elections; Act of May 6, 1869, Concerning; Construction of.

can in no manner, or respect, impair the right of those who are and have been entitled to vote under the provisions of that instrument. Who are so entitled?

By the constitution every elector must possess these qualifications, viz.:

- 1st. He must be a "male."
- 2d. He must be "white."
- 3d. He must be a "citizen of the United States."

All persons not possessing all of these qualifications are, and have been, by the constitution excluded from the ballot box, as well before, as since the passage of said act.

But it is only against voting by persons not having these qualifications that the penalties of the act are denounced. Therefore, every person who was entitled to vote before the passage of said act is still entitled.

Upon whom do the penalties of the act fall? Only upon those persons who are not "white," and who are not "citizens of the United States." Who are these persons?

First. Under the constitution as interpreted by a series of judicial decisions running through, and concurred in, for nearly half a century, persons of mixed races possessing a preponderance of Caucasian blood, are "white." Then the penalties of said act do not affect these, for they are directed against persons who are "not white." They, therefore, fall upon those not having a preponderance of Caucasian blood, upon Indians and Negroes of half blood or more. But these are, and have been, by the constitution, excluded from the ballot box, as well before as since the passage of the act.

Second. By the national constitution, which is the supreme law of the land, "all persons born or naturalized in the United States are citizens of the United States." But the penalties of said act are denounced against persons who are "not citizens of the United States." They, therefore, fall upon those persons of foreign birth, who have not been naturalized. But these are, and have been, by the constitu-

*Atlantic & Erie Railway Company; Certificate to Incorporate
Should Not Be Filed.*

tion, excluded from the ballot box, as well before as since the passage of said act.

Therefore, as the provisions of the act have respect only to persons who are not "white male citizens of the United States," and as all male persons of pure or preponderating Caucasian blood, born or naturalized in the United States, are "white male citizens of the United States," it follows that all persons who were entitled to vote before the passage of the act are still entitled, and that its penalties exclusively affect those only who are and always have been excluded by the constitution.

Thus, you perceive, that the rights of those who were entitled to vote before the passage of the act are in no manner interfered with, or impaired by its provisions; while it groups together in one category the unnaturalized foreigner, the Indian and the Negro, and hurls its vindictive penalties at them. Why this distinction is made between non-voters of native and of foreign birth; why exclusive penalties of greater severity should be denounced against illegal voting by an unnaturalized German, Irishman, or other foreigner, than is against the same offence by a Kentuckian or Virginian, I am unable to discover.

I have the honor to be,

Respectfully, yours,

W. H. WEST,

Attorney General.

ATLANTIC & ERIE RAILWAY COMPANY; CER-
TIFICATE TO INCORPORATE SHOULD NOT
BE FILED.

Bellefontaine, Ohio, June 3, 1869.

Hon. J. R. Sherwood:

SIR:—I have the honor to acknowledge yours of June 1st, enclosing certificate of the Atlantic & Erie Railway

*Atlantic & Erie Railway Company; Certificate to Incorporate
Should Not Be Filed.*

Company, asking my opinion as to whether it is in conformity with the laws of Ohio, and whether it is your duty to file it in the office of the secretary of state.

The certificate declares as follows: It is the design of said company to construct a railroad, etc., * * * from the Ohio River, at or near Pomeroy, in Meigs County, Ohio, northerly through the counties of Athens, Perry, Hocking, Fairfield, Licking, Knox, Franklin, Delaware, Union, Morrow, Richland, Crawford, Marion, Seneca, Hancock, Wyandotte, Wood, Sandusky, Erie, and Lucas, to the city of Toledo.

2d. It is the design of said company to construct a branch of said road from some point in Meigs County north of Pomeroy, through the counties of Meigs, Athens, Perry, Morgan, Muskingum, Guernsey, Coshocton, Holmes, Wayne, Tuscarawas, Stark, Summit, Medina, Carroll, Lorrain and Cuyahoga to Cleveland.

3d. It is the declared design of said company to construct a railroad from some point on the Ohio River in Meigs or Gallia County, through West Virginia, Virginia, North Carolina, South Carolina and Florida.

These are three declared objects and purposes of said company. The first object or design is to build a main trunk line on an impossible route. The second object or design declared, is the building of a second main line of railroad, under the name of a branch, both practically starting from the same point in the same county, running an entirely different route through different counties across the State. This second or branch object is wholly unauthorized by any law of this State. The third object, to build a railroad outside of the State, is also wholly unauthorized.

The object of a certificate of incorporation is to confer upon the company power to do that which the law authorizes. It should not, therefore, contain a declared purpose or design to do a thing which the law does not authorize. This certificate contains a declared purpose and object on the

County Commissioners Responsible for County Funds Committed by Them to Care of an Improper Custodian.

part of the company, to do two things of the greatest importance which are wholly unauthorized by law, and a third and only remaining purpose is an impracticable thing.

My opinion is, therefore, clear that the secretary of state ought not in this, or any other case, file a certificate, organizing a corporation to do that which is illegal and without authority, by which an unsuspecting public, confiding in the official integrity of the State officers, and relying upon the validity of instruments by them officially certified, may be misled, overreached, or deceived to their injury.

I have the honor to be,

Respectfully,
W. H. WEST,
Attorney General.

COUNTY COMMISSIONERS RESPONSIBLE FOR
COUNTY FUNDS COMMITTED BY THEM TO
CARE OF AN IMPROPER CUSTODIAN.

The State of Ohio,
Office of the Attorney General,
Columbus, June 5, 1869.

I. F. Brotherton, Esq.:

SIR:—Yours of June 3, 1869, is received. The county auditor not being the proper custodian of funds belonging to the county, the commissioners are responsible for committing the same to his care.

2. The commissioners, having committed the funds to an improper custodian, are liable for losses sustained by any negligence or want of care on his part, precisely as if they had retained the custody of the funds themselves, and

*Infants May Be Committed to the State Reform Farm By
Mayors or Magistrates.*

the loss had occurred by their own personal negligence or want of care.

Truly yours,
W. H. WEST,
Attorney General of Ohio.

INFANTS MAY BE COMMITTED TO THE STATE
REFORM FARM BY MAYORS OR MAGISTRATES.

The State of Ohio,
Office of the Attorney General,
Columbus, June 5, 1869.

Hon. George E. Howe:

SIR:—Infants, who under the sixth, seventh, eighth, and ninth sections of the act to establish houses of refuge might be committed to any such house in any county in the State, may under the tenth section of the act to establish reform schools, be committed to the State reform farm from any county in the State, whether a house of refuge be situated therein or not. Such is the spirit and obvious intention of said tenth section.

Such infants may be committed by any mayor or magistrate under said sixth and seventh sections as therein provided, but not under the eighth or ninth sections.

Yours truly,
W. H. WEST,
Attorney General.

*County Funds Cannot Be Invested in Joint Stock Companies
Owning Lands for Agricultural Purposes.*

COUNTY FUNDS CANNOT BE INVESTED IN
JOINT STOCK COMPANIES OWNING LANDS
FOR AGRICULTURAL PURPOSES.

Bellefontaine, Ohio, June 5, 1869.

J. M. Kirk, Esq., Prosecuting Attorney:

DEAR SIR:—Yours of 31st May, enclosing report, etc., is received. I have no doubt as to the correctness of the committee's report in regard to the appropriation of \$3,000 by the county commissioners for agricultural purposes.

Agricultural societies may purchase or may lease property. The case presented is not a purchase, but a lease of ground as a site, etc. The commissioners have power to appropriate and apply on the lease, the amount which the society had paid, or individuals had contributed and paid on such lease; provided, however, that the appropriation by the county could in no case be applied to refunding to individuals, any sum by them so contributed to the payment of such lease.

The investment of the county funds in the stock of a joint stock company was neither a purchase of the grounds as contemplated by the statute, for the title to the ground still continues in the joint stock company; nor was it the lease of the grounds. The appropriation was, therefore, wholly unauthorized.

The moneys may be recovered back from the parties or persons to whom the same were paid, or may be recovered from the county commissioners as individuals, or upon their official bond.

A suit against the parties or persons receiving the money should be in the name of the board of county commissioners; suits against the commissioners may be upon their official bond in the name of the obligee of the bond for the benefit of the county.

City Boards of Equalization; When to be Appointed.

I will call the attention of the auditor of state to your case and have the matter attended to.

Yours, etc.,

W. H. WEST,

Attorney General.

CITY BOARDS OF EQUALIZATION; WHEN TO BE APPOINTED.

The State of Ohio,
Office of the Attorney General,
Columbus, June 16, 1869.

J. N. Thomas, Esq., County Auditor, Ironton, Ohio:

SIR:—In reply to your favor of the 4th instant, I have to say that I find no authority of law for the appointment of a city board of equalization after the fourth Monday of May; but where such board, by mistake, accident or neglect, has not been sooner appointed, I think its subsequent appointment an exercise of duty, so that the same shall not be after the fourth Monday of June, and will be recognized as valid. (See Swan & Sayler, 755, Sec. 9.)

Very respectfully,

W. H. WEST,

Attorney General.

Marriage Law of May 5, 1869; Duty of Probate Judges Concerning.

MARRIAGE LAW OF MAY 5, 1869; DUTY OF PROBATE JUDGES CONCERNING.

The State of Ohio,
Office of the Attorney General,
Columbus, June 16, 1869.

Hon. Isaac R. Sherwood, Secretary of State, Columbus, Ohio:

SIR:—The act of May 5, 1869, "to amend section thirty-one of an act regulating marriages," reads as follows:

"Section 1. *Be it enacted by the General Assembly of the State of Ohio*, that section one of the above named act be amended so as to read as follows:

"Section 1. That male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage: provided always, that male persons under the age of twenty-one years, and female persons under the age of twenty-one years, shall first obtain the consent of their fathers respectively, and in case of the death or incapacity of their fathers, then of their mothers or guardians.

"Section 2. This act to take effect on its passage."

The proviso requiring female persons under the age of twenty-one years first to obtain the consent of their fathers respectively, was, as I am informed, the result of a blunder of the enrolling clerk of the House. The bill as it passed the two Houses read: "Females under the age of eighteen years," etc. As the law now stands it is clearly inconsistent with other provisions, and in some cases operates as a restraint upon marriage. It should be disregarded

Western Military Institute; Change of Location of.

by the officers whose duty it is to execute it, and treated as if it read "eighteen" instead of "twenty-one" years.

Very respectfully,

W. H. WEST,
Attorney General.

WESTERN MILITARY INSTITUTE; CHANGE OF
LOCATION OF.

The State of Ohio,
Office of the Attorney General,
Columbus, June 22, 1869.

To His Excellency, Governor R. B. Hayes, Columbus, Ohio:

SIR:—I find no authority for changing the location of the Western Military Institute. The incorporators, or they with others, may organize another Western Military Institute *de novo*, located at College Hill, and transfer all of the property belonging to the present institution to the new one, and thereby effect their object.

Very respectfully,

W. H. WEST,
Attorney General.

Subsistence Not Included in Traveling Expenses of Geological Corps—Animals Running at Large; Notice Concerning When Taken Up, Etc.

SUBSISTENCE NOT INCLUDED IN TRAVELING
EXPENSES OF GEOLOGICAL CORPS.

The State of Ohio,
Office of the Attorney General,
Columbus, June 22, 1869.

To His Excellency, Governor R. B. Hayes, Columbus, Ohio:

SIR:—My opinion is that subsistence is not included in the traveling expenses of the geological corps, the salary being intended to cover the former.

Very respectfully,
W. H. WEST,
Attorney General.

ANIMALS RUNNING AT LARGE; NOTICE CONCERNING WHEN TAKEN UP, ETC.

The State of Ohio,
Office of the Attorney General,
Columbus, June 22, 1869.

S. R. Foust, Esq., Clerk of Perry Township, Woodview, Morrow County, Ohio:

SIR:—In reply to your favor of the 18th instant, I have to say that the trustees of one township cannot give permission for certain animals to run at large in an adjacent township or county.

The sixth section of the act referred to prescribes the time that notice shall be given. It should be given within a reasonable time after taking up the animals. Reasonable time is generally construed to mean such length of time as may be necessary to prepare and post the notices, say from one

“Ohio White Sulphur Springs” Property; Title to.

to three days. The notice should then stand ten days thereafter before further proceedings.

Very respectfully,

W. H. WEST,
Attorney General.

“OHIO WHITE SULPHUR SPRINGS” PROPERTY;
TITLE TO.

Office of the Attorney General,
Columbus, June 29, 1869.

I have this day examined the title to the property known as the “Ohio White Sulphur Springs,” represented to contain 189 acres, and find the fee simple, under and by a regular succession of conveyances from the United States, to be now vested in James W. Gaff, of Cincinnati, subject to the following encumbrances, which when removed will leave the title free, clear and perfect, viz.:

<i>Reid.</i>	1st. Tax claim held by W. P. Reid & T. E. Powell, date January 21, 1868\$1,179 30 Interest and penalty thereon.
<i>Treasurer.</i>	2d. Current taxes unpaid on duplicate 720 25
<i>S. Moore & Reid</i>	3d. W. C. Depouw—Mortgage, Aug. 3, 1866\$10,000 00 Interest from Aug. 3, 1867.
<i>Reid.</i>	4th. Hunnewell, Mores & Hakill, Mtge. Dec. 24, 1866. Reduced to decree Jan. 20, 1868. \$3,673 90 Interest since Jan. 20, 1868. Costs. Assigned to J. D. Parker.

"Ohio White Sulphur Springs" Property; Title to.

<i>Reid.</i>	5th.	Vibbard, Fisk & Co., Mtge. Dec. 24, 1866.....\$8,845 19 Reduced to decree Sept. 23, 1864. Interest from Sept. 23, 1867. Costs.
<i>Mitchell & Watson or Reid.</i>	6th.	J. G. Matthers & Co., Mtge. Jan. 21, 1867. Reduced to decree Sept. 23, 1867\$5,045 33 Interest from Sept. 23, 1867. Costs.
<i>Reid.</i>	7th.	T. G. Mitchell—Judgt. April 22, 1867 \$2,668 75 Interest. Costs.
<i>Reid.</i>	8th.	Storage, Sanders & Co., Sept. 23, 1867, Judgt \$537 81 Interest. Costs.
<i>Carper.</i>	9th.	Jos. B. Hay—Judgt. Sup. Court, Cinti., Mar. 2, 1868 \$273 90 Interest from Mar. 2, 1868. Costs \$18 60 Levy and lien, April 25, 1868.
<i>Carper.</i>	10th.	Patrick Robins, Judgt. Sup. Ct. Cin., Mar. 2, 1868. \$135 80 Interest from Mar. 2, 1868. Costs \$19 81 Levy and lien, April 25, 1868.
<i>Carper.</i>	11th.	J. R. Wynne & Co., Judgt., June 6, 1868 \$76 42 Interest. Costs. Levy and lien, July 28, 1868.

"Ohio White Sulphur Springs" Property; Title to.

<i>John G. Miller.</i>	12th.	Jonna Bowers, Judgt., July 25, 1868	\$25 00
		Interest.	
		Costs	\$9 77
		Levy and lien, Aug. 12, 1868.	
<i>Reid.</i>	13th.	Henry H. Brenneman, Judgt., Oct. 14, 1868	\$345 22
		Interest from Oct. 14, 1868.	
		Costs.	
<i>Carper.</i>	14th.	John Fitsgibbon, Judgt., Sup. Ct. Cin., Nov. 2, 1868	\$639 17
		Interest.	
		Costs	\$14 22
		Levy and lien, Dec. 9, 1868.	
<i>Carper.</i>	15th.	Wm. F. Harris, Judgt., Jan. 18, 1869	\$1,015 13
		Interest from Jan. 18, 1869.	
		Costs.	
	16th.	James W. Gaff, Note Oct. 16, 1866	\$20,000 00
		Interest from April 16, 1867.	
		Mortgage recorded Dec. 25, 1867.	
		Deed Jan. 1, 1868.	

The execution and delivery of deed by Mr. Gaff will, of course, satisfy and cancel this mortgage, the lien of which bears date from the date of its record.

The priority of liens is determined by their respective dates, as indicated above, and will be paid accordingly, if any controversy arises.

All these liens must be removed and satisfied before deed is accepted, except 13. 14 and 15, which are subsequent to record of deed.

The trustees will compute the interest on the several claims. They will also call on the clerk of the court, in Delaware, who will furnish amount of costs in each case, and which must also be paid.

W. H. WEST,

Attorney General.

P. S.—To clear off tax claims Reid & Ferry should give quit claim to the board.

Boiler Inspector; Duty of in Regard to Appointment of In-competent Deputies.

BOILER INSPECTOR; DUTY OF IN REGARD TO
APPOINTMENT OF INCOMPETENT DEPUTIES.

The State of Ohio,
Office of the Attorney General,
Columbus, June 29, 1869.

Charles Ridgway, Inspector-in-chief, Etc.:

SIR:—If any person be appointed deputy inspector, who is known to you to be incompetent or not a practical engineer of the requisite qualifications, it seems to me to be your plain duty, to communicate the fact forthwith to the proper probate judge, and request the appointment of a competent person; and, in the meantime, to withhold from him the apparatus, etc., to be furnished by you. There is no more dangerous or delicate responsibility, than that imposed on these officers. Upon the proper discharge of their duty, the lives of our citizens are made to depend. So far from being a protection, the late law will be the instrument of death if executed by incompetent or ignorant hands. If such incompetency shall ascribe undue powers and pressure to these dangerous engines, which shall serve as a guide to their use, it would be far better that they were left untested to the fears and caution of those controlling them. I would, therefore, suggest the greatest strictness be observed, and that you take the responsibility of withholding from unskilled hands the means of mischief.

Very respectfully,
W. H. WEST,
Attorney General.

Gutters; How to be Paid For—Malt Liquors; Municipal Corporations Cannot Prohibit Their Sale.

GUTTERS; HOW TO BE PAID FOR.

The State of Ohio,
Office of the Attorney General,
Columbus, July 13, 1869.

J. E. Burr, Esq., Mt. Gilcad, Ohio:

SIR:—In reply to your communication of the 12th instant, I have to say that gutters are no part of a sidewalk, and their paving and grading must be paid for in the same manner as the improvement of street property.

Very respectfully,
W. H. WEST,
Attorney General.

MALT LIQUORS; MUNICIPAL CORPORATIONS
CANNOT PROHIBIT THEIR SALE.

The State of Ohio,
Office of the Attorney General,
Columbus, July 13, 1869.

C. C. Ball, Esq., Frederickstown, Knox County, Ohio:

SIR:—I have to acknowledge the receipt of your communication of the 10th instant, inquiring as to the constitutionality or legality of an ordinance, passed by your village council, entitled "An ordinance to prevent the sale of intoxicating liquors within the limits of the incorporated village of Fredericktown," which ordinance prohibits the sale of "ale, porter, beer and all other malt liquors," in addition to other liquors.

In reply, I have only to call your attention to the case of Thompson vs. The City of Mt. Vernon (11 O. S. Reports, 688) in which the court held:

Bachman Lease; Opinion Concerning.

“The ordinance of a municipal corporation, prohibiting the sale of pure Ohio wine, ale, beer and cider, to be drank where sold, and prohibiting the sale of such liquors in less quantity than one gallon is void, because inconsistent with and against the policy of this statute.”

The copy of the ordinance is herewith returned.

Very respectfully,

W. H. WEST,
Attorney General.

BACHMAN LEASE; OPINION CONCERNING.

The State of Ohio,
Office of the Attorney General,
Columbus, July 13, 1869.

*Hon. John M. Barrere, President Board of Public Works,
Columbus, Ohio:*

SIR:—It is provided in the lease of water power to Theobald Bachman that “if at any time any installment which shall become due for rent, as in said lease expressed, shall remain unpaid for one month from the time the same shall fall due, * * * then all the rights and privileges derivable to the said Bachman from the said agreement, shall from the time of such failure cease and determine, and any authorized agent of the State, or lessee under the same, shall have full right and power to enter upon and take possession of the premises and resume all the rights and privileges therein granted to the said Bachman, who shall moreover be liable for all damages,” etc.

I understand the rents under said lease are unpaid for several years. If so, any member of the board of public works or lessees of said works, may demand the surrender

*Malt Liquors; Municipal Code Gives no Greater Powers
Than Old Law.*

of said premises, and upon refusal may bring an action to recover the same.

Very respectfully,
W. H. WEST,
Attorney General.

MALT LIQUORS; MUNICIPAL CODE GIVES NO
GREATER POWERS THAN OLD LAW.

The State of Ohio,
Office of the Attorney General,
Columbus, July 22, 1869.

*Hon. W. D. Henkle, Commissioner of Common Schools,
Columbus, Ohio:*

DEAR SIR:—The last clause of the twenty-fifth section of the act “to provide for the organization of cities and incorporated villages,” passed May 3, 1852, empowers municipal corporations “to regulate *or prohibit*, ale and porter shops and houses, and places for significant and habitual resort for tippling and intemperance.”

While this act was in force the city council of Mt. Vernon passed an ordinance, prohibiting the sale of wine, cider, ale, porter, beer or fermented beverages, to be drunk in or about the building or premises where sold. The Supreme Court (11 O. S. Reports, 688) held this ordinance to be void because inconsistent with and against the policy of the general statute of May 1, 1854, “to provide against the evils resulting from the sale of intoxicating liquors.”

The language of the municipal code confers upon municipal corporations no greater powers than did the act of 1852. I think the ordinance of the village of Salem, prohibiting ale, beer or porter shops and the sale of such bever-

*Estray Law; Sixth Section of, Binding on All Constables
—Williams County Entitled to a Separate Representation
in the House of Representatives.*

ages, falls within the decision of the Supreme Court above referred to.

Very respectfully,
W. H. WEST,
Attorney General.

ESTRAY LAW; SIXTH SECTION OF, BINDING ON
ALL CONSTABLES.

The State of Ohio,
Office of the Attorney General,
Columbus, July 31, 1869.

Hon. G. W. Brooke, Ellsworth, Mahoning County, Ohio:

DEAR SIR:—Your favor of the 22d instant is received.

The sixth section of the "act to restrain from running at large certain animals," passed April 13, 1865, is obligatory on all constables of townships the same as on marshals of villages.

Very respectfully,
W. H. WEST,
Attorney General.

WILLIAMS COUNTY ENTITLED TO A SEPARATE
REPRESENTATION IN THE HOUSE OF REP-
RESENTATIVES.

The State of Ohio,
Office of the Attorney General,
Columbus, July 30, 1869.

Hon. Isaac R. Sherwood, Secretary of State, Columbus, Ohio:

SIR:—In reply to the interrogatory of your friends, propounded through you, I have to state the following:

*Williams County Entitled to a Separate Representation in the
House of Representatives.*

The whole population of Ohio, by the eighth federal census, was 2,339,599.

The population of the following counties was:

Williams	16,633
Defiance	11,886
Paulding	4,945
	16,831

By section one, of article eleven, of the constitution, the decennial apportionment for representatives is fixed by dividing the whole population of the State by 100. The quotient arising therefrom constitutes the ratio of representation. The ratio of representation for the present House of Representatives was therefore 23,396.

By section two of the same article it is provided as follows:

“Every county, having a population equal to one-half of said ratio, shall be entitled to one Representative.”

The half of 23,396 is 11,698. It is quite clear, therefore, that the county of Williams was and is entitled to one full Representative.

It is also equally clear that the county of Defiance was also entitled to one full Representative, its population being 11,886, or more than half of the ratio.

By section nineteen of the *schedule*, the counties of Paulding, Defiance and Williams constituted one representative district.

By section four, article eleven, it is provided that “any county, forming with another county or counties, a representative district, during one decennial period, if it have acquired sufficient population at the next decennial period, *shall be entitled* to a separate representation, if there be left, in the district from which it shall have been separated, a population sufficient for a Representative.”

Williams County Entitled to a Separate Representation in the House of Representatives.

Williams County had acquired at the end of the first decennial period, sufficient population for one full Representative. The remaining counties of the district, to-wit: Paulding and Defiance had also sufficient population for one full Representative, viz.: 16,831 inhabitants.

Williams County, therefore, was then and is now entitled, as a separate and independent district, to elect one Representative. The same would also be true of Defiance, except that to separate it from Paulding would leave the latter without sufficient population for a Representative. Therefore, Paulding must yet continue united with Defiance. This is necessary, because of their territorial contiguity. If Paulding and Williams were contiguous, then Paulding might be attached to either of the other two at the option of the apportioning commissioners. As their relative situation now is, Williams is, and at the beginning of this decennial period was, entitled, as a separate district, to elect a Representative.

In regard to this, the constitution is peremptory. "Shall be entitled" is its emphatic language.

The fact that the commissioners did not separate these counties in making the last apportionment cannot impair their constitutional rights. In the first decennial period the counties of Hardin and Wyandotte formed one district. Suppose the commissioners, in making the last apportionment, had continued them as one district, it could not have concluded their respective rights under the constitution to elect one member each, for the constitution says they "shall be entitled."

I can, therefore, see no reason why Williams County shall not exercise her constitutional right. The counties of Carroll, Fayette, Geauga, Hardin, Lake, Madison, Marion, Pike, Union, Vinton and Wyandotte had severally less population than Williams, yet each have one Representative. I

*Directors of a Life Insurance Company are Elective and
Number Must Be Fixed in Charter.*

have no doubt the continuance of Williams in joint district was an oversight in making the apportionment.

Very respectfully,

W. H. WEST,
Attorney General.

DIRECTORS OF A LIFE INSURANCE COMPANY
ARE ELECTIVE AND NUMBER MUST BE
FIXED IN CHARTER.

The State of Ohio,
Office of the Attorney General,
Columbus, August 20, 1869.

Hon. Isaac R. Sherwood, Secretary of State:

SIR:—I have the honor to acknowledge the receipt of your communication of the 17th instant, enclosing for my examination and approval, a declaration for the incorporation of "The Toledo Life Insurance Company," which is herewith returned without endorsement for the following reasons:

1st. The number of directors is indefinite and uncertain. It is doubtless competent to reserve the power to increase or diminish the number of directors by resolution, or by-law, but the initiatory number must be fixed and certain.

2d. Directors are in all cases elective. The first board may be elected at the organization of the company, to continue in office until the time fixed in the charter for the regular election. A board of directors cannot be constituted by appointment as indicated in said declaration.

Section four of the act of 1867 (S. & S., p. 219) is quite clear upon these two requirements.

Very respectfully,

W. H. WEST,
Attorney General.

*Infirmary Superintendents May Be Removed at Pleasure
of the Directors.*

INFIRMARY SUPERINTENDENTS MAY BE RE-
MOVED AT PLEASURE OF THE DIRECTORS.

The State of Ohio,
Office of the Attorney General,
Columbus, August 20, 1869.

John H. Tripp, Esq., Carrollton, Ohio:

SIR:—Your favor of the 13th instant is received.

The superintendent of a county infirmary may be removed by the directors at their pleasure. This is explicitly stated in Sec. 28, Swan & Saylor, p. 531. This answers your first two questions.

The third question, relative to the support of dangerous pauper lunatics, has been fully answered in a letter addressed to your prosecuting attorney, dated December 30, 1868, to which you are referred.

Very respectfully,
W. H. WEST,
Attorney General.

Municipal Code; Constructions of Sections 114 and 123, As to Payment of Fines, Etc., into Municipal Corporations; Mayors Acting as Justices Must Pay Fines, Etc., Over, the Same as Regular Justices of the Peace.

MUNICIPAL CODE; CONSTRUCTIONS OF SECTIONS 114 AND 123, AS TO PAYMENT OF FINES, ETC., INTO MUNICIPAL CORPORATIONS; MAYORS ACTING AS JUSTICES MUST PAY FINES, ETC., OVER, THE SAME AS REGULAR JUSTICES OF THE PEACE.

Office of Attorney General,
Columbus, August 23, 1869.

Ezra V. Dron:

SIR:—I have the honor to acknowledge the receipt of your letter of the 19th instant, and now reply.

Section one hundred and fourteen of the municipal code confers upon mayors all the powers and jurisdiction of justices of the peace in all matters *civil and criminal*, arising under the laws of the State. By this section they are made *ex officio* justices of the peace, and are, in the exercise of these powers and jurisdiction, to be governed by "the laws of the State" governing justices in like cases. What these powers and jurisdiction are, and how they shall be exercised must therefore be gathered from the statutes governing justices. Whatever the statutes prescribe, these *ex officio* justices must do.

Except the provisions of section one hundred and fourteen the code is silent as to the *ex officio* powers of the officers, as justices, but proceeds at once to declare and prescribe their proper municipal duties as mayors. These proper duties are set forth in section one hundred and seventeen, and subsequent sections, no further allusion being made to their functions as justices. In prescribing these proper duties of mayors, section one hundred and twenty-three provides "that all fines, penalties and forfeitures which may be collected by the mayor, or which may in any manner

Municipal Code; Constructions of Sections 114 and 123, As to Payment of Fines, Etc., into Municipal Corporations; Mayors Acting as Justices Must Pay Fines, Etc., Over, the Same as Regular Justices of the Peace.

come into his hands and *all moneys which may be received by him in his official capacity*, other than his fees of office, shall be by him weekly paid over to the treasurer of the corporation.

This language is very general and comprehensive. But it must be interpreted with reference to its context, and the various other laws affecting the subject. There are many statutes directing certain fines to be paid to different objects and purposes. These statutes are not repealed unless by implication. Repeals by implication are never favored. If section one hundred and twenty-three be interpreted to include "fines, forfeitures and penalties," collected by mayors in their *ex officio* capacity as justices of the peace exercising criminal jurisdiction it must also be interpreted to include *all moneys* by them received as justices of the peace in the exercise of *civil* jurisdiction. This involves a most palpable absurdity.

I am, therefore, clear in the opinion that section one hundred and twenty-three has reference to moneys, fines, penalties and forfeitures by the mayor collected or received, in his official character as such, and in the exercise of his proper duties and jurisdiction as a municipal officer, not in his *ex officio* character of justice of the peace.

I have the honor to be,

Yours, etc.,

W. H. WEST,

Attorney General.

Ezra V. Dron, Esq., Prosecuting Attorney, Ironton, Ohio.

Safety Valves; What Kinds are Prohibited.

SAFETY VALVES; WHAT KINDS ARE PROHIBITED.

The State of Ohio,
Office of the Attorney General,
Columbus, September 10, 1869.

C. M. Ridgway, Esq., Inspector-in-chief, Columbus, Ohio:

SIR:—The second section of the act of May 7, 1869, relating to the inspection of steam boilers, enacts that safety valves shall “fulfill all the conditions *now* adopted by the board of supervising inspectors of the United States, in reference to such valves.”

The conditions then adopted by said board, in reference to such valves will be found in the forty-fifth general rule as published in the manual of the year, which declares that “no spring-loaded piston or balance valve shall be accepted.” To this rule there is but one exception, namely: valves on steamers navigating on the northern lakes. In no other place can spring-loaded valves be used under said regulations.

Our statute evidently intended to adopt the valve permissible by these rules upon steamers plying on the navigable waters of Ohio, generally. The action of the board of supervisors, on page 27, of the manual does not affect the construction of our statute. It does not require valves to fulfill conditions to be adopted thereafter, by either the board or the supervisors of the several districts; but such conditions as were *then* adopted by the board. The statute plainly reads so, and it matters not what power the board, or any supervising inspector may have, or what alteration the conditions they may hereafter make, our statute must be construed with reference to the conditions which had *then* been adopted by the board.

My opinion is, then, that on steamboats navigating the northern lakes “spring-loaded valves are permissible,” under a special resolution of the board. In all other places, under

Minor Criminals Can Be Sentenced to Reform School.

the general rule forty-five, spring-loaded piston and balance valves were on the 7th of May, 1869, expressly prohibited.

I think, therefore, that our statute must be construed with reference to the general "condition" and not the special exception, and hence, that by it, these valves are prohibited in this State except as to boilers specified in section eleven of the act of May 7th, 1869, which are exempted.

Very respectfully,

W. H. WEST,
Attorney General.

MINOR CRIMINALS CAN BE SENTENCED TO RE-
FORM SCHOOL.

The State of Ohio,
Office of the Attorney General,
Columbus, September 17, 1869.

*Charles Calkins, Esq., Prosecuting Attorney, Greenville,
Ohio:*

DEAR SIR:—Upon my return to the city, after an absence of several weeks, I find your favor of the 25th ultimo.

A minor criminal under sixteen years of age can be sentenced to the State reform school instead of the penitentiary.

Very respectfully,

W. H. WEST,
Attorney General.

Fees of Sheriffs for Executing the Death Warrant—Encroachments on Public Highways May be Removed at Any Time.

FEEES OF SHERIFFS FOR EXECUTING THE
DEATH WARRANT.

The State of Ohio,
Office of the Attorney General,
Columbus, September 17, 1869.

*W. T. Elswick, Esq., Sheriff of Lawrence County, Ironton,
Ohio:*

DEAR SIR:—In reply to your favor of the 14th instant, I have to say that I am unable to find any law making an allowance of fees to sheriffs for executing the death warrant. It would seem that the costs and expenses attending the execution are provided for, but not fees.

Very respectfully,
W. H. WEST,
Attorney General.

ENCROACHMENTS ON PUBLIC HIGHWAYS MAY
BE REMOVED AT ANY TIME.

The State of Ohio,
Office of the Attorney General,
Columbus, September 17, 1869.

Wm. T. McIntire, Esq., Springfield, Ohio:

DEAR SIR:—Your favor of the 30th ult. was promptly received at this office, but absence from the city has delayed my answer.

I am of the opinion that roads which have been regularly laid out and opened for travel cannot be so encroached upon as to lose their character as public highways, and all

*Probate Courts; Jurisdiction as to Taking Cognizances
Under Justice Act.*

such encroachments, or other obstructions, being in violation of the criminal or penal laws of the State, may be removed at any time, no matter how long they may have existed.

Very respectfully,

W. H. WEST,
Attorney General.

PROBATE COURTS; JURISDICTION AS TO TAKING COGNIZANCES UNDER JUSTICE ACT.

The State of Ohio,
Office of the Attorney General,
Columbus, September 17, 1869.

*Hon. S. B. Yeoman, Probate Judge, Washington C. H.,
Ohio:*

DEAR SIR:—In reply to your favor of the 23d ult., which I find upon my return to the city after several weeks' absence, I have to say that the case you present is not one for an examining court under the statute. The probate judge has no authority to take cognizance from a prisoner committed under the justice act, to await an examination. It is only in cases after an examination, and committal by a justice, in default of bail, for appearance in court, that the examining court takes jurisdiction, otherwise the examining court might in all cases supersede the jurisdiction of justices, which is clearly not the intention of the law.

Very respectfully,

W. H. WEST,
Attorney General.

*Road Duty; Liability to Perform Such Service—County
Commissioner Report; Publication of.*

ROAD DUTY; LIABILITY TO PERFORM SUCH
SERVICE.

The State of Ohio,
Office of the Attorney General,
Columbus, September 17, 1869.

H. B. West, Esq., Put-in-Bay, Ohio:

DEAR SIR:—Absence from the city has prevented me from replying to your favor of the 25th ult. earlier than this date.

1st. Citizens of this State who go to your place to reside permanently can be made to perform road duty, unless they can show a receipt that the tax has been paid elsewhere.

2d. Any one who has paid his tax in another locality may establish the fact in a suit against him as in other civil actions.

3d. A married man is liable to do duty on the public highways only in the township where his family resides.

Very respectfully,
W. H. WEST,
Attorney General.

COUNTY COMMISSIONER REPORT; PUBLICA-
TION OF.

The State of Ohio,
Office of the Attorney General,
Columbus, September 17, 1869.

*W. A. Walden, Esq., Prosecuting Attorney, Steubenville,
Ohio:*

SIR:—I have your communication of yesterday, and in reply, desire to say that it is very apparent that the requirement

Steam Boiler Inspection; Penalties, Etc.

to publish the county commissioners' report was omitted from the amendatory act of 1869 by mistake or accident. There is now no law requiring its publication. Not being required by the act to publish it, and particularly not being authorized to do so at the expense of the county, the commissioners cannot be liable for omitting to do that which the law makes no provision for them to do.

Very respectfully,
W. H. WEST,
Attorney General.

STEAM BOILER INSPECTION; PENALTIES, ETC.

The State of Ohio,
Office of the Attorney General,
Columbus, September 24, 1869.

*C. M. Ridgway, Esq., Inspector-in-chief of Steam Boilers,
Columbus, Ohio:*

SIR:—1. By section two of the act relating to the inspection of steam boilers, etc., each owner is required on or before the 1st of August, to report the location of his boiler to the deputy inspector.

2. And it is made the duty of the deputy inspector to inspect the same within *sixty days*.

3. By section four, it is made the duty of the deputy, upon receiving said report, to notify the owner of the time when he will inspect the same.

4. And the owner shall have the same ready for inspection at such time and place.

5. In case the owner fails to report the location of his boiler, he shall be liable to a penalty of twenty-five dollars.

6. Or if he fails to have the same ready for inspection, he shall pay the fees and expenses thereof and five dollars in addition thereto.

Steam Boiler Inspection; Penalties, Etc.

7. Said penalty, fees, expenses, etc., shall be recovered in a civil action in the name of the inspector-in-chief.

The foregoing are the several clauses of the act affecting the question you ask.

1st. If the owner fails to report the location of his boiler until after August 1st, the deputy may still notify him of the time when he will inspect it, if he knows its location, in which it will still be the owner's duty to have it ready.

2d. If he fails to have it ready, it is still the duty of the deputy to take possession of it, put it in readiness, inspect it, and attach the appliances, charging the owner with the costs, expenses and fees.

3d. If the owner refuses, or resists, the inspection, or the appliance, he may then be prosecuted for resisting an officer. (See S. & C., Vol. 1, p. 428.)

4th. If after any boiler is declared insecure by the deputy inspector, the owner, by section five of the statute, if he continues to use the boiler without the appliances, is liable to a penalty of fifty dollars for each day he runs it, to be recovered in a civil action in the name of the inspector-in-chief as is prescribed in section four.

If the amount in any case is less than one hundred dollars for which suit is brought, it must be brought before a justice of the peace; otherwise it may be brought in the Common Pleas Court of the proper county.

Very respectfully,

W. H. WEST,

Attorney General.

Aliens May Inherit Real and Personal Property.

ALIENS MAY INHERIT REAL AND PERSONAL
PROPERTY.

The State of Ohio,
Office of the Attorney General,
Columbus, October 1, 1869.

To His Excellency, Governor R. B. Hayes:

SIR:—I have the honor to acknowledge the receipt of the enclosed documents from the Bavarian consulate at Cincinnati, which are herewith returned to you.

I know of no law in Ohio making any distinction in inheritable blood on account of alienage. The constitution of 1851 is the same in this respect as the constitution of 1802.

The only statutory provision on the subject is the fourteenth section of the act of March 14, 1853, which declares that "no person who shall be capable of inheriting shall be deprived of the inheritance by reason of any of his or her ancestors having been aliens."

I find no judicial decisions touching the point. The statute in its terms and scope is without qualification except as to legitimacy; and I have no hesitation in giving it as my opinion that aliens who are not enemies are capable of inheriting real and personal property in Ohio.

I have the honor to be,

Very respectfully,
W. H. WEST,
Attorney General.

*Probate Courts May Take Cognizance for Appearance of a
Prisoner for Examination Before a Justice of Peace—
Sheriff's Fees.*

PROBATE COURTS MAY TAKE COGNIZANCE FOR
APPEARANCE OF A PRISONER FOR EXAM-
INATION BEFORE A JUSTICE OF PEACE.

The State of Ohio,
Office of the Attorney General,
Columbus, October 5, 1869.

Hon. S. B. Yeoman, Washington C. H., Ohio:

SIR:—Your favor in reply to my communication of the
17th ult. is received.

Since you have called my attention to Sec. 51, Vol. 66,
Ohio Laws, p. 295, I see no reason why a probate judge
may not recognize a prisoner to appear before a justice of the
peace, when committed in default of bail to await examina-
tion.

Very respectfully,

W. H. WEST,
Attorney General.

SHERIFF'S FEES.

The State of Ohio,
Office of the Attorney General,
Columbus, October 5, 1869.

N. V. Cleaver, Esq., Sheriff Warren County, Lebanon, Ohio:

SIR:—In reply to your favor of the 17th ult., I have
to say that a sheriff is entitled to fees to any amount not
exceeding \$300 in any one year, and no more. (See C. &
S., 366.)

Very respectfully,

W. H. WEST,
Attorney General.

County Surveyor Must Be Sworn When Appointed Surveyor of a Road—Sinking Fund; Transfers to General Revenue Fund.

COUNTY SURVEYOR MUST BE SWORN WHEN
APPOINTED SURVEYOR OF A ROAD.

The State of Ohio,
Office of the Attorney General,
Columbus, October 5, 1869.

Samuel Baker, Esq., County Auditor, Jackson C. H., Ohio:

SIR:—Your favor of the 30th ult. is received.

The county surveyor must be sworn whenever appointed by the commissioners as surveyor of a road. Such service is not a part of his official duties which only are covered by the oath taken at the commencement of his term of office.

Very respectfully,

W. H. WEST,
Attorney General.

SINKING FUND; TRANSFERS TO GENERAL REVENUE FUND.

Office of the Attorney General,
Columbus, October 12, 1869.

Hon. James H. Godman, Auditor of State:

SIR:—The eighth article of the constitution, section seven, requires the creation of a sinking fund, which "shall consist of *the net annual income of the public works* and stocks owned by the State, of any other funds or resources *that are or may be provided by law*, and of such further sum, to be raised by taxation, as may be required," etc. Section ten of the same article provides that "it shall be the duty of the *fund commissioners* faithfully to apply said funds, *together with all moneys that may be by the General Assembly*

Sinking Fund; Transfers to General Revenue Fund.

appropriated to that object, to the payment of the interest as it becomes due, and the redemption of the principal of the public debt."

The act of April 12, 1858, creating the sinking fund, provides:

"Section 2. . That the sinking fund shall consist of the net annual income of the public works," together with sundry other funds enumerated therein.

Section three provides that

* * * * "of the moneys paid into the State treasury, to the credit of the sinking fund, the auditor of state shall annually set apart a specific fund for the payment of the principal of the public debt of the State, according to the requirements of the constitution," etc., "*which shall not be applied to any other use or purpose whatever.*"

Section six of the act prescribing the duties of the fund commissioners, provides that

"All moneys paid into the State treasury to the credit of the sinking fund, belonging to the same, shall only be paid out by the treasurer of state on the warrant of the auditor of state, drawn on the requisition of the commissioners of the sinking fund, * * * which shall particularly specify the purpose and object for which the same is made; and said requisition shall be attached to or be a part of said warrant, * * * which shall be made payable to the order of the said commissioners of the sinking fund, and shall be *by them endorsed over to the special object* for which it is drawn whether the same be the payment of the *interest* on any part of the public debt, or for the redemption of any part of the *principal* thereof."

"Section 7. The said commissioners are hereby authorized and *required*, as often as there shall

Sinking Fund; Transfers to General Revenue Fund.

be money in the treasury to the *credit of the sinking fund*, which shall *not be required* to pay the *interest* on the public debt, to apply the same to the *investment in*, or payment and redemption of, such part of the public debt * * as may be so paid and redeemed or *invested in*, * * * and to no other use or purpose whatever."

Section five of the act of 1858 further provides that

"It shall be the special duty of the auditor of state and the treasurer of state to keep at *all times* and *under all circumstances*, the moneys belonging to the sinking fund *inviolate*, and to have a special care that *no money* belonging to the sinking fund be used, transferred, or applied at any time, or under any circumstances, than the payment of the *principal and interest* of the public funded debt of the State."

The act of May 5, 1869, authorizes and *requires* the auditor of state to transfer the sum of \$200,000 from the sinking fund to the general revenue, to be repaid to the sinking fund by the like transfer or transfers from the general revenue *when there shall be a surplus in the general revenue over and above all demands upon the same authorized by law*; and to transfer \$25,000 from the canal fund to the general revenue fund.

These provisions are in direct conflict with the spirit, if not the letter of the constitution:

1st. The auditor of state is required to make the transfer. But no money can be disbursed from the sinking fund except upon the requisition of the commissioners. The commissioners can only draw their requisition to pay *principal* or *interest* of the public debt.. (See Sec. 6, Commissioners' act.)

2d. There can be no disbursement except in payment as aforesaid. Therefore, as a transfer is no disbursement in any proper sense, the requisition of the commissioners is

Sinking Fund; Transfers to General Revenue Fund.

not necessary to effect it. It is the sole duty of the auditor to make the transfer, if it be constitutional to do so at all.

3d. The net annual income of the public works is by the constitution, dedicated to the sinking fund, and no transfer thereof can be made.

4th. All moneys which have been once passed to the credit of the sinking fund become a part thereof, and cannot be transferred to any other use or purpose. It must be invested or applied as the constitution and statutes require, to the single purpose of extinguishing the public funded debt.

5th. If it can be transferred for an hour, it may be for any longer period. But if a temporary transfer was competent, the one proposed is not temporary, but in its very nature permanent, because no provision is made for creating any surplus revenue out of which to refund it. It is in the power of the legislature to make direct provision for replenishing the sinking fund, as it is to first create a surplus revenue and then re-transfer it. In any respect it is a tampering with the sinking fund, made sacred and inviolable by the constitution; and so far as I am concerned, I do not yet see my way clear to make the order.

The statute requiring the commissioners to invest any surplus of sinking fund in the public securities is either in force or it is repealed. If in force, as one of the commissioners I feel compelled to execute it, for nothing in the act of May 5, 1869, is addressed to them. It certainly is not intentionally repealed—I may say, not repealed at all. If the legislature has the power to authorize the auditor to divert the fund on which the commissioners' act operates, and thus leave them powerless, it may do so. It has not ordered me to make the diversion. On the other hand it has ordered me to invest the fund otherwise. If the power conferred on you as auditor supersedes that conferred on me as a commissioner, and you think best to exercise it, I am sure it is your province to do so, for as auditor you are independent of the commissioners in all matters of exclu-

Incorporation Certificates; What Kind to Be Filed by Secretary of State.

sively auditorial power. I do not, as a commissioner, feel at liberty to join in making the transfer, especially as I am not by law authorized or required to do so. I can only aid in disbursing the sinking fund, not in its transfer, either temporarily or permanently, for the law confers on me no power to do so.

Truly, etc.,
W. H. WEST,
Attorney General.

INCORPORATION CERTIFICATES; WHAT KIND
TO BE FILED BY SECRETARY OF STATE.

Office of the Attorney General,
Columbus, November 11, 1869.

Hon. I. R. Sherwood, Secretary of State:

SIR:—By the third section of the act for the creation and regulation of incorporated companies, it is provided “that when the provisions of sections one and two have been *complied* with, the persons named as corporators in the certificate are authorized to carry into effect *the objects named in the certificate*, in accordance with the provisions of the act,” etc.

What kind of paper is it made the duty of the secretary to file? Only such as comply with the provisions of the act. May he file a paper enumerating objects not authorized by the act? If he does, he assists the corporators to perpetuate a legal fraud. May he file a certificate that omits some of the legal requisites? If so, he commits the like fraud.

The Defiance Manufacturing Company propose to organize under section 53 of the act (S. & C., 301). That section requires the certificate to specify:

Incorporation Certificates; What Kind to Be Filed by Secretary of State.

- 1st. The name of the company.
- 2d. The amount of capital stock.
- 3d. The amount of each share.
- 4th. The name of the place where said establishment shall be located.
- 5th. The name of the place where any proposed branch shall be located, if it propose to have branches.

It is very clear that under this section the place where the manufactory shall be located cannot be *outside* of the jurisdiction of the law. But this may be done as *legally* as to locate a branch outside. If it may do either, it may do both, for no distinction is made. This would be preposterous as to the main establishment; and no more authority is given to go beyond the jurisdiction to locate a branch than there is to locate the main institution. Any certificate, therefore, so specifying, violates the law, that is, does not comply with its provisions, and should not be filed.

If, after a company is duly organized, a sister State will allow it to carry on business therein, this State cannot and will not object. But there is no law authorizing a certificate to be filed which locates branches outside the jurisdiction, and such certificate should not be filed.

Truly, etc.,

W. H. WEST,
Attorney General.

County Treasurers Entitled to One Per Cent. on Moneys Borrowed and Paid Into the Treasury—Hartford Mutual Benefit Company; Is a Life Insurance Company.

COUNTY TREASURERS ENTITLED TO ONE PER CENT. ON MONEYS BORROWED AND PAID INTO THE TREASURY.

Office of the Attorney General,
Columbus, November 19, 1869.

D. E. Fee, Esq.:

DEAR SIR:—By the act found on pages 916 and 917 of Swan & Saylor's Statutes, county treasurers are entitled to one per cent. on moneys borrowed and paid into the treasury.

Very respectfully,
W. H. WEST,
Attorney General.

HARTFORD MUTUAL BENEFIT COMPANY; IS A LIFE INSURANCE COMPANY.

Office of the Attorney General,
Columbus, November 27, 1869.

Dr. James Williams, Chief Clerk Auditor's Office, Columbus, Ohio:

DEAR SIR:—I have examined the constitution and by-laws of the Hartford Mutual Benefit Company, and am of the opinion that it is a life insurance company, within the meaning of our statutes, and cannot transact business in this State without a license. I have not elaborated this opinion, but will do so, giving reasons, if you desire.

Very respectfully,
W. H. WEST,
Attorney General.

Boiler Inspection Law; Who to Prosecute Under—Railroads, Powers of the Commission of, and the Laws Relating to.

BOILER INSPECTION LAW; WHO TO PROSECUTE UNDER.

Office of the Attorney General,
Columbus, December 1, 1869.

C. M. Ridgway, Esq., Inspector-in-chief of Steam Boilers, Columbus, Ohio:

SIR:—It is not the duty of the prosecuting attorney to bring suits under the boiler inspection law, or attend to them after they are brought. The suit must be brought in the name of the inspector-in-chief. I have no doubt it is competent for him to employ counsel, and pay them a percentage of the sums collected. He should prepare a blank bill of particulars, and have a quantity of them printed ready to fill up whenever a case arises, then place it in the hands of proper counsel for attention.

Very respectfully,
W. H. WEST,
Attorney General.

RAILROADS, POWERS OF THE COMMISSIONER OF, AND THE LAWS RELATING TO.

Office of the Attorney General,
Columbus, December 7, 1869.

Hon. George B. Wright, Commissioner of Railroads and Telegraphs, Columbus, Ohio:

SIR:—I have the honor to acknowledge the receipt of your letter of the 28th ult., which engagements have prevented me from answering at an earlier day. It contains the following inquiries, to which I now reply, namely:

*Railroads, Powers of the Commissioner of, and the Laws
Relating to.*

1st. What power have I, as commissioner of railroads and telegraphs, to enforce obedience to the laws regulating such corporations?

2d. Suppose the road of an Ohio railroad corporation is sold or leased to, or the corporation becomes consolidated with, a corporation of an adjoining or distant State, and its officers and principal managers are not residents of the State of Ohio, how can I enforce a compliance with the law requiring reports, and answers to my inquiries, or sue for and collect the penalty in case of neglect or refusal?

3d. Is not a full and correct corporate history of every railroad company in Ohio absolutely essential to a knowledge and understanding of their present rights?

4th. Is not a careful revision, classification and codification of the laws regulating railroad corporations essential to their proper control, and to the protection of the rights of stockholders, creditors and the general public?

First. Your powers as commissioner are prescribed by the statute. To enumerate them here would involve a tedious detail. Suffice it to say that in my opinion they are wholly inadequate to the proper enforcement of the laws which it is made your duty to execute. It would be well for you, however, to specify in your report some of the remedial embarrassments you have encountered in practice, that the legislature may, if it desires to give efficiency and vigor to your office, supply the needed legislation.

Second. It is the clearest dictate of sound policy, viewed in either an economic or political aspect, that all the great, material interests existing or enjoyed within the State, be subordinated to its legislative jurisdiction. Unless this subordination be asserted and maintained, we must occupy the status of a mere dependency, at the mercy of, and tributary to, external interests and foreign influences.

This observation is especially true of the great corporations engaged in the carrying trade. Upon these our producers and merchants, especially of the interior, are

*Railroads, Powers of the Commissioner of, and the Laws
Relating to.*

absolutely dependent for the interchange of commodities. Many of them are as yet in circumstances of embarrassment and feebleness, requiring and soliciting aid and indulgence. The tendency, however, is to consolidation, under the management of a few overgrown corporations of enormous wealth, having respective centers of empire on the seaboard, beyond the jurisdiction of our laws. Unless they are held in check and controlled by, they will control, the State, and subordinate its material interests, and if need be, its political power, to their will. Hence the importance of a thorough understanding of and familiarity with their corporate history and legal rights, in order to due and proper vigilance, so that, a knowledge of these being accessible to the legislature, it may not blindly bind the hands of the State by the unwitting and imprudent grant of powers.

Your power to compel the making of reports, and answers to inquiries, by the foreign officers and managers of roads in this State, are contingent. The penalties prescribed are personal, not against the corporation, but the officer. Possibly *quo warranto* might lie, for the dereliction of the officer, but both the nature and the uncertainty of this proceeding precludes its being recorted to. A personal action for the penalty requires personal service, or the seizure of property in attachment. If neither the person nor the property of the officer can be found within the State, the law is nugatory.

Again, it is uncertain whether attachment will lie, to recover a mere statutory penalty. If it will not, of course the remedy cannot be enforced, except on personal service in this State.

In any aspect of the question I think the law requires amendment, so as to enlarge your powers, and render them more effectual. The corporation should be made liable for the official delinquency of its officers, in addition to the liability of the official himself.

Third. My official experience has long since demon-

*Railroads, Powers of the Commissioner of, and the Laws
Relating to.*

strated the necessity for having a full and accurate history of every railroad, and other corporation of a *quasi* public nature, deposited in some public office at the capital. Of those under the supervision of the commissioner, his office is the most appropriate place of deposit.

It is not exaggeration to declare that our already vast and rapidly augmenting system of railroads is tending to legal chaos, in consequence of the many organic and corporate changes its parts have been permitted to undergo. The powers of extension, consolidation, leasing, conveyance, and miscellaneous transformation, have been granted and exercised so liberally that it is next to impossible for the law officer of the State, whose duty it is to enforce the statutes of *quo warranto*, to ascertain under what laws, or by what authority, many of these corporations exist, or assume to exercise their liberties. More than four weeks last past have been unsuccessfully occupied in endeavoring to learn the names and residence of the directors of one of our most powerful railroad companies. Yet not one name, nor whether it has any directors, can be learned.

Except the few historical records which you have been enabled to obtain from a small number of companies, by the courtesy of their managers, the chaos is as yet unbroken.

Power should be given the commissioner to demand and require that a full and accurate transcript of all records, resolutions, judicial decrees, conveyances, consolidations, leases, contracts and whatsoever else affects its organic existence, together with copies of or references to the laws authorizing the same, be furnished by each corporation, subject to his supervision. Unless this be done, it will soon be not only impossible to enforce the laws against, but to ascertain what are the legal status and rights of, many corporations existing, or asserting privileges, in the State. When this history shall have been obtained, it should thereafter be kept up, and all organic changes, with the names of officers, be annually reported.

Prosecuting Attorneys; Compensation of.

Fourth. To insure the orderly government of this vast system of corporations, it is necessary that, in addition to the collection of corporate histories, the laws should be clear, explicit and liberal, and then their observance be rigidly exacted.

Great liberality in the laws now obtains. But clearness and explicitness can hardly be ascertained of them. Thirty years of disconnected and experimental legislation has produced a system of patchwork, insomuch that our corporation laws present a kind of incongruous mosaic, the parts of which, in some instances, it is most difficult to adapt to each other. I have no hesitation in expressing the opinion that a commission should be raised, and charged with the duty of thoroughly examining into the state of the law affecting each railroad in the State, and then revise, classify and codify the whole body of the statutes creating and regulating them.

Very respectfully,
W. H. WEST,
Attorney General.

PROSECUTING ATTORNEYS; COMPENSATION
OF.

Office of the Attorney General,
Columbus, December 11, 1869.

J. Patrick, Jr., Esq., Prosecuting Attorney, New Philadelphia, Ohio:

SIR:—Your favor of the 7th instant requesting a construction of section one, Swan & Sayler, p. 633, is received.

Prosecuting attorneys, in counties having a population above twenty thousand according to the last federal census, are entitled to a compensation at the rate of two dollars per each 100 inhabitants. The county commissioners have no

Members of Board of Public Works Can Act as County Commissioners.

power to diminish that rate. They do not fix the compensation. They determine the installments and fix the time of payment, but not the amount.

Very respectfully,
W. H. WEST,
Attorney General.

MEMBERS OF BOARD OF PUBLIC WORKS CAN
ACT AS COUNTY COMMISSIONER.

Office of the Attorney General,
Columbus, December 11, 1869.

H. C. Ellison, Esq., County Auditor, Canton, Ohio:

SIR:—I have to acknowledge the receipt of your favor of the 10th instant, inquiring if Mr. R. R. Porter can hold the position of member of the board of public works, and at the same time retain that of commissioner of Stark County.

I find nothing upon the subject but what you will find on page 889, S. & C. Statutes. According to that act he is not prevented from holding both positions at the same time.

Very respectfully,
W. H. WEST,
Attorney General.

Hall, Auld & Leonard; Claim of—School Boards; Vacancies in, Under Akron School Law.

HALL, AULD & LEONARD; CLAIM OF.

Office of the Attorney General,
Columbus, December 22, 1869.

To the Trustees of the Asylum for Idiots:

GENTLEMEN:—In compliance with your written request of the 18th instant, I have the honor to submit the following opinion in regard to the claim of Messrs. Hall, Auld & Leonard.

1st. A settlement may be opened up to correct mistake, notwithstanding a receipt has been passed.

2d. Latent defects in the workmanship, not discoverable at the time by any reasonable diligence, constitute a ground for action for damages, notwithstanding the settlement.

3d. A promise to complete any unfinished work is binding, notwithstanding payment and the passing of receipts.

This, I think, answers your inquiries.

Very respectfully,

W. H. WEST,

Attorney General.

SCHOOL BOARDS; VACANCIES IN, UNDER
AKRON SCHOOL LAW.

The State of Ohio,
Office of the Attorney General,
Columbus, January 8, 1870.

Hon. W. D. Henkle, Commissioner of Common Schools:

SIR:—In reply to your inquiry in regard to the power of filling vacancies in school boards under the Akron law,

School Boards; Vacancies in, Under Akron School Law.

I have no hesitation in expressing the decided opinion, that the provision authorizing the "acting director to fill vacancies" (2 S. & C., 1373) confers upon such directors as remain, full power to fill vacancies, although the number so remaining be less than a quorum. If it were not so, the resignation or removal of one-half of the board would destroy or suspend its functions.

Very respectfully,
W. H. WEST,
Attorney General.