

"SALOON" WITHIN MEANING OF TERM "STORE-  
HOUSE" IN BURGLARY STATUTE.

Attorney General's Office,  
Columbus, Ohio, January 14, 1888.

*S. D. McLaughlin, Esq., Prosecuting Attorney, Waverly,  
Ohio:*

DEAR SIR:—Owing to the delay incident to the in-  
auguration, I have not been able to answer yours of the 9th  
inst., until today.

I think the term "saloon" comes within the meaning of  
the term "storehouse" as used in the burglary statute. *Bauer  
vs. the State*, 25 Ohio St. Reports, p. 70, sustains this view,  
I think. But the statute, after naming a number of places,  
says: "or any other buildings," volume III, Williams Re-  
vised Statutes, section 6835. An indictment containing a  
count charging the defendant with breaking into a certain  
building, to wit: a saloon, I think would be good.

Very respectfully,

DAVID K. WATSON,  
Attorney General.

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DOW LAW TAX; NO RIGHT TO COLLECT AFTER  
CLOSING SALOON.

Attorney General's Office,  
Columbus, Ohio, January 20, 1888.

*J. W. Seymour, Esq., Prosecuting Attorney, Medina, Ohio:*

DEAR SIR:—Having been out of the city for some time  
on official business, I have been unable to answer your in-

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*Sheriff's Fees "Going and Returning."*

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quiry before this. As I understand your letter of the 15th inst., it presents the following case:

A town council passed an ordinance closing the saloons within the corporate limits of the town, thereupon a ratable proportion of the tax was refunded to those whose saloons had been thus closed. Subsequently one who had been a saloon keeper plead guilty to an indictment for selling contrary to section 12 of an act commonly known as the "Dow Law."

Your first inquiry is: Can a tax be collected from such a person for selling contrary to said section 12? I do not think it can. When the council passed the ordinance closing the saloon, the right of the county to recover the tax was gone. The council can not close the saloon and the county treasurer collect the tax at the same time. If, after the saloons have been closed by ordinance, some person sells in violation thereof, the remedy lies in the council to repeal the ordinance or in the town authorities punishing the violators according to the terms of the ordinance. This answer disposes of both your questions. I do not think your county treasurer would be warranted in collecting the tax in the case mentioned by you. Yours very truly,

DAVID K. WATSON,  
Attorney General.

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SHERIFF'S FEES "GOING AND RETURNING."

Attorney General's Office,  
Columbus, Ohio, January 21, 1888.

*W. H. Barnhard, Esq., Prosecuting Attorney, Mt. Gilead,  
Ohio:*

DEAR SIR:—Your letter of the 19th inst. duly received. The section of the Revised Statutes to which you call my attention, namely: 1230, was amended April 17, 1880

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*County Commissioners; Report Published in German Newspaper.*

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(Ohio Laws, Vol. 77, p. 116) ; see also Vol. III of Williams' Revised Statutes, section 1230. Upon turning to the section as amended, you will have no difficulty in solving the question you ask me. In the amendment to the section the words "going and returning" are added to the old section, which means that the sheriff is to receive eight cents per mile each way.

Yours very truly,  
DAVID K. WATSON,  
Attorney General.

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COUNTY COMMISSIONERS; REPORT PUBLISHED  
IN GERMAN NEWSPAPER.

Attorney General's Office,  
Columbus, Ohio, January 21, 1888.

*J. A. Deindoerfer, Esq., Defiance, Ohio:*

DEAR SIR:—Your letter of the 12th inst. was duly received at this office. Absence on official business has prevented an earlier answer.

I am of the opinion, that, under section 917 of the Revised Statutes, the matter of publishing the commissioners' annual financial report in a German newspaper lies wholly within the discretion of the board of the commissioners.

They can publish their report in two weekly newspapers of different political parties printed in the county. The statute is silent as to what kind of a paper the report shall be printed in and leaves that matter entirely optional with the board.

Very respectfully,  
DAVID K. WATSON,  
Attorney General.

*County Commissioners; Duty of as to Auditor's Fees. School House; Use of, For Sunday School Against Objection of Tax Payers.*

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COUNTY COMMISSIONERS; DUTY OF AS TO AUDITOR'S FEES. SCHOOL HOUSE; USE OF, FOR SUNDAY SCHOOL AGAINST OBJECTION OF TAX PAYERS.

Attorney General's Office,  
Columbus, Ohio, January 21, 1888.

*F. A. Kauffman, Esq., Prosecuting Attorney, Delaware, Ohio:*

DEAR SIR:—Concerning your first inquiry in your letter of the 14th inst. to wit: What is the duty of the county commissioners under section 4064 of the Revised Statutes when there is a dispute between the outgoing and present auditor concerning fees? I am of the opinion that, under that section, when the auditor presents to the commissioners the statement required by that section, duly certified by the commissioner of common schools, the commissioner should make the payment to the auditor presenting such certificates; and that they are precluded from undertaking to settle the respective rights of auditors. That is a matter to be settled by the auditors themselves.

Concerning your other inquiry contained in the same letter, to wit: the use of a school house for the purpose of holding a Sunday school therein against the objection of the tax payers of the district, I am of the opinion that the tax payers could obtain an injunction against the school authorities for permitting the school house to be thus used.

This view is based upon the decision rendered in the case of *Scofield vs. Eighth School District*, 27 Conn.; also upon the case of *Wier vs. Day, et al*, 35 Ohio State Reports, 143.

Hoping the above is satisfactory, I remain,

Yours very truly,

DAVID K. WATSON,  
Attorney General.



*Judgeship; Expiration of Term; First Sub-District of Tenth  
Judicial District—County Commissioners; Compensation  
of; Game Warden; Compensation of.*

JUDGESHIP; EXPIRATION OF TERM; FIRST SUB-  
DISTRICT OF TENTH JUDICIAL DISTRICT.

Attorney General's Office,  
Columbus, Ohio, January 23, 1888.

*Hon. J. S. Robinson, Secretary of State:*

DEAR SIR:—Concerning the matter of the judgeship in the first sub-division of the tenth judicial district of Ohio, submitted by you to my predecessor, Hon. J. A. Kohler, I will say, that I have given the matter as careful consideration as it was possible under the circumstances, and am of the opinion that Judge Dodge's term ceases, and Judge Ridgley's begins in February next.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

COUNTY COMMISSIONERS; COMPENSATION OF.  
GAME WARDEN; COMPENSATION OF.

Attorney General's Office,  
Columbus, Ohio, January 23, 1888.

*Jas. G. Patrick, Esq., Prosecuting Attorney, New Philadelphia, Ohio:*

DEAR SIR:—Owing to absence from the city on official business, your letter of late date has not been answered sooner.

Concerning the first inquiry you ask, namely: as to the compensation of county commissioners under section 897, as amended April 8, 1886 (Ohio Laws, Vol. 83, p. 71), I am of opinion that the commissioners, while doing business *in the*

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*County Surveyor and Engineer; "Expenses" in Addition to Per Diem.*

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*county*, are not entitled to charge for livery hire, railroad fare or hotel bills. I think the statute limits their compensation to three dollars per day and five cents per mile.

Concerning the other question which you ask, namely: The power of the commissioners, under section 409 of the Revised Statutes, as amended May 17, 1886 (Ohio Laws, Vol. 83, p. 186, 7), I am at a loss to know exactly what you mean to ask me. The act limits the amount of compensation to the county fish and game fund, which shall be made up from fines assessed from convictions for violations of the fish and game law. No power is given the commissioners to pay any additional compensation to the warden from any other county fund, but the commissioners have a discretionary power and if in their judgment the warden, in special cases, should be entitled to special compensation, they have the power to pay him out of the State fund set apart for the use of the county.

Yours very truly,  
DAVID K. WATSON,  
Attorney General.

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COUNTY SURVEYOR AND ENGINEER; "EXPENSES" IN ADDITION TO PER DIEM;

Attorney General's Office,  
Columbus, Ohio, January 23, 1888.

*John W. Winn, Esq., Prosecuting Attorney, Defiance, Ohio:*

DEAR SIR:—In your letter of the 17th inst. you submit to me the following: "Is the county surveyor or engineer, when employed to perform services under sections 4454 and 4456 of the Revised Statutes, entitled to receive his expenses in addition to his per diem?"

My answer will depend entirely upon what you mean by

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*County Auditor; Penalty for Five Years; Taxes.*

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the term "expenses." If you mean by it money which the engineer or surveyor pays out for himself in the way of board, etc., I am of the opinion he is not entitled to that in addition to his per diem. Section 4456 says that: "The surveyor or engineer shall make and file with his report an itemized bill of all costs made in the proper discharge of his duty under this and the two preceding sections." I do not think the word "costs," as here used, includes the personal expenses of the surveyor or engineer, but refers to any outlays of money necessary for the proper discharge of the work.

I regret that this opinion is somewhat at variance with the opinions of my two distinguished predecessors, Messrs. Kohler and Nash, and also yourself.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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COUNTY AUDITOR; PENALTY FOR FIVE YEARS;  
TAXES.

Attorney General's Office,  
Columbus, Ohio, January 23, 1888.

*J. H. Mackey, Esq., Cambridge, Ohio:*

DEAR SIR:—Yours of the 19th inst. duly at hand.

I am of the opinion that under section 2781 of the Revised Statutes, as amended April 14, 1886 (Ohio Laws, Vol. 83, p. 82), the auditor of the county can add the penalty for five years.

The constitutionality of the statutes has suggested itself to me, but as you do not raise that question I express no opinion on it.

Yours very truly,

DAVID K. WATSON,  
Attorney General.

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*Sheriff's Fees, Under Sections 1235 and 7379 Revised Statutes.*

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SHERIFF'S FEES, UNDER SECTIONS 1235 AND  
7379 REVISED STATUTES.

Attorney General's Office,  
Columbus, Ohio, January 23, 1888.

*George E. Martin, Esq., Attorney-at-Law, Lancaster, Ohio.*

DEAR SIR:—Your two letters in reference to sheriff's fees under sections 1235 and 7379 of the Revised Statutes duly received some days since.

I have been somewhat deliberate in answering because I wished to examine the matter carefully and also because you intimated there was no special haste about it.

I have carefully read the opinion of Judge White cited by you and certainly can not subscribe to all that he says therein. The same question has been decided, I am reliably informed, by another Common Pleas Judge, the opposite way. The opinions of this office have been in support of the last decision. While I am not clear about the question, I am not disposed at present to disturb the rulings of this office. The whole matter will soon come before the Common Pleas of Wayne County upon a case brought specially to test the compensation to which the sheriff is entitled under these respective sections of the statutes. In view of that fact I think it best for us to wait for that decision.

Very truly yours,

DAVID K. WATSON,

Attorney General.

*Counsel; Fees of; Defending Indigent Prisoner—False Pretenses; Indictment.*

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COUNSEL; FEES OF; DEFENDING INDIGENT PRISONER.

Attorney General's Office,  
Columbus, Ohio, January 25, 1888.

*Disney Rogers, Esq., Prosecuting Attorney, Youngstown, Ohio:*

DEAR SIR:—Your letter of the 23d inst. duly at hand. The question presented in your letter calls for a construction of section 7246 of the Revised Statutes. This section limits the fee which counsel, who have been assigned to defend an indigent prisoner, may receive, to one hundred dollars in any case of homicide. There has been but one indictment and but one case though two *trials*, in the matter you present.

My opinion is, that the counsel can not get from the county more than one hundred dollars for both trials. I exceedingly regret that I am forced to come to this conclusion as the compensation provided by the statute is insufficient in the first instance, but I do not see how the language of the section can be construed to include one hundred dollars for each trial. The remedy is exclusively within the power of the Legislature.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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FALSE PRETENSES; INDICTMENT.

Attorney General's Office,  
Columbus, Ohio, January 28, 1888.

*D. R. Crissinger, Esq., Prosecuting Attorney, Marion, Ohio:*

DEAR SIR:—I am of the opinion, concerning the matter suggested in yours of the 26th inst., that you can not get along under section 7092, referred to by you, nor under sec-

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*Pardons; Power of Governor to Grant Unconditional, to One Already Conditionally Pardoned.*

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tion 7091, which, I take it, is the section you want to refer to.

I think all you can do is to indict under section 7076, for getting money under false pretenses. For an authority on this point see Bishop on Criminal Law, Vol. II, section 442. It may only amount to a misdemeanor, but you can indict many times. Let me know how you get along and what you do in the matter.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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PARDONS; POWER OF GOVERNOR TO GRANT UNCONDITIONAL, TO ONE ALREADY CONDITIONALLY PARDONED.

Attorney General's Office,  
Columbus, Ohio, January 30, 1888.

*Hon. Joseph B. Foraker, Governor of Ohio:*

SIR:—I have the honor to submit herewith my opinion upon the question that you asked me a few days since: Whether you have the power to grant an unconditional pardon to a prisoner who has been conditionally pardoned by one of your predecessors.

The Constitution of Ohio provides that "The governor shall have power, after conviction, to grant reprieves, commutations, and pardons for all crimes and offenses except treason and cases of impeachment, upon such conditions as he may think proper." Under this clause the governor may unconditionally pardon.

Granting an unconditional pardon is but a partial exercise of his pardoning power and until he exercises his full power, I see no objection to his changing a conditional to an unconditional pardon. The fact that a subsequent governor is to issue the unconditional pardon in place of the

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*Pardons; Power of Governor to Grant Unconditional, to One Already Conditionally Pardoned.*

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conditional one makes no difference. The office of the governor is a continuing one and until the pardoning power is exhausted, it may be exercised in the same case by one governor as well as another. This view, I think, is sustained by the opinion of the Hon. Felix Grundy, Attorney General of the United States, in the case of the *United States vs. Martin*, reported in "Opinions of Attorneys General," Vol. III, p. 418,-9. The question in that case arose concerning the pardoning power of the President under the provisions of the Federal Constitution, which says: "The President shall have power to grant reprieves and pardons, etc.," and the attorney general held that the executive possessed of the pardoning power might exercise it in part, at one time, and part at another, and that the President might pardon or remit a portion of the sentence at one time and a different portion at another, and that a pardon granted by one chief magistrate, upon conditions, did not deprive another chief magistrate of the power of granting other conditions, or make additional remittances in the same case.

The question has never been adjudicated and is not discussed in any text book so far as I have been able to discover, but the opinion of the attorney general, in the case above referred to, undoubtedly establishes a correct precedent and is based upon sound reason.

I am, therefore, of the opinion, that you have the power, under the constitution of this State, to grant an unconditional pardon in the case submitted. With great respect I am,

DAVID K. WATSON,  
Attorney General.

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*County Auditors; Power to Assess in Certain Cases—County Auditors; No Power to Refund Portion of Penalty for Violating Liquor Laws.*

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COUNTY AUDITORS; POWER TO ASSESS IN CERTAIN CASES.

Attorney General's Office,  
Columbus, Ohio, February 1, 1888.

*J. W. Hollingsworth, Esq., Prosecuting Attorney, St. Clairsville, Ohio:*

DEAR SIR:—Replying to yours of January 27th last, I will say, that, on the statement of fact as set out in your letter, I am of the opinion that the county auditor can not assess the twenty-five dollars which you say he did in the Johns case.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

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COUNTY AUDITORS; NO POWER TO REFUND PORTION OF PENALTY FOR VIOLATING LIQUOR LAWS.

Attorney General's Office,  
Columbus, Ohio, February 1, 1888.

*Henry Gregg, Esq., Prosecuting Attorney, Steubenville, Ohio:*

DEAR SIR:—Yours of the 30th January duly received. It is my opinion, upon the case stated by you, that the auditor has no power to refund the last half of the penalty. The statute intends the payment of the two hundred and fifty dollars to be a punishment or penalty for violating the law. When the law has been violated, the penalty must attach, and I find no law which would authorize the auditor to remit any portion of it.



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*Assignee For Creditors; Should Pay Delinquent Taxes.*

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My opinion therefore, is, that he should collect the remaining one hundred and twenty-five dollars.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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ASSIGNEE FOR CREDITORS; SHOULD PAY DELINQUENT TAXES.

Attorney General's Office,  
Columbus, Ohio, February 1, 1888.

*Robt. C. Miller, Esq., Prosecuting Attorney, Washington C. H., Ohio:*

DEAR SIR:—Replying to your letter of January 30th, I will say, that, under section 6355 of the Revised Statutes, the assignee should pay the delinquent taxes, together with such other taxes as may be assessed against the personal property of the assignor, before paying the general creditors.

Yours, respectfully,

DAVID K. WATSON,  
Attorney General.

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*Jurisdiction; Criminal, In Court of County in Which Offenses are Committed. Legislature; No Power to Pass Law Providing for Trial in Franklin County of Offenses Committed in Other County.*

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JURISDICTION; CRIMINAL, IN COURT OF COUNTY IN WHICH OFFENSES ARE COMMITTED. LEGISLATURE NO POWER TO PASS LAW PROVIDING FOR TRIAL IN FRANKLIN COUNTY OF OFFENSES COMMITTED IN OTHER COUNTY.

Attorney General's Office,  
Columbus, Ohio, February 2, 1888.

*Members of the Board of Public Works, Columbus, Ohio:*

GENTLEMEN:—You recently submitted to me the question, whether the Legislature could pass a law providing for the trial in Franklin County, of a person who had destroyed the property of the State in a county remote from Franklin.

I am of the opinion that the law gives no such power. Article 1, section 10, of the Bill of Rights, provides, among other things, concerning the trial of accused persons, that they should be entitled to a "speedy and public trial, by an impartial jury of the county or the district in which the offense was alleged to have been committed."

The word "district" as here used, would seem to mean judicial district. It would appear that the Legislature put this construction upon it, for section 7263 of the Revised Statutes provides that: "All criminal cases shall be tried in the county where the offense was committed, unless it appear to the court, by affidavits, that a fair and impartial trial can not be had therein, in which case the court shall direct that the person accused be tried in some adjoining county." I cite this section to show what construction the Legislature seems to have placed upon the provisions of the Constitution above quoted.

I am of the opinion that the Legislature has no power to

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*County Commissioners, Power to Grant Free Turnpike Near  
Line of State, County or Township Road. Free Turn-  
pikes.*

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pass an act providing that a person could be tried in a portion  
of the State remote from where the offense was committed.

Very respectfully,

DAVID K. WATSON,

Attorney General

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COUNTY COMMISSIONERS, POWER TO GRANT  
FREE TURNPIKE NEAR LINE OF STATE,  
COUNTY OR TOWNSHIP ROAD. FREE TURN-  
PIKES.

Attorney General's Office,  
Columbus, Ohio, February 2, 1888.

*J. B. Worley, Esq., Prosecuting Attorney, Hillsboro, Ohio:*

DEAR SIR:—Replying to yours of January 30th, will say,  
that after an examination of the section of the statutes re-  
ferred to by you, sec. 4774, I am of the opinion that in lay-  
ing out and establishing free turnpikes in the county, the  
commissioners have the power to grant such a road, without  
it following “on or near the line of some State, county or  
township road.”

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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*Dow Law; Lien Under, Lease Executed Prior to Passage  
of the Act; No Lien.*

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DOW LAW; LIEN UNDER, LEASE EXECUTED  
PRIOR TO PASSAGE OF THE ACT; NO LIEN.

Attorney General's Office,  
Columbus, Ohio, February 2, 1888.

*C. B. Winters, Esq., Prosecuting Attorney, Sandusky, Ohio:*

DEAR SIR:—Yours of the 26th of January, submitting substantially the following facts on which you ask my opinion duly received.

A party leased certain premises, for a period of three years, in which to carry on the liquor business. Before the expiration of the lease, the tenant vacated the premises, and there is now due and charged against the premises a certain sum of money, to wit: ninety-one dollars and twenty cents. Under section 2 of the Dow law, which law was passed *after* the execution and *before* the expiration of said lease I do not think that the premises are liable. The lease was executed prior to the passage of the act referred to, and the lien imposed by the law does not attach in such a case. The second section of the act of May 14, 1886 (Ohio L., Vol. 83, p. 157), being the act in question, and commonly known as the "Dow law," is almost word for word like the second section of the act of April 17, 1883 (Ohio L., vol. 80, p. 164) commonly known as the "Scott law" which last section was construed by the Supreme Court in the case of the *State vs. Frame*, 39 Ohio St., 399, and the court held, that "the provisions of section 2 of the law do not operate when the real property, on and in which the business was conducted by a tenant, is held by such tenant under a lease for a term executed before the passage of the statute." This was substantially followed in the case of *Anderson vs. Brewster*, 44 Ohio St., 576.

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*County Clerks; Fees of for Indexing. County Commissioners, What Fees May Allow for Indexing.*

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I am of the opinion, therefore, that, in the present case, the property is not liable for the sum charged against it.

Very respectfully,

DAVID K. WATSON,

Attorney General.

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COUNTY CLERKS; FEES OF FOR INDEXING.  
COUNTY COMMISSIONERS, WHAT FEES MAY  
ALLOW FOR INDEXING.

Attorney General's Office,  
Columbus, Ohio, February 2, 1888.

*James Magers, Esq., Tiffin, Ohio:*

DEAR SIR:—Some time since, Hon. P. M. Adams submitted to me your letter to him of January 18, in which you asked him to get my opinion as to what fee you are entitled to under section 5339a (Ohio L., Vol. 80, p. 216).

I have delayed writing you on account of the fact that Senator Adams desired to look into the question himself and told me there was no special hurry.

I have examined the matter somewhat carefully and am of the opinion that, under section 1260 of the Revised Statutes, the commissioners should allow fifteen cents for indexing judgments. I am aware of the provisions of section 1263, and would, if I could, award you the additional eight cents, but I cannot do so. There is an opinion on file in this office by Attorney General Hollingsworth, in which he allows twenty-three cents for indexing, but he says in the opinion that he has great doubts about it being the law. This opinion was followed by Attorney Generals Lawrence and Kohler, but a few days since Mr. Lawrence was here and I told him that I had been compelled, upon this question, to overrule several of my predecessors, he being among them. He at once said that he had never felt satisfied that his

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*County Commissioners; Not Entitled to Livery Hire in Addition to Per Diem and Mileage.*

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opinion was correct, and that he had no doubt now about his being in error on the question.

Hoping the above is satisfactory, and assuring you that I have given the statutes as broad a construction as I could, I am,

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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COUNTY COMMISSIONERS; NOT ENTITLED TO  
LIVERY HIRE IN ADDITION TO PER DIEM  
AND MILEAGE.

Attorney General's Office,  
Columbus, Ohio, February 6, 1888.

*F. J. Esker, Esq., Chillicothe, Ohio:*

DEAR SIR:—There are so many opinions on file in this office concerning the act referred to by you, that I can not determine from yours of January 31st which opinion you want.

It is held, however, and I think correctly, that county commissioners are not entitled to livery hire in addition to their per diem and mileage, while traveling on business for the county.

Please show this to your auditor and greatly oblige,

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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*Probate Judges; When Terms of Office Begin.*

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PROBATE JUDGES; WHEN TERMS OF OFFICE  
BEGIN.

Attorney General's Office,  
Columbus, Ohio, February 6, 1888.

*Hon. H. Sagebid, Probate Judge, Kenton, Ohio:*

DEAR SIR:—Yours of February 2d, relative to when the terms of probate judges elect begin, duly received. My opinion is that it is on the 9th inst. The question, I think, is settled in the case of *the State on the relation of Moffet vs. Chase, Governor*, Ohio State Reports, Vol. 7, p. 372; also see 8 Ohio St., p. 620-9. I know that persons holding a contrary opinion rely upon section 4 of the Schedule, which provides that the term shall begin on the 2d Monday of February, but this referred to the first judges elected under the Constitution of 1851, Art. 4, Sec. 7 of which says that the term shall be for *three* years. If the second Monday of February always came on the 9th of February, there would be no difficulty in the matter, but we know that this is not the case, as, for instance, this month, when it comes on the 13th. The second Monday of February, 1852, *happened* to be on the 9th day of the month. Three years from the second Monday of February would not always be three years from the 9th day of February; so that in construing the provisions of the Schedule and the Constitution governing this matter, the Supreme Court reckons the three years which the judge is to hold, from the 9th day of February; which I think is the day on which the new judges should commence their term.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

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*Boards of Health; Orders and Regulations of Local Boards.  
Mayor as President, Right to Vote.*

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BOARDS OF HEALTH; ORDERS AND REGULATIONS OF LOCAL BOARDS. MAYOR AS PRESIDENT, RIGHT TO VOTE.

Attorney General's Office,  
Columbus, Ohio, February 8, 1888.

*H. J. Sharp, M. D., Member of the State Board of Health,  
London, Ohio:*

DEAR SIR:—Yours of the 28th of January duly received at this office, and had I not been absent from the city on official business, it would have been answered sooner.

I have examined the matter which you submitted to me, arising under section 2122 of the Revised Statutes and other sections relating thereto, and am of the opinion that orders and regulations promulgated by a local board of health, acting under a general ordinance of the council, have the force and authority of ordinances of the municipality and may issue such orders concerning the preservation of the town as are necessary, in their judgment, without a special ordinance for special cases. For a general discussion of this and kindred subjects, see Dillon on Municipal Corporations, 2d edition, sections 303 and 306—notes inclusive.

Concerning the question as to whether the mayor, as president ex-officio of the board, has a right to vote, I am not able to find that the question has ever been adjudicated; neither do I find it discussed in any text book. I am of the opinion, however, after careful examination of the statute, that he would have a vote. If I find that a different construction has been placed upon this section, I will notify you.

Yours respectfully,

DAVID K. WATSON,

Attorney General.



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*County Auditors; Compensation for Making Tax Duplicates.  
County Commissioners; Not To Allow Extra Compensation  
for Making Duplicates.*

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COUNTY AUDITORS; COMPENSATION FOR MAK-  
ING TAX DUPLICATES. COUNTY COMMIS-  
SIONERS; NOT TO ALLOW EXTRA COMPEN-  
SATION FOR MAKING DUPLICATES.

Attorney General's Office,  
Columbus, Ohio, February 8, 1888.  
*A. Leach, Esq., Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Yours of the 6th received today. I am of the opinion, upon the facts stated in your letter of this date, that the commissioners ought not to allow the new auditor compensation for the work which he performed, and to which you called my attention in your letter. The principal reason for this opinion is that the duplicates which are referred to by you, were, I presume, the general tax duplicates (although upon this point you give me no information). This work the county auditor is required to do, and his compensation for doing it is undoubtedly covered by the provisions of section 1069 of the Revised Statutes. In addition to this, the statute gives the auditor until the first of October to deliver the duplicates to the county treasurer, but at the same time puts the new auditor into office the second Monday of September preceding the day when the duplicate is to be delivered; thus depriving the old auditor of much working time.

Upon the whole case, I do not see how the commissioners can pay the new auditor.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

*Courts; Power Over Prisoner Who Escapes After Sentence and is Recaptured. Prisoner; Recaptured After Sentence.*

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COURTS; POWER OVER PRISONER WHO ESCAPES AFTER SENTENCE AND IS RECAPTURED. PRISONER; RECAPTURED AFTER SENTENCE.

Attorney General's Office,  
Columbus, Ohio, February 8, 1888.

*Simeon W. Winn, Esq., Prosecuting Attorney, Zanesville, Ohio:*

DEAR SIR:—Yours of January 27th was duly received, and the only excuse I have for not answering sooner is that part of the time I have been absent from the city on official business, and the rest of the time I have been so crowded with work that I have not had the time.

The question presented in your letter is by no means free from doubt and embarrassment. I would not surrender any point which I could make on the hearing under section 7325. I hardly think that the point which you say they will undertake to make under section 1189 of Swan & Critchfield is good. I have examined that section somewhat carefully and do not believe that it applies only to cases of writs of error, I have examined the authorities as closely as my time and the rush of business in this office would permit, and have not been able to find any authority directly applicable to this case. But it seems to me to be a question whether or not a court can enforce its own sentence. A court sentences a prisoner to the penitentiary; he escapes before he is taken there; is it possible that the court can't enforce the sentence, when the prisoner has been captured? Suppose he had escaped and been retaken in an hour, day, week or month, could not the sheriff have proceeded to carry out the order of the court and taken him to the penitentiary? I will call your attention

Ohio State University; Board of Trustees; Security for Costs.

to 6 Ohio Reports, p. 435. I regret exceedingly that I am unable to render you more assistance at this time.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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OHIO STATE UNIVERSITY; BOARD OF TRUSTEES; SECURITY FOR COSTS.

Attorney General's Office,  
Columbus, Ohio, January 26, 1888.

*Alexis Cope, Esq., Secretary Board of Trustees, Ohio State University, Columbus, Ohio:*

DEAR SIR:—A few days since you submitted to me the question: Whether the board of trustees of the Ohio State University could be compelled to give security for costs in an action brought by it outside of Franklin County, and I herewith submit to you my opinion on the subject.

Section 213 of the Revised Statutes provides: "No security is required on behalf of the State or any officer thereof, in the prosecution or defense of any action, writ or proceeding." Section 2 of the act of May 1, 1878 (Vol. 75, p. 126; Williams' Revised Statutes, Vol. III, p. 65) vests the government of the Ohio State University in a board of seven trustees, who shall be appointed by the governor with the advice and consent of the Senate. This section clearly makes these trustees State officers. Section 4 of the act of March 22, 1870 (Vol. 67, p. 20, Williams' Revised Statutes, Vol. III, p. 760) remains unchanged or unamended except as to the name of the college. The section as amended now reads: "The trustees and their successors in office shall be styled the 'Board of Trustees of the Ohio State University,' with the right as *such*, of suing and being sued, of contracting, etc." It will thus be seen that it is the Board of Trus-

*Sheriff's Fees; For Services in Keeping Prisoners Under  
Section 1235 Revised Statutes.*

tees of the University who brings this suit, and as such trustees are officers of the State, within the meaning of section 213 above referred to, security for costs can not, in my opinion, be required of them.

Yours very truly,  
DAVID K. WATSON,  
Attorney General.

SHERIFF'S FEES; FOR SERVICES IN KEEPING  
PRISONERS UNDER SECTION 1235 REVISED  
STATUTES.

Attorney General's Office,  
Columbus, Ohio, February 10, 1888.

*M. Slusser, Esq., Prosecuting Attorney, Wauseon, Ohio:*

DEAR SIR:—Replying to yours of the 6th inst., will say, that the matter concerning which you wrote has been decided by two Common Pleas Judges in different ways. The whole question will soon come up before the Court of Common Pleas in Wayne County on a test case to be brought on purpose. There is an opinion in this office by one of my predecessors that the fifty cents per day allowed under section 1235, is intended to include full compensation for all that is required of the sheriff under that section and section 7379.

I am not disposed to take issue with my predecessor on this subject and am inclined to think it correct.

I trust, however, that the test case will put the matter at rest.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General

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*Prosecuting Attorney; Fees of, Under Section 1298 Revised Statutes. Surveyor and Assistants, Fees of*

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PROSECUTING ATTORNEY; FEES OF, UNDER SECTION 1298 REVISED STATUTES. SURVEYOR AND ASSISTANTS, FEES OF.

Attorney General's Office,  
Columbus, Ohio, February 13, 1888.

*E. W. Maxson, Esq., Prosecuting Attorney, Ravenna, Ohio:*

DEAR SIR:—Replying to your two inquiries contained in your letter of February 9th, will say, that I have received a letter from the auditor of your county, written, as he said, at the request of the county commissioners and relating, as I take it, to the same matter mentioned in your first question, I have answered him that, in my opinion, under section 1298 of the Revised Statutes, you are only entitled to receive the sum of one hundred dollars. By referring to his letter, you will see the whole scope of my opinion.

Your second question gives me a great deal more trouble. I am of the opinion, however, that the surveyor is not entitled to more than his regular per diem, and the same opinion prevails in reference to his assistants—although on this point I have some doubt, owing to the peculiar language of the statute. The opinions heretofore rendered by my predecessors on similar questions, have not been uniform and I feel that in rendering this opinion that the matter is inclosed in doubt, but after a somewhat careful examination, my conclusion is that no allowance can be made for sustenance for the engineer or his assistants.

Yours truly,

DAVID K. WATSON,

Attorney General.

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*Prosecuting Attorney, Fees of Under Section 1298 Revised Statutes.*

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PROSECUTING ATTORNEY, FEES OF UNDER  
SECTION 1298 REVISED STATUTES.

Attorney General's Office,  
Columbus, Ohio, February 13, 1888.

*S. R. Freeman, Esq., County Auditor, Ravenna, Ohio:*

DEAR SIR:—Yours of the 9th inst. duly received. As I understand the case presented in your letter it is this: The prosecuting attorney of your county brought suit on the forfeited recognizance and collected the sum of one thousand dollars thereon, for which he has been paid a fee of one hundred dollars, being ten per cent. of the amount so collected. He further claimed the sum of ten dollars for filing the petition in same case and also claims the sum of ten dollars for preparing the judgment and journal entries in same case. Upon these facts, you ask my opinion, whether the prosecuting attorney is entitled to his percentage of one hundred dollars, and his fees—amounting in the aggregate to twenty dollars.

In my opinion, he is only entitled to the one hundred dollars. This is based upon my construction of section 1298 of the Revised Statutes.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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*Board of Public Works; Right to Lease, Sell or Permit to be Occupied, Lands Owned by State.*

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BOARD OF PUBLIC WORKS; RIGHT TO LEASE,  
SELL OR PERMIT TO BE OCCUPIED, LANDS  
OWNED BY STATE.

Attorney General's Office,  
Columbus, Ohio, February 13, 1888.

*Members of Board of Public Works, Columbus, Ohio:*

GENTLEMEN :—Yours of January 30th in which you ask my opinion relative to the right of your board to lease, sell or permit to be occupied by the city of Newark or the Baltimore and Ohio R. R. Co., certain lands belonging to the State and lying within the city of Newark, has been duly received.

I have given the question careful consideration and am of the opinion that you have no power to lease, sell, or permit said lands to be occupied by any corporation whatever, municipal or otherwise.

A similar question was considered in the case of the *State on the relation of, etc., vs. Railway Company* reported in 37 Ohio State, p. 157-178. In delivering the opinion (Johnson, Judge) the Court used the language; "It may also be true that in these days of improved methods of commercial intercourse, canals are relatively of minor importance, but so long as the present policy of the State, as shown by its laws, stands, the Courts must carry out that policy. It is for the Legislature, not for the board of public works, nor for the courts to change it."

But the question of your power to enter into any contract to lease, sell or for permission to occupy said lands seems wholly removed by an act of the Legislature passed May 8, 1886, Ohio Laws, Vol. 83, p. 118, providing: "That it shall be unlawful for the board of public works to lease any property belonging to the State which is under their control and management, unless the same be authorized by the General Assembly."

It may be that, on presenting the matter to the General

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*County Commissioners; Control Over Fish and Game Fund.  
Fish and Game Wardens; Fees of.*

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Assembly, they would pass an act enabling you to make a lease or to sell or grant permission to occupy said land, but unless that is done you have no power in the premises.

Very respectfully,

DAVID K. WATSON,

Attorney General.

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COUNTY COMMISSIONERS; CONTROL OVER  
FISH AND GAME FUND. FISH AND GAME  
WARDENS; FEES OF.

Attorney General's Office,  
Columbus, Ohio, February 13, 1888.

*F. Douthitt, Esq., Attorney-at-Law, New Philadelphia, Ohio:*

DEAR SIR:—Yours of the 6th inst. was duly received. Had it been possible, I would have answered sooner.

I have given the statute careful examination and see the difficulty there is in it. My opinion, however, is, that the county commissioners have the power to pay the warden out of the *county* fish and game fund. This fund, as the statute provides, is "made up from fines arising from convictions for violations of the fish and game law." This fund is at the control of the county commissioners. I think, however, that in cases where the warden asks for increased compensation, he must appeal to the *State* commissioners. I think that, inasmuch as the statute provides; "That if, in the judgment of the commissioners, special cases shall be entitled to increased compensation, it shall be paid by them out of the State fund set apart for their use." The term "commissioners" as here used, means State commissioners. I this morning conferred with the member of the General Assembly who introduced this bill and pointed out to him the apparent inconsistency in its language, and gave him



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*County Commissioners; Control Over Fish and Game Fund.  
Fish and Game Wardens; Fees of.*

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what I understood to be the fair interpretation of it. He agreed with me and said that in reference to the payment of the county warden, it was meant that the county commissioners should dispose of the county fund, but that the State commissioners should make the extra allowance, if any. This answers your first question.

Your second question is perhaps more difficult of solution. The total amount which is subject to be disposed of by the county commissioners, is the amount realized from fines arising from convictions for violations of the law. In the case put by you the amount is fifty dollars. The county commissioners are authorized to pay the warden this amount if his services, estimated as such services are estimated, amount to this much. I am of the opinion that the commissioners may allow the warden fees for policing the county and for other services, such fees as the statute allows the sheriff in similar cases. For instance; if the warden serves a writ, he may be allowed for similar service. In my letter to Mr. Patrick, I thought I had inserted the word "County" before the word "Commissioners," in speaking of the payment of the warden, but on referring to that letter, I found I did not. I intended, however, to have done so. In other words, I have not changed my views since writing Mr. Patrick upon the subject as to the right and the power of the county commissioners to pay the warden out of the county fund. There are many defects, however, in this act which make it exceedingly difficult to give it an intelligent and consistent interpretation.

Hoping the above is satisfactory and that you will excuse the delay in answering, I am,

Very respectfully,

DAVID K. WATSON,

Attorney General.

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*County Commissioners; Sale of Bonds by.*

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## COUNTY COMMISSIONERS; SALE OF BONDS BY.

Attorney General's Office,  
Columbus, Ohio, February 14, 1888.

*Clarence Curtin, Esq., Prosecuting Attorney, Circleville,  
Ohio:*

DEAR SIR:—Your inquiry of the 10th inst. duly received.

I have carefully examined the section on page 68, Vol. 80, Ohio Laws, referred to by you in your communication of that date. I can not agree with your construction of the statute. The section provides that the bonds shall be "sold to the highest bidder after being advertised, etc." It is silent as to the manner in which such sales shall be made, but I think that the commissioners, in such a case, are vested with the exercise of a sound discretion.

The section further provides that "the privilege shall be reserved of rejecting all or any bids, etc." This would seem to indicate that, if anything, the sale was not to be at public auction, as the privilege of rejecting bids would seem to be more consistent with the idea of rejecting a sealed proposal than an open bid at public auction.

There is no way of determining the matter, but my opinion on a careful reading of the law is that the commissioners can accept sealed bids for the bonds if they choose.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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*Ohio Penitentiary; Officers Attending "Prison Congress";  
Expenses.*

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OHIO PENITENTIARY; OFFICERS ATTENDING  
"PRISON CONGRESS"; EXPENSES.

Attorney General's Office,  
Columbus, Ohio, February 14, 1888.

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

DEAR SIR:—Some days since you submitted to me the question, whether you could allow, as a valid claim, the amount of money paid out by the warden and other officers of the penitentiary, as expenses for going as delegates to the "Prison Congress" at Toronto.

In the act found in Vol. 84, p. 203, it is provided, that no bills or "expenses for officers attending state, interstate or national associations of *benevolent institutions*, etc.," shall be paid out of appropriations made for current expenses of said institutions. I am of the opinion that this does not prevent you from allowing the claims, as the penitentiary is not embraced under the term "*benevolent institution*" and I see no valid reason why this language of the statute should prevent you allowing this claim and am, therefore, of the opinion, that you can allow it.

Very respectfully,

DAVID K. WATSON,

Attorney General.

*Sheriff; Fees of for Calling Jury and Witnesses in Criminal Cases—County Treasurer; Should Collect Tax as Certified by Auditor.*

SHERIFF; FEES OF FOR CALLING JURY AND WITNESSES IN CRIMINAL CASES.

Attorney General's Office,  
Columbus, Ohio, February 15, 1888.

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

DEAR SIR:—You recently submitted to me the question; Whether or not in criminal cases, when the defendant pleads guilty, before the jury has been sworn and called, and when no witnesses have been sworn, the sheriff is entitled to the usual fee for calling the jury and witnesses.

I have examined the question and am of the opinion, that, in such case, the sheriff is not entitled to any compensation.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

COUNTY TREASURER; SHOULD COLLECT TAX AS CERTIFIED BY AUDITOR.

Attorney General's Office,  
Columbus, Ohio, February 15, 1888.

*W. W. Savage, Esq., Prosecuting Attorney, Wilmington, Ohio:*

DEAR SIR:—Yours of the 9th received at this office.

The same day that you were in the city, several members of your city council and some of your county officers—among them the treasurer—called at this office, relative to the matter about which you write. I got from them what I supposed to be a history of the case, and it is substantially as set forth

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*Sheriffs; Fees of, for Subpoenaing Witnesses for Grand Jury, Etc.*

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in your letter. I told the treasurer that he had nothing to do with the reason why the court declared the ordinance invalid. It was sufficient that the court held it so, and it was sufficient protection to him that the auditor certified it for collection. I am still of that opinion. I think the treasurer should proceed to collect the tax as certified by the auditor.

I leave today for Washington City and am greatly pressed for time. You must, therefore, excuse me for not going into detail; yet I have, I think, substantially covered the question you asked of me.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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SHERIFFS; FEES OF, FOR SUBPOENAING WITNESSES FOR GRAND JURY, ETC.

Attorney General's Office,  
Columbus, Ohio, February 16, 1888.

*J. C. Elliott, Esq., Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have been prevented from answering yours of the 6th inst. sooner. In my opinion, sheriffs are entitled for subpoenaing witnesses for the grand jury, ten cents each. This includes copies. He is also entitled to sixty cents for committing to prison or discharging therefrom. I do not think this is covered by the three hundred dollars allowed by section 1231. I do not think the case in 7th Ohio State, referred to by you, has any special application. Hoping this is satisfactory, I am,

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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*County Commissioners; Power to Allow Counsel Fees Under Section 845. County Commissioners; Prosecuting Attorney Legal Adviser.*

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COUNTY COMMISSIONERS; POWER TO ALLOW  
COUNSEL FEES UNDER SECTION 845. COUNTY  
COMMISSIONERS; PROSECUTING ATTORNEY  
LEGAL ADVISER

Attorney General's Office,  
Columbus, Ohio, February 16, 1888.

*A. Leach, Esq., Prosecuting Attorney, Jackson, Ohio:*

DEAR SIR:—Replying to yours of the 10th inst. I will answer your questions in the order you ask them.

First—Under section 845 of the Revised Statutes, the county commissioners are not authorized to pay *more* than two hundred and fifty dollars for any one case. This must pay for both counsel.

Second—The question of *dividing* the fees, is a matter for the attorneys to settle themselves.

Third—The prosecuting attorney, by statute, is made the legal adviser of the county commissioners, and they ought not, and I seriously doubt if they can, employ additional counsel, in any case, to his exclusion.

Very respectfully,

DAVID K. WATSON,

Attorney General.

*Prisoner; Re-Hearing Under Section 7165 Revised Statutes  
—Board of Education; School Books to Children Under  
Section 4026 Revised Statutes.*

PRISONER; RE-HEARING UNDER SECTION 7165  
REVISED STATUTES.

Attorney General's Office,  
Columbus, Ohio, February 16, 1888.

*Robert C. Miller, Esq., Prosecuting Attorney, Washington  
C. H., Ohio:*

DEAR SIR:—Yours of the 14th inst. received yesterday. I am greatly pressed for time, as I leave in a few hours for Washington City. I have only made a glancing examination of the matter presented in your letter. I am at a loss to know just what the section means. While I am not sure that I am right about it, I would suggest that you attend the examination and allow it to proceed. In saying this, I am largely persuaded that your construction of the section is right, yet it may be that, under the circumstances, it would be best to have the examination. I very much regret that I can not give it more time and go fully into the matter.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

BOARD OF EDUCATION; SCHOOL BOOKS TO  
CHILDREN UNDER SECTION 4026 REVISED  
STATUTES.

Attorney General's Office,  
Columbus, Ohio, February 24, 1888.

*H. M. Folz, Esq., Kent, Ohio:*

DEAR SIR:—Absence from the city has prevented an earlier reply to your letter of the 9th inst., addressed to my predecessor, Hon. J. A. Kohler, concerning the right of the

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*County Commissioners; Mileage of, When Attending Called Meetings. County Commissioners; Power of to Rent Office for Prosecuting Attorney.*

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board of education to furnish school books to children under certain circumstances. I very cheerfully refer you to the law governing the matter. You will find it in section 4026 of the Revised Statutes; which authorizes the board, in certain cases, to furnish school books to children.

I have no doubt that under that section you can procure for your friend, what books he needs. I sincerely trust you will have no difficulty in getting the assistance.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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COUNTY COMMISSIONERS; MILEAGE OF, WHEN ATTENDING CALLED MEETINGS. COUNTY COMMISSIONERS; POWER OF, TO RENT OFFICE FOR PROSECUTING ATTORNEY.

Attorney General's Office,  
Columbus, Ohio, February 25, 1888.

*M. Slusser, Esq., Prosecuting Attorney, Wauseon, Ohio:*

DEAR SIR:—Absence from the city has prevented an earlier reply to yours of the 16th inst. You submitted *two* questions to me and asked my opinion upon them.

First—"Are the county commissioners entitled to mileage when traveling to and from the auditor's office to attend the ditch hearings provided for in sections 4457 and 4458; such hearings being in addition to the twelve regular or called sessions mentioned in amended section 897, Ohio Laws, Vol. 83, p. 71?"

I am of the opinion that a fair construction of this section does not warrant the commissioners in taking mileage in traveling to such meetings. The *sessions* of the com-



*Township Relief Commission; Compensation of; Expenses.  
Township Trustees; Compensation for Report of.*

commissioners are limited to one a month or twelve a year. When traveling on official business, they are entitled to mileage. I take it that attending called meetings, under the sections referred to by you, *in addition to the twelve sessions* authorized by the statute, is not such official business as is meant by the statute.

Your second question, namely; "In a county where the commissioners have not and can not well provide an office for the prosecuting attorney in the county building, have they the right and authority to rent, for the use of the prosecuting attorney, an office elsewhere and furnish the same at the expense of the county?" I am of the opinion that there is no statute *requiring* the commissioners to do this. On the other hand, I am not disposed to say that if they should do it, it would be an abuse of their power under section 897 of the Revised Statutes.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

TOWNSHIP RELIEF COMMISSION; COMPENSA-  
TION OF; EXPENSES. TOWNSHIP TRUSTEES;  
COMPENSATION FOR REPORT OF.

Attorney General's Office,  
Columbus, Ohio, February 25, 1888.

*J. Cahill, Esq., Prosecuting Attorney, Bucyrus, Ohio:*

DEAR SIR:—Yours of the 23d inst. requesting my opinion concerning the rights of township trustees and the members of the relief commission, under the act of May 19, 1886 (Ohio Laws, Vol. 83, p. 232-234) duly received.

In reference to your first question, namely: the compensation of the Commissioners, I am of the opinion that

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*Superintendent; Asylum for Insane; Salary of; Secretary of  
Board of Trustees.*

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their compensation is controlled entirely by section 5 of the act, and that, under that section, they are not entitled to more than "their actual expenses incurred in the performance of their duties."

As to your second question, namely: "The compensation of township trustees under said act," I am of the opinion that they are not entitled to compensation for the report which they are required to make under section 2 of said act. It is one of those cases where the Legislature imposes additional labor upon an officer, without providing any additional compensation; such cases are of frequent occurrence. The relief must come from the Legislature.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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SUPERINTENDENT; ASYLUM FOR INSANE; SAL-  
ARY OF; SECRETARY OF BOARD OF TRUS-  
TEES.

Attorney General's Office,  
Columbus, Ohio, February 25, 1888.

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

DEAR SIR:—Some time since you submitted to me the following proposition and asked my opinion on same; the trustees of the Toledo asylum for the insane have employed the superintendent of the asylum to act as secretary of the board, at a salary of four hundred dollars per year, and propose to pay him out of the appropriation allowed for the expenses of the trustees.

I have carefully looked into the matter, and see no objection to such payment. The Legislature, at its last session, appropriated the sum of fifteen hundred dollars for defraying the expenses of this asylum. See Ohio Laws Vol. 84, p. 197.

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*County Commissioners; Power to Release Surety, Under Sections 5837 and 5838 Revised Statutes.*

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If, in the judgment of the trustees, it is necessary to employ a secretary, I see no reason why they can not pay him out of this fund.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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COUNTY COMMISSIONERS; POWER TO RELEASE SURETY, UNDER SECTIONS 5837 AND 5838 REVISED STATUTES.

Attorney General's Office,  
Columbus, Ohio, February 27, 1888.

*Maurice H. Donahue, Esq., Prosecuting Attorney, New Lexington, Ohio:*

DEAR SIR:—Yours of the 16th inst. duly received. I have examined the sections mentioned by you, to wit: 5837 and 5838 of the Revised Statutes, and am of the opinion that the county commissioners have no power, under these sections, to release the surety, nor do I find any provision in the statute applicable to such a case.

Very respectfully,

DAVID K. WATSON,

Attorney General.

*County Commissioners; Mileage, Attending Business Outside the County.*

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COUNTY COMMISSIONERS; MILEAGE, ATTENDING BUSINESS OUTSIDE THE COUNTY.

Attorney General's Office,  
Columbus, Ohio, February 27, 1888.

*C. G. Smith, Esq., Prosecuting Attorney, Hamilton, Ohio:*

DEAR SIR:—Yours of the 23d inst. duly received.

You ask my construction of section 897—found on page 71, Vol. 83 of Ohio Laws, in reference to the right of county commissioners to receive mileage while attending to official business outside of the county.

After a careful examination of the section, I am of the opinion, that if your county does not come within the exceptions mentioned in the section, the commissioners are entitled to mileage while traveling on official business outside of the county.

I also think that, in cases where the full board can not attend, and a less number is delegated to act, in reference to business outside of the county, the member or members of the board, attending to such business, would be entitled to mileage.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

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*Mutual Endowment Society; Incorporation of. Corporations; "For Assisting at Marriages, Etc."*

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MUTUAL ENDOWMENT SOCIETY; INCORPORATION OF. CORPORATIONS; "FOR ASSISTING AT MARRIAGES, ETC."

Attorney General's Office,  
Columbus, Ohio, February 28, 1888.

*Hon. James S. Robinson, Secretary of State:*

DEAR SIR:—You recently submitted to me the articles of incorporation of the "Correspondent Mutual Endowment Society," and requested me to give you an opinion as to whether you should issue a certificate of incorporation.

I have carefully examined the matter, and herewith submit my opinion. Similar questions were submitted to my predecessor Hon. Geo. K. Nash, and in each instance he held that the certificate of incorporation ought not to issue. The same matter, about that time, was brought before a court in Pennsylvania, which went elaborately into the question, and held, as a conclusion of its examination, that the State ought not lend its authority in such matters.

I notice that among the purposes for which said association desires to become incorporated is; "Assisting its members at marriage—to furnish money with which to buy a home or start in business." I do not believe that such an association should be legalized in this State; even under the broad provisions of section 3235 of the Revised Statutes, which provides; "Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for dealing in real estate, or carrying on professional business," etc.

The purpose, undoubtedly of the incorporation is, to hold out inducements for people to marry, they representing, no doubt, that they can readily secure money with which to establish homes and start in business. Upon this point the Pennsylvania court held; That "the companies enlarge the circle of mercenary motives prompting to marriage and

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*Notaries Public; Commission Granted or Revoked by Governor.*

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tend to make money the sole motive, which is contrary to good morals." The court also holds that such companies "offer an inducement to allege marriage where none exists and thus throw a cloud on the legitimacy of issue."

I do not believe that the letter and spirit of the statute requires you to grant articles of incorporation to such a society, nor do I believe it consonant with the interests of society or public morals that such an association should be incorporated. I therefore suggest that you decline to place these articles of incorporation upon file in your office.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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NOTARIES PUBLIC; COMMISSION GRANTED OR  
REVOKED BY GOVERNOR.

Attorney General's Office,  
Columbus, Ohio, February 29, 1888.

*Hon. B. S. Wydman, Columbus, Ohio:*

DEAR SIR:—Concerning the matter you submitted to me this morning, I have this to say; Section 110 of Williams Revised Statutes, Vol. III providing for the appointment of notaries public, says: "The governor shall have the authority to revoke any commission issued to any notary public upon the presentation of satisfactory evidence of official misconduct or incapacity." You will thus see that the whole matter is lodged with the governor, upon evidence to him satisfactory, that such commission ought to be revoked. What would be satisfactory evidence in any given case is a matter resting wholly with him.

Trusting the above is satisfactory, I remain,

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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*Benevolent Institutions; Trustees of; Toledo Asylum for Insane.*

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BENEVOLENT INSTITUTIONS; TRUSTEES OF;  
TOLEDO ASYLUM FOR INSANE.

Attorney General's Office,  
Columbus, Ohio, February 29, 1888.

*Governor J. B. Foraker:*

SIR:—Some time since you informed me that the Toledo Asylum for the Insane was about completed, and asked for an opinion as to whether the present trustees of the institution had not been prematurely appointed, and if it was not now your duty to make appointments, under the general provisions of the statutes governing the benevolent institutions of the State.

I have given the matter careful attention, and submit to you the following opinion thereon; On the 18th day of April, 1883, the Legislature passed an act "To provide for additional accommodations for the insane of the State," (Ohio Laws, Vol 80, p. 181). At the time of the passage of said act, the benevolent institutions of the State were under the control and management of a board of five trustees for each institution. See Ohio Laws, Vol. 77, p. 203.

The provisions of the act of 1883, already cited, are as follows: First—It appropriates a stated sum for providing accommodations "for the care of the insane of the State, not now provided with such care." Second—It also creates a commission "to determine upon the manner in which said provisions for the care of the insane shall be made; and authorizes such commissioners to adopt plans for the erection of buildings, etc." Third—It further provides that; "If the said commission shall select any site or sites located upon the grounds of any asylum or asylums for the insane in the State, the trustees of such asylum or asylums for the insane shall be and are hereby empowered to proceed with the erection of said buildings." Fourth—Said act also provides that "If the commission shall select a site remote from

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*Benevolent Institutions; Trustees of; Toledo Asylum for Insane.*

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either of the asylums for the insane, then the governor shall appoint five trustees, who shall proceed with the erection of the building as provided by law, etc.”

In 1887, by an act of the Legislature, the asylums for insane in Ohio were designated by name, the one in question being designated the “Toledo Asylum for the Insane.” By the same act, the State was divided into asylum districts. The act further provided that each asylum should be under the charge of a separate board of trustees. (Ohio Laws, Vol. 84, p. 203). The Legislature on February 23, 1886, passed an act amending several sections of prior acts, and provided for the general management and control of the benevolent institutions of the State. Section 634 reads: “The control and management of the State benevolent institutions shall be under a board of five trustees for each institution.” Section 635 provides: “The governor shall annually, by and with the advice and consent of the Senate, appoint one trustee for each of the State benevolent institutions, including, etc., who shall hold his office for the term of five years from the first Monday in April next after his appointment.” At the time of the appointment of the present board of trustees for the Toledo asylum, the attention of the executive could not have been called to the peculiar language of the act of April 18, 1883. As above stated, section four of that act provides; “If the said commission shall select a site remote from either of the asylums for the insane, then the governor shall appoint five trustees, who shall proceed with the erection of the building as provided by law, etc.” The act would seem to contemplate that the trustees then to be appointed, should not do anything more than proceed with the erection of the building according to law. In fact, that is all that could be done at that time. There was nothing else to do after the building had been commenced, except to proceed and finish it. Until it should be completed, it could not be occupied for the purpose for which it is constructed. The statute does not give the trustees any authority to



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*County Commissioners; Employing Counsel to Assist Prosecutor. Sheriff's Costs; "Attending a Person Before Judge or Court."*

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manage or control said institution. It simply provides for the appointment of a given number of trustees who shall proceed with the building as provided by law.

In my opinion, grave doubts exist as to the legality of the appointment of the present board of trustees, and consequently their power to make contracts is involved in great uncertainty and consequent danger to the interests of the institution and the State.

I suggest to your excellency, that you ask the Legislature to remove this doubt by a special act or joint resolution, such as may meet your views of the emergency, and am clearly of the opinion that the interests of the institution and State require such action. I have the honor to be,

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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COUNTY COMMISSIONERS; EMPLOYING COUNSEL TO ASSIST PROSECUTOR. SHERIFF'S COSTS; "ATTENDING A PERSON BEFORE JUDGE OR COURT."

Attorney General's Office,  
Columbus, Ohio, March 3, 1888.

*Albert Anderson, Esq., Prosecuting Attorney Lebanon, Ohio:*

DEAR SIR:—Replying to yours of February 27th, will answer your questions in their order: First—I have no doubt of the power of the county commissioners under section 845, as amended by the act of April 8, 1881, found in Vol. 78, Ohio Laws, 121, to employ counsel to assist the prosecuting attorney, upon the facts as presented in your letter.

*Corporations; Discretion of Secretary of State; "The Cincinnati Junger Maenner Chor."*

Second—As to your second question: My predecessors in office, Messrs. Nash and Lawrence, hold that the words, "attending a person before a judge or court" meant sixty cents for each day, but not for an adjournment for less than a day. While I am not fully in harmony with this view, I am not disposed to disturb it. It is important that there be as much uniformity in the opinions of this office as possible, and when the difference of opinion between the attorneys general would be slight, the rule is observed of not reversing. I will, therefore, follow the rulings of my predecessors in this matter.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

CORPORATIONS; DISCRETION OF SECRETARY OF STATE; "THE CINCINNATI JUNGER MAENNER CHOR."

Attorney General's Office,  
Columbus, Ohio, March 6, 1888.

*Hon. James S. Robinson, Secretary of State:*

DEAR SIR:—In the matter of the incorporation of "The Cincinnati Junger Maenner Chor," of Cincinnati,—on a careful consideration I have concluded that, where two applications for incorporation are received simultaneously, asking for the same corporate name, you would be justified in making inquiry into the matter, and exercising a sound and reasonable discretion as to which should receive the certificate of incorporation.

This view of the case is upon the reason that otherwise it would be easy to prevent incorporations in many cases where parties are justly entitled to such articles.

Very respectfully,

DAVID K. WATSON,  
Attorney General.

*Jury Costs; McCoy Case (Scioto County)—Benevolent Institutions; Board of Trustees of; Authority to Pay for "Fire Protection."*

JURY COSTS; MCCOY CASE (SCIOTO COUNTY).

Attorney General's Office,  
Columbus, Ohio, March 7, 1888.

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

DEAR SIR:—In reference to the matter of the jury costs in the McCoy Case (tried in Scioto County)—submitted by you some time since—I am of the opinion that such costs are to be paid by the State.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

BENEVOLENT INSTITUTIONS; BOARD OF TRUSTEES OF; AUTHORITY TO PAY FOR "FIRE PROTECTION."

Attorney General's Office,  
Columbus, Ohio, March 9, 1888.

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

DEAR SIR:—Some time since, you submitted to me the matter of the payment, by the board of trustees of the Central Asylum for the Insane, the sum of four hundred dollars to Dr. Finch, and also stated: "The board has authorized the auditor of state to pay said sum to Dr. Finch, out of the 'appropriation for fire protection'." You ask my opinion as to the legality of such payment.

I have examined the matter, and am of the opinion that the board had the power to employ Dr. Finch in the premises and pay him out of the appropriation aforesaid.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

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*Township Local Option Law; Notice of Election.*

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TOWNSHIP LOCAL OPTION LAW; NOTICE OF  
ELECTION.

Attorney General's Office,  
Columbus, Ohio, March 13, 1888.

*A. Crain, Esq., Lucasville, Ohio:*

DEAR SIR:—Yours of late date duly at hand. I did not receive a certified copy of the law referred to by you till a day or two since.

On examination I find it provides that; "Notice shall be given and the election conducted in all respects as provided by law, for the election of township trustees." The statute governing such elections requires the trustees to give the constable notice at least twenty days before the annual election, and the constable must give ten days notice of the election. See sections 1445, 1446 and 1448 of the Revised Statutes. It will thus be seen that *twenty days* must intervene between the notice given by the trustees to the constable and the day of election, and that at least *ten* days must intervene between the giving of the notice by the constable and the day of election.

It is now too late to hold the election on the regular spring election day, and I am told by the author of the bill, it was not intended that both elections should occur on the same day, though there is nothing in the act preventing it.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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*County Auditor; Compensation for Extra Services.*

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## COUNTY AUDITOR; COMPENSATION FOR EXTRA SERVICES.

Attorney General's Office,  
Columbus, Ohio, March 14, 1888.

*Louis Hicks, Esq., Batavia, Ohio:*

DEAR SIR:—It has been impossible for me to answer yours of the 5th inst. until today.

In my opinion, the county commissioners are prohibited by section 1078 of the Revised Statutes from allowing the county auditor additional compensation for labor performed by him, except in cases where such labor is performed under some act specially providing for such extra compensation. You refer, in your letter, to services rendered under the free turn pike act. Section 1074 of the Revised Statutes provides for the compensation of the auditor by fees, under that act. The general rule is, that where a public officer is paid by salary or by fees, he is not entitled to extra compensation for new work required of him, unless the act specifically provides for such compensation. I am just preparing to leave for the East and have not time to go more fully into the question. Hoping the above is satisfactory, I remain,

Yours respectfully,

DAVID K. WATSON,

Attorney General.

*Counsel Appointed by Court to Defend Indigent Prisoner;  
Fees of.*

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COUNSEL APPOINTED BY COURT TO DEFEND  
INDIGENT PRISONER; FEES OF.

Attorney General's Office,  
Columbus, Ohio, March 16, 1888.

*George G. Jennings, Esq., Prosecuting Attorney, Woodsfield,  
Ohio:*

DEAR SIR:—Yours of the 9th inst. duly received. By reason of the unusual press of business I have not been able to answer sooner. The question presented by you amounts to this; Is an attorney, appointed by the Court, to defend an indigent prisoner, in a case of felony (which is not a homicide) entitled to more than fifty dollars, though there may be several trials in the same case?

I had occasion to construe this section in a case of murder in the first degree, where the first trial lasted three weeks and the prisoner was convicted. The Circuit Court reversed for error and the case was again tried. Counsel who defended prisoner in that case under appointment by the Court, received one hundred dollars at the close of the first trial and made application at the second trial for another one hundred dollars. The question was referred to me and I held, under section 7246, that the commissioners had no power to allow more than one hundred dollars for services rendered in both trials. The language of the statute is: "*In any case,*" not in any *trial*. This would seem to dispose of the question asked by you. I think in such a case, the commissioners have no power to allow more than fifty dollars, although I recognize that this compensation is frequently wholly inadequate, as in the case you put.

Yours respectfully,

DAVID K. WATSON,  
Attorney General.

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*Township Local Option Law; Place for Holding Election—  
Township Local Option Law; Notice; Thirty Days  
After Election Saloons Close.*

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TOWNSHIP LOCAL OPTION LAW; PLACE FOR  
HOLDING ELECTION.

Attorney General's Office,  
Columbus, Ohio, March 23, 1888.

*J. A. Stoneker, Esq., Collinsville, Ohio:*

DEAR SIR:—When I returned from the East, I found your letter of the 20th inst. on my table. The first question submitted by you, I will express no opinion upon, as it would be improper for me to do so.

Your second question, to wit: "Can we hold the special election on 'local option' in the incorporated village, our usual place of elections?" I will answer by saying that the act referred to by you provides that such election shall be held at the usual place or places for holding the township elections, and if your village is the usual place for holding the township elections, then this special election can be held therein, but persons who reside within the incorporation can not vote at such election. Hoping this is satisfactory, I remain.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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TOWNSHIP LOCAL OPTION LAW; NOTICE;  
THIRTY DAYS AFTER ELECTION SALOONS  
CLOSE.

Attorney General's Office,  
Columbus, Ohio, March 23, 1888.

*J. P. Lynde, Esq., Kensington, Ohio:*

DEAR SIR:—I returned from Washington City yesterday afternoon and found your letter of the 16th inst. on my table awaiting a reply.

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*Township Local Option Law; Duty of Trustees.*

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The statute requires that twenty days must intervene between the giving of the notice by the township trustees to the constable and the day of election. The second section of this act provides as follows: "If a majority of the votes cast at such election shall be 'against the sale,' then from and after thirty days from the day of the holding of said election it shall be unlawful for any person within the limits of such township and without the limits of such municipal corporation to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished." In other words, if the vote is against the continuance of the saloons, the saloon keepers can hold thirty days thereafter and no longer.

Yours respectfully,

DAVID K. WATSON,

Attorney General.

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TOWNSHIP LOCAL OPTION LAW; DUTY OF  
TRUSTEES.

Attorney General's Office,  
Columbus, Ohio, March 23, 1888.

*Jas. C. Redman, Esq., Maineville, Ohio:*

MY DEAR SIR:—I returned yesterday afternoon from Washington City where I had been for a week, and found your letter of the 21st inst. on my table.

The statute to which you refer provides as follows: "That whenever *one-fourth of the qualified electors of any township*, residing outside of any municipal incorporation shall petition the trustees therefor for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of the township, and without the limits of any such municipal incorporation, such trustees shall order a special election for the pur-



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*Township Trustees; Power of, to Compromise Suit. Boards of Education; Power of, to Compromise Suit.*

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pose, etc." It will thus be seen that the duties of the trustees are plain. They should grant the petition whenever one-fourth of the electors of the township sign a petition therefor.

Respectfully yours,

DAVID K. WATSON,

Attorney General.

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TOWNSHIP TRUSTEES; POWER OF, TO COMPROMISE SUIT. BOARDS OF EDUCATION; POWER OF, TO COMPROMISE SUIT.

Attorney General's Office,  
Columbus, Ohio, March 26, 1888.

*F. A. Kauffman, Esq., Prosecuting Attorney, Delaware, Ohio:*

MY DEAR SIR:—Since my return from Washington City, I have given your question of February 28th some considerable examination, which I could not possibly do at an earlier period. I am not ready to fully agree with your views that the power to bring a suit means the power to compromise, nor, do I think, it was the intention of the Legislature that such construction should be placed upon the statute. Township trustees and boards of education are, to a certain extent, trustees of public trusts and funds, and their power over such matters ought to be carefully guarded. At the same time, I think each of these boards is invested with a reasonable discretion, and I can understand why, in certain cases, it would be better, all things being fully considered, that they be allowed to make adjustments rather than proceed with the suit, but it is a power that should be cautiously guarded.

Upon this subject I would call your attention to a case in the 21st Ohio State Reports, p. 575, to wit: *Shanklin vs.*

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*Probate Judge; Compensation of. Township Trustees; to  
Make Improvements Along County Roads.*

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*Commissioners of Madison County.* I especially cite you to page 583, where the court comments upon a question similar to the one asked by you. From this case I think it may be reasonably inferred that the trustees of the township and the board of education would have the right to make such compromise as to them seems proper, in the exercise of a sound, judicious and fair discretion in the premises.

Regretting that absence from the city, together with an unusual press of public business has prevented an earlier reply, I am.

Yours respectfully,  
DAVID K. WATSON,  
Attorney General.

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PROBATE JUDGE; COMPENSATION OF. TOWNSHIP TRUSTEES; TO MAKE IMPROVEMENTS ALONG COUNTY ROADS.

Attorney General's Office,  
Columbus, Ohio, March 27, 1888.

*M. Slusser, Esq., Prosecuting Attorney, Wauseon, Ohio:*

DEAR SIR:—Replying to yours of the 20th inst., will say that I some time ago gave an opinion in a case similar to Judge Brown's, that the probate judge was entitled to a reasonable compensation for making the examination referred to by you, upon the ground that the compensation of the probate judge is made up by fees, and that he would be entitled to a reasonable compensation for such services. I think section 547 of the Revised Statutes covers this case.

In reference to your second question, namely: the meaning of the words "except upon improved and free turnpike roads," as found in Ohio Laws, Vol. 84, p. 173, under this section, I think the trustees of the township would be

*Township Local Option Law; Separate Tickets—Extradition; From Foreign Country.*

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required to make such improvements along "ordinary county roads which have been opened but not graded or otherwise specially improved."

Very respectfully,  
 DAVID K. WATSON,  
 Attorney General.

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TOWNSHIP LOCAL OPTION LAW; SEPARATE TICKETS.

Attorney General's Office,  
 Columbus, Ohio, March 27, 1888.

*McC. Heminger, Esq., Somerdale, Ohio:*

DEAR SIR:—Yours of the 26th just received. In my opinion there ought to be separate tickets on the local option question. The trustees must provide necessary ballot boxes and tally sheets.

I see no objection to the same judges and clerks acting at both elections.

Very respectfully yours,  
 DAVID K. WATSON,  
 Attorney General.

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EXTRADITION; FROM FOREIGN COUNTRY.

Attorney General's Office,  
 Columbus, Ohio, April, 2, 1888.

*P. M. Smith, Esq., Prosecuting Attorney, Wellsville, Ohio:*

MY DEAR SIR:—Replying to yours of March 28, will say that in "Spear on the Law of Extradition," beginning at

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*Sheriff's Fees; Removing Patient to Asylum; Costs, on Inquest of Lunacy.*

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page 228, you will find a full discussion of the subject mentioned in your letter. The demand must be made by the governor of this State upon the secretary of state at Washington. The President appoints an agent to go to the foreign country and bring home the prisoner. If you desire to prosecute the matter it will be necessary for you to come to Columbus with a copy of the indictment. If I can be of any further service to you let me know.

Very truly yours,  
 DAVID K. WATSON,  
 Attorney General.

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SHERIFF'S FEES; REMOVING PATIENT TO ASYLUM; COSTS, ON INQUEST OF LUNACY.

Attorney General's Office,  
 Columbus, Ohio, April 4, 1888.

*J. B. Worley, Esq., Prosecuting Attorney, Hillsboro, Ohio:*

DEAR SIR:—I regret that absence from the city has prevented me from sending you an opinion before this, in reply to yours of the 21st of March last.

After an examination of section 719 of the Revised Statutes, as amended, Vol. 83, page 36, Ohio Laws, I am of the opinion that a sheriff is entitled to ten cents for each mile for the entire distance traveled by the nearest route, both in going to and returning from the asylum, but is not entitled to any additional compensation. I am not able to understand why the sheriff would lose money when compelled to take more than one person at the same time. He is entitled to compensation for assistants and for boarding the patients while en route. I do not therefore see how his fees are affected by the number of patients conveyed by him at one time.

In reference to your second question, I think you are

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*Probate Courts; Jurisdiction of, in Certain Cases.*

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right in holding that where an inquest of lunacy is held and the person is discharged upon the hearing, the person filing the affidavit is responsible for the costs. I think this logically follows from section 702, Revised Statutes.

Very respectfully,

DAVID K. WATSON,

Attorney General.

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PROBATE COURTS; JURISDICTION OF, IN CERTAIN CASES.

Attorney General's Office,  
Columbus, Ohio, April 4, 1888.

*J. W. Hollingsworth, Esq., Prosecuting Attorney, St. Clairsville, Ohio:*

MY DEAR SIR:—I deeply regret that long absence from the city on official business has prevented me from replying to yours of March 7th before this.

Upon examining the question of jurisdiction of probate courts in certain cases, I find that section 6454, Revised Statutes, Vol. III, gives the Probate Court of your county jurisdiction in certain criminal cases concurrent with the Common Pleas Court. I am of the opinion that under this section they will have authority to try the cases referred to by you.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*Probate Judge; Compensation of, for Making Indexes.*

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PROBATE JUDGE; COMPENSATION OF, FOR  
MAKING INDEXES.

Attorney General's Office,  
Columbus, Ohio, April 7, 1888.

*J. Cahill Esq., Prosecuting Attorney, Bucyrus, Ohio:*

MY DEAR SIR:—I regret that long absence from the city on official business has prevented me from answering your letter of March 6th sooner.

The question submitted by you is by no means free from difficulty, but, after somewhat careful examination of the statutes, I am of the opinion that section 546, fairly construed, precludes the probate judge from receiving compensation for making the indexes you refer to. In that section (at the bottom of page 114) we find that for "issuing a marriage license and filing and recording the certificate of marriage, the judge is entitled to seventy-five cents." At the close of the same section we find this language: "but no other compensation for any indexing, or recording, or any other service whatever that is necessary to complete the records or reports required." Is it not clear that the indexing which the judge has made is necessary to complete the records required by the statute? If this be so, is it not equally clear, under the language just quoted from section 546, that no charge can be made for the same? It appears to me that the seventy-five cents allowed for issuing, filing and recording the certificate of marriage is all the judge can get for keeping the marriage record. If it was not for the closing clause of section 546, I would think that section 547 might govern this case and let the judge in, but if you take the position (and I think you are bound to do so), that the indexing is necessary to complete the marriage records, which the probate judge is required to keep, then you are controlled by the language of section 546, which in my opinion precludes the judge from recovering for the indexes. I think the whole question capable of solution under section 546 alone, and that

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*Intoxicating Liquors; Dow Law; Distribution of Fund  
Arising Outside Municipal Corporations.*

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section 547 does not refer to such services as are required for the completion and perfecting of the marriage records.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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INTOXICATING LIQUORS; DOW LAW; DISTRIBUTION OF FUND ARISING OUTSIDE MUNICIPAL CORPORATIONS.

Attorney General's Office,  
Columbus, Ohio, April 9, 1888.

*Walter G. Shotwell, Esq., Cadiz, Ohio:*

DEAR SIR:—I regret very much that continued absence from the city and an unusual press of business have prevented me from sending you an opinion before this in reply to yours of late date.

I understand from your letter that you wish a construction of section 9 of an act entitled "An act providing against the evils resulting from the traffic in intoxicating liquors," passed May 14, 1886 (Ohio Laws 83, page 157), commonly known as the Dow law, in so far as that act relates to the distribution of the fund which arises *outside* of municipal corporations.

I think the words "together with all other revenues resulting hereunder in said county" mean, that all revenue derived in a county, outside its municipal incorporations, by virtue of this act, shall go to the credit of the poor fund of such county. That is to say there are two funds realized in every county by virtue of this act which the law distributes. One arises from the tax paid in municipal corporations. The other from tax levied outside such corporations. The

*Intoxicating Liquors; Township Local Option Law; Zoar Society; Those Living Inside of No Right to Vote.*

whole of such latter tax goes to the credit of the poor fund of the county, in my opinion.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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INTOXICATING LIQUORS; TOWNSHIP LOCAL  
OPTON LAW; ZOAR SOCIETY; THOSE LIVING  
INSIDE OF NO RIGHT TO VOTE.

Attorney General's Office,  
Columbus, Ohio, April 12, 1888.

*L. Zimmerman, Mayor, Etc., Zoar, Ohio:*

DEAR SIR:—Yours of the 11th inst. duly received. The Dow law and the law recently passed commonly called "The Township Local Option Law" are separate and independent acts. In other words, there is no such thing, and there can not be such a thing as township local option under the Dow law. The act under which township local option can be voted upon was passed and went into effect on the third of last month. It provides that "Whenever one fourth of the qualified electors of any township residing outside of any municipal incorporation, etc."

Inasmuch as you are an incorporated village, you have the power to determine by ordinance whether or not the saloons shall continue in the village. This act gives to the people of the township the right to vote upon the same question directly. The law therefore does not permit persons who live inside a municipal incorporation to vote on township local option.

I am therefore of the opinion that those persons who



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*Judges and Clerks of Election; Compensation of, When City  
and Township Officers Elected at Same Time.*

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live inside the incorporated village would have no right to vote on the question of township local option.

Very respectfully,

DAVID K. WATSON,

Attorney General.

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JUDGES AND CLERKS OF ELECTION; COMPEN-  
SATION OF, WHEN CITY AND TOWNSHIP  
OFFICERS ELECTED AT SAME TIME.

Attorney General's Office,  
Columbus, Ohio, April 12, 1888.

*Henry Gregg, Esq., Prosecuting Attorney, Steubenville,  
Ohio:*

DEAR SIR:—I have been prevented from answering yours of the 3d inst. sooner. As I understand your letter, the facts are as follows: In your city an election was held for city and township officers, including a justice of the peace, at the same time and same place with one set of judges and clerks. The question is: What compensation are the judges and clerks entitled to, under section 2963, as amended in Vol. 84, page 217, Ohio Laws.

It is my opinion that they should each receive \$2.00 to be paid out of the county treasury.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*Probate Judge; Compensation of, for Making Indexes Omitted by His Predecessor.*

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PROBATE JUDGE; COMPENSATION OF, FOR  
MAKING INDEXES OMITTED BY HIS PRE-  
DECESSOR.

Attorney General's Office,  
Columbus, Ohio, April 14, 1888.

*J. H. Mackey, Esq., Prosecuting Attorney, Cambridge, Ohio:*

DEAR SIR:—I have been absent so much on official business, since receiving yours of the 13th of March, and also been so pressed with work, that I have not been able to send you an opinion on the question submitted by you before this.

The matter is by no means free from doubt, but after a somewhat careful examination of section 530 of the Revised Statutes, I am of the opinion that the probate judge has the right to charge for making indexes which had not been made by his predecessors. The language of the section referred to is: "The probate judge shall make, in the respective books of his office, the proper records, entries, and indexes, so omitted by his predecessor or predecessors in office."

The statute does not say the judge shall make the proper records and entries and indexes to the same which had been omitted, but it does say, the proper records, entries and indexes, so *omitted*, etc., thus treating the indexes which had been omitted, the same as it does the records and entries. In other words, I think section 530 requires the probate judge to do three things, namely, make the proper records, entries and indexes, which had been omitted by his predecessor or predecessors. This construction of section 530 is clearly sustained I think, by the provisions of section 531. That section says "For all services performed under the next preceding section, in making such records, entries, or *indexes*, etc." Section 531 provides for the payment of the judge who actually makes the records, entries or indexes. Section 532 provides for four things, namely: First, that the judge doing such omitted work shall make out and certify

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*Children's Home, Trustees of; Expenses.*

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to the county auditor a written statement of the same, the cause or causes in which such work has been done, the fees to which he is entitled for having done it, and that he has received no compensation for the same, or less than full compensation therefor. Second, that such fees have been paid to his predecessor, naming him. Third, the auditor shall then issue his warrant on the treasurer for such sum as he finds due the judge doing the work. Fourth, the prosecuting attorney shall then bring suit on the official bond of the judge receiving the fees, but who failed to perform the labor therefor. The statute clearly intends that the county shall not be the loser, but it also intends that the judge who performs the labor shall be paid for it, and that the judge who received the compensation without performing the labor shall be compelled to refund the same to the county.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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CHILDREN'S HOME, TRUSTEES OF; EXPENSES.

Attorney General's Office,  
Columbus, Ohio, April 13, 1888.

*George G. Jennings, Esq., Prosecuting Attorney, Woodsfield,  
Ohio:*

DEAR SIR:—Replying to yours of the 9th inst., in which you ask my opinion as to whether the trustees of a children's home are entitled to their necessary expenses in attending meetings of their board and transacting necessary business pertaining to the home, from the examination which I have been able to give to the matter, I am of the opinion that the trustees should be paid such expenses. There is no express provision of the statute to this effect, but I think it fairly im-

*Dow Law; Intoxicating Liquors; Refunding Order.*

plied from the language of section 930, which says the "Trustees shall not receive any *compensation* for their services."

It is hardly probable that the Legislature intended that the trustees, in addition to contributing their time and services for nothing, would pay their own expenses. I think the inference a fair one that the language of the statute implies they are to receive their actual expenses; which should be paid by an order given by the county commissioners upon the auditor for that amount out of the general fund set aside for the erection of the home.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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DOW LAW; INTOXICATING LIQUORS; REFUNDING ORDER.

Attorney General's Office,  
Columbus, Ohio, April, 14, 1888.

*Isaac S. Motter, Esq., Prosecuting Attorney, Lima, Ohio:*

DEAR SIR:—Replying to yours of April 2d, will say, as I understand your question, it is substantially this: "Where a person has paid, under the Dow law, a year's tax or a part thereof, then sells liquor at a public sale or fair in his own county, can such person, after such a sale, obtain from the county auditor a refunding order for a proportionate part of said assessment? Then suppose he goes to another sale and repeats the operation of selling, can he again get a refunding order, and in this way pay but a small pittance, though selling at different times at public places?"

In my opinion, when a person pays for the privilege of selling for a year and sells only a portion thereof, no matter where, he is entitled, if after the selling, he satisfies the

*Justice of the Peace; Unexpired Term; Tie Vote for.*

county auditor that he is going out of the business, to a refunding order proportioned in amount to the balance of the assessment year. But he must, in any event, pay \$25.00 no matter how short a time he sells. If he again sells at a fair, after having claimed to have gone out of the business he must again pay the \$25.00. In other words, no person will be allowed to engage in the business of dealing in intoxicating liquors, under the provisions of the act of May 14, 1886, it makes no difference for how short a time he is engaged in such business without paying \$25.00 for the privilege. I believe this is the fair interpretation of the spirit, if not the positive letter, of section 3 of that act. I do not believe the refunding order mentioned in the latter part of that section means that the minimum tax is to be reduced below \$25.00. My conclusion upon the question, as presented by your letter, is this: A person should not be permitted, upon paying \$25.00 only, to carry on the business of selling intoxicating liquors at a fair, then go out of the business for a time, then carry it on again at another fair, and so on under one payment of \$25.00. Each starting up of the business is a new business, and \$25.00 should be paid by the dealer as a tax each time he starts up.

Very respectfully yours,  
 DAVID K. WATSON,  
 Attorney General.

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JUSTICE OF THE PEACE; UNEXPIRED TERM; TIE  
 VOTE FOR.

Attorney General's Office,  
 Columbus, Ohio, April 23d, 1888.

*Hon. James S. Robinson, Secretary of State:*

DEAR SIR:—You recently requested of me a written opinion on certain questions arising from the following facts:

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*Justice of the Peace; Unexpired Term; Tie Vote for.*

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A justice of the peace in Perry Township, Allen County, this State, resigned his office. At the recent election, the electors of the township voted for a justice of the peace to fill the unexpired term. Two persons received an equal number of votes for the office. Thereupon the trustees of the township cast lots and in that way decided which of the two candidates should receive the commission.

Three questions arise from the above statements of facts: First—If a commission should issue at all, for what period of time should it be? Second—The candidates having received an equal number of votes, had the *township trustees* any authority to determine the matter by lot? Three—If not, what is the present status of the controversy? I am of the opinion that no election could be held to fill a vacancy. There is no vacancy in the office of a justice of the peace in the sense of there being an *unexpired term*. It is true that section 567 of the Revised Statutes provides that, "When a vacancy occurs in the office of justice of the peace in any township, the trustees shall give notice to the electors of such township to *fill such vacancy*;" But this refers, I think, to the vacancy of the office, and not to the *unexpired term* of said officer. The term of office of a justice of the peace is controlled by the constitution; section 9, article 4, which provides that, "A competent number of justices of the peace shall be elected, by the electors, in each township in the several counties. Their term of office shall be three years, and their powers and duties shall be regulated by law." If therefore you issue a commission, it should be for the term of three years. As to the second question, I think the township trustees acted without authority in undertaking to determine the matter by lot. There is nothing in the statutes authorizing them to do so. Section 569 of the statutes provides as follows: "All elections of justices of the peace shall be conducted in the same manner as is required in the election of members of the General Assembly, etc." Although this section does not expressly provide so, yet I assume from it that the manner of deciding a

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*Justice of the Peace; Unexpired Term; Tie Vote for.*

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tie vote, in the election of members of the General Assembly shall govern in case of a tie vote in the election for justice of the peace. Section 2993, among other things, provides as follows:

“\* \* \* \* if, at any election for senators or representatives to the General Assembly, there is no choice in any instance, on account of two or more persons having received the highest and equal number of votes, the clerk of the court issuing the certificate of election, and the county auditor, with two justices of the peace of the county, shall publicly determine by lot who of those having such equal number of votes shall be elected; such decision by lot shall be made in the office of the clerk aforesaid, at ten o'clock, a. m., on the eighth day after the election; and in such case the clerk shall not be required to forward the returns of the election until such decision by lot has been made.”

Here is a plain provision as to who shall determine by lot. The officers are named whose duty it is to do so, and I am of the opinion that such a power can not be exercised by other officers than those mentioned by the statute.

In this case the clerk of the court, the county auditor and two justices of the peace could have determined by lot which of those having an equal number of votes should be elected.

The most difficult question of all arises at this point. The statute provides that such decision of the clerk, auditor, and justices shall be at *ten o'clock a. m., on the eighth day* after the election. Are these provisions mandatory, or merely directory? If mandatory, it is now too late for the decision to be made, and a new election must be held. If directory only, there is still time for the officers designated to determine the question by lot.

The general doctrine is thus stated in Smith on Constitutional Construction, section 670:

“Where a statute directs a person to do a thing in a certain time, without any negative words re-

*Prosecuting Attorney; Legal Adviser of County Officers;  
County Commissioners, and Other County Officers May  
Employ Prosecutor Under Sections 845 and 2862, Re-  
vised Statutes.*

straining him from doing it afterwards, the naming of the time will be considered as directory to him, and not as a limitation of his authority."

There are other authorities to the same effect.

In 12 Connecticut, *Colt vs. Eves*, p. 243, it was held:

"Where a city charter required that a certain number of jurors should be chosen on the first Monday of *July*, and they were not chosen until the 8th of *August*, it was held, that this provision was directory, and a jury empaneled from the jurors so chosen, was a legal jury."

I am of the opinion that the officers designated in section 2993, to wit: the clerk, auditor and two justices of the peace, can still determine by lot who was elected, and that they should proceed at once to do so, giving both candidates due notice of the time and place thereof.

Respectfully yours,

DAVID K. WATSON,

Attorney General.

PROSECUTING ATTORNEY; LEGAL ADVISER OF  
COUNTY OFFICERS; COUNTY COMMISSION-  
ERS, AND OTHER COUNTY OFFICERS MAY  
EMPLOY PROSECUTOR UNDER SECTIONS  
845 AND 2862, REVISED STATUTES.

Attorney General's Office,  
Columbus, Ohio, April 24, 1888.

*Cyrus Huling, Esq., Prosecuting Attorney, Columbus, Ohio:*

DEAR SIR:—You recently submitted to me certain questions on which you desire my official opinion.



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*Prosecuting Attorney; Legal Adviser of County Officers; County Commissioners, and Other County Officers May Employ Prosecutor Under Sections 845 and 2862, R. S.*

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Your first question is as follows :

“Does section 1274, Revised Statutes, constitute the prosecuting attorney the attorney of county officers in cases in which they sue or are sued, or are the services therein provided for limited to advice and counsel?”

I am of the opinion that the section referred to makes the prosecuting attorney the legal adviser of the county commissioners and other county officers, *in all cases*, and consequently does not limit his services to written opinions or instructions.

Your second question is as follows :

“Are the county commissioners under section 845, Revised Statutes, and the county treasurer, auditor and other county officers, under section 2862, Revised Statutes, authorized to employ the prosecuting attorney to attend to litigation provided for in those sections, if they so desire?”

I think, under the provisions of the sections referred to, the officers mentioned therein are fully authorized to employ the prosecuting attorney. In fact the language in section 845 would almost seem to indicate that the commissioners must employ him.

Your third question is more difficult of solution. You ask :

“If those officers do employ the prosecuting attorney as their attorney in cases litigated under those sections, and he renders services as such attorney therein, is he entitled to be paid for those services as provided in those sections and as any other attorney would be paid, or must those fees be charged as an allowance, under section 1274, or are those services to be rendered gratuitously as part of his duty as prosecuting attorney?”

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*County Commissioners; No Power to Provide Sheriff With Barn.*

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I do not think the fees of the prosecuting attorney, in such cases, should be controlled by the provisions of section 1274, or that he is required to render such services gratuitously; but he should be paid according to the respective sections. Under section 845, his compensation, together with any counsel who might assist him, could not exceed \$250.00, while under section 2862 his compensation should be a "reasonable fee."

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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COUNTY COMMISSIONERS; NO POWER TO PROVIDE SHERIFF WITH BARN.

Attorney General's Office,  
Columbus, Ohio, April 25, 1888.

*J. C. Elliott, Esq., Prosecuting Attorney, Greenville, Ohio:*

DEAR SIR:—Absence from the city, together with an unusual press of business, has prevented me from answering yours of the 11th inst. before this.

I have carefully examined the statutes and do not find anything therein which requires the county commissioners to provide the sheriff with a barn in which to keep his horses.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Marriage License; Such as Comes Within Provisions of Section 7091, Revised Statutes. Fraud; Allegation of, Under Section 7223, Revised Statutes—Dow Law, Intoxicating Liquors; Druggist Not Liable to Pay Tax.*

MARRIAGE LICENSE; SUCH AS COMES WITHIN PROVISIONS OF SECTION 7091, REVISED STATUTES. FRAUD; ALLEGATION OF, UNDER SECTION 7223, REVISED STATUTES.

Attorney General's Office,  
Columbus, Ohio, April 25, 1888.

*S. D. McLaughlin, Esq., Prosecuting Attorney, Waverly, Ohio:*

DEAR SIR:—Replying to yours of late date, will say, I am of the opinion that a marriage license is such a license as comes within the provisions of section 7091 of the Revised Statutes.

Under section 7223 it is not necessary to allege intent to defraud any *particular* person or persons. A simple allegation of *intent to defraud is sufficient*. Whether you can show this on trial or not, is of course a matter I have nothing to do with.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

DOW LAW; INTOXICATING LIQUORS; DRUGGIST NOT LIABLE TO PAY TAX.

Attorney General's Office,  
Columbus, Ohio, April 25, 1888.

*C. W. Wagner, Esq., Mansfield, Ohio:*

DEAR SIR:—Yours of the 17th inst. duly received. In reply thereto will say I ought not really to answer you, as

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*County Commissioners; Jurisdiction Not Lost by Failure of Auditor, Under Section 4709. County Auditor; Duty to Lay Papers and Transcript Before County Commissioners, Under Section 4709.*

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my duties under the statute are plainly prescribed, and I am not able to keep up with my official work; but the frankness and sincerity of your letter impressed me, and I do not feel like declining to reply. I do not understand that a druggist must pay the Dow law tax simply because he is a druggist. He may carry on such a business without paying the tax. But if, in carrying on business, he brings himself within the provisions of the law, then he must pay. If a druggist sells liquor otherwise than upon a prescription issued in good faith by a reputable physician in active practice, or for purposes known to be exclusively mechanical, pharmaceutical or sacramental, then he is liable for the tax, but if he sells as above stated he is not liable. The fact that the purchaser presents a ticket such as you enclosed does not excuse the druggist for selling contrary to law. He (the druggist) is chargeable with knowledge of the law, and there are only two conditions under which he can sell without violating it, and these I have just stated. Very respectfully,

DAVID K. WATSON,  
Attorney General.

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COUNTY COMMISSIONERS; JURISDICTION NOT  
LOST BY FAILURE OF AUDITOR, UNDER  
SECTION 4709. COUNTY AUDITOR; DUTY TO  
LAY PAPERS AND TRANSCRIPT BEFORE  
COUNTY COMMISSIONERS, UNDER SECTION  
4709.

Attorney General's Office,  
Columbus, Ohio, April 30, 1888.

*D. R. Crissinger, Esq., Prosecuting Attorney, Marion, Ohio:*

DEAR SIR:—I very much regret that absence from the city and an unusual press of official business has prevented

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*County Commissioners; Jurisdiction not Lost by Failure of Auditor, under Section 4709; County Auditor; Duty to Lay Papers and Transcript Before County Commissioners, Under Section 4709.*

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me from sending you an opinion concerning the matter set forth in yours of the 14th inst. before this. I am of the opinion that, under the language of section 4709 of the Revised Statutes as applied to the facts stated in your letter, the failure of the auditor to "lay the papers and transcript before the county commissioners, at their next session," while in its nature mandatory, did not deprive the commissioners of jurisdiction over the matter. To hold that it did would put it in the power of the auditor to always defeat the jurisdiction of the commissioners in such cases.

Section 4960 is analogous to 4709, in this: It provides:

"Within ten days after the filing of an appeal bond, of the making of an entry for an appeal, as aforesaid, the county auditor shall transmit *to the probate court the original papers in the proceedings, etc.*"

Yet in the case of *Geddes vs. Rice*, 24 Ohio St. 60, it was held:

"The jurisdiction of the probate court acquired by such appeal, is not lost by the failure of the auditor to transmit the original papers and transcript of the proceedings before the commissioners within the time directed by the fourth section of said act."

It appears to me, from what I can learn of the case from your letter, the above decision determines the matter. In any event, I am of the opinion that the commissioners did not lose jurisdiction.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Schools; School District; Apportionment of Tax, for Construction of Building—Criminal Law; Costs in Case of Change of Venue.*

SCHOOLS; SCHOOL DISTRICT; APPORTIONMENT OF TAX, FOR CONSTRUCTION OF BUILDING.

Attorney General's Office,  
Columbus, Ohio, April 30, 1888.

*John M. Swartz, Esq., Prosecuting Attorney, Newark, Ohio:*

DEAR SIR:—Yours of the 24th inst., in which you ask for a construction of section 3961 of the Revised Statutes, is duly received. I have consulted with the state commissioners of schools concerning the above section, as applied to the facts set forth in your letter. After a careful examination of the statute, I am of the opinion that *upon the facts as stated by you*, Lima Township should pay one-third, Aetna Township two-thirds of the cost of the building. Aetna Village Special District does not cut any figure in the case.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

CRIMINAL LAW; COSTS IN CASE OF CHANGE OF VENUE.

Attorney General's Office,  
Columbus, Ohio, April 30, 1888.

*Marcus G. Evans, Esq., Prosecuting Attorney, Chillicothe, Ohio:*

MY DEAR SIR:—I deeply regret that absence from the city, together with an unusual press of official business, has prevented me from answering your inquiry of the 12th inst. sooner, in which you ask for a construction of section 7264 of the Revised Statutes as applied to a case in which there

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*Criminal Law; Costs in Case of Change of Venue.*

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has been a change of venue. Your question, as stated in your letter, is:

“If on a change of venue in a criminal case and a trial in the county to which the case is removed, when there is an acquittal, do the costs include jury fees, and is the sheriff and clerk entitled to their fees, or do they lose them, as they would in the county from which the case came, in the event of an acquittal?”

The case, as you say, is one of much difficulty and whichever way you may have decided it, you may console yourself that there is a decision to sustain you. In Kans., 312, the court held that costs on a change of venue should be paid. In 10 Neb., 304, the Kansas case was criticised and a contrary opinion held. On the whole, I am inclined to think there is no more law, and no stronger reason, for paying costs in the county when the trial is held than there would be in paying the same costs in the county where the crime was committed. The same rule, in my opinion, prevails in each county, and in case of an acquittal the officers of the county where the case is tried can not recover their costs. You do not state whether the case was tried at a term specially called for that purpose or not, nor do you state whether a special venire was issued for this case or not. If the regular jury for the term tried the case, I am of the opinion that the jury fee can not be included as costs; but if a special venire was issued and a special jury summoned for this particular case, the rule, I think, is different, and such costs, except the jury fee of \$6, could be recovered in case of conviction.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*County Commissioners; Expenses While on Official Business Within County; County Commissioners; Allowance by, to Officers Under 1309-1311, Revised Statutes.*

COUNTY COMMISSIONERS; EXPENSES WHILE ON OFFICIAL BUSINESS WITHIN COUNTY. COUNTY COMMISSIONERS; ALLOWANCE BY, TO OFFICERS UNDER 1309-1311, REVISED STATUTES.

Attorney General's Office,  
Columbus, Ohio, May 8, 1888.

*J. B. Worley, Esq., Prosecuting Attorney, Hillsboro, Ohio:*

DEAR SIR:—An usual amount of official business, litigated and otherwise, has come to this office in the last few weeks, in consequence of which I have been unable to answer your letter of the 27th of April.

I will answer your questions in the inverse order in which you ask them. In reference to the expenses of county commissioners, you do not say whether the expenses were incurred while on official business within or without your county, but I assume they were within the county. I am of the opinion, in such cases, that the commissioners are only entitled to \$3.00 per day and five cents per mile.

Your other question is more troublesome, and I am in much doubt to know just what you mean. Construing sections 1309 and 1311 together, it is apparent that the allowance made by the commissioners can only be in cases where the officer exercised reasonable care in taking security, and this must be evidenced by the certificate of the officer to the satisfaction of the commissioners, that the prosecuting witness was indigent, or unable to secure the costs, and that the officer exercised due care in taking such security. It does not appear from your letter whether the provisions of section 1311 have been observed.

I am of the opinion, on the whole, from the information which I have, that the commissioners have no discretion to make such allowance.

Very respectfully yours,  
DAVID K. WATSON,

Attorney General.



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*Monumental Commissioner Holding Other Office.*

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MONUMENTAL COMMISSIONER HOLDING  
OTHER OFFICE.

Attorney General's Office,  
Columbus, Ohio, May 11, 1888.

*Hon. James Barrett, Cleveland, Ohio:*

DEAR SIR:—Absence from the city and other unavoidable causes prevented me from replying to yours of the 5th inst. sooner. It will not be necessary to discuss the abstract question whether the position of "Monumental Commissioner" makes you an officer within the meaning of the act of 1886. The recent act of the General Assembly, creating the monumental commission of Cuyahoga County, provides that said commission "shall consist of twelve persons, who shall be members of the present monumental committee of the Cuyahoga County Soldiers' and Sailors' Union." It will thus be seen that the Legislature designated the persons who should constitute the monumental commission. It can hardly be presumed that the Legislature intended, by this express provision, to create an office that would conflict with some other office, or that they regarded an appointment on the monumental commission as being an office as would so conflict. I am at present inclined to the opinion that you can serve in both capacities.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*Canal Commission; Expenses and Salaries, How Paid.*

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## CANAL COMMISSION; EXPENSES AND SALARIES; HOW PAID.

Attorney General's Office,  
Columbus, Ohio, May 14, 1888.

*Members of the Canal Commission:*

GENTLEMEN:—You recently requested me to furnish you an official opinion construing the act of March 28, 1888, in reference to the payment of the general expenses of your board, including your salaries.

The language of the act, relating to this subject, is as follows: "Said commissioners shall each receive the sum of twelve hundred dollars per annum, and their necessary expenses while in the prosecution of their duties, to be paid out of the canal fund, said salary to be paid in quarterly installments; and all accounts for expenses shall be evidenced by (a) detailed statement duly verified by oath, and approved by the auditor of state; and the necessary amount to meet such salary and all other expense of the commission is hereby appropriated out of said canal fund of the State."

It has been suggested that there is no specific canal fund as such, and hence the difficulty in determining from what fund said expenses are to be paid. It is apparent from the whole act, that the Legislature intended, in good faith, to provide means with which all the legitimate expenses of the commissioners should be paid, and while the language used is not as clear as it might have been, it is very evident from the language of the act, that the intention of the Legislature was to pay the expenses of the commission out of the money derived from the canals, although such money had passed to, and become a part of, the general revenue fund of the State. No rule of statutory construction is better established than that the intention of the Legislature is to govern in the construction of a statute. It is apparent that when the Legislature said "the necessary amount to meet such salary and all other expenses of the commission is hereby appropriated out

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*Canal Commission; Expenses and Salaries, How Paid.*

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of said canal fund of the State," the manifest intention was to pay such expenses out of the money in the general revenue fund, which came from the canals; and although such fund may have been improperly designated, I think it clear, what fund was meant, and that a failure to give a more perfect description of it should not defeat the plain intention of the Legislature.

The case of *Ohio ex rel, vs. Oglevee*, 37 Ohio State, page 1, is quite analogous to the one here. It seems an appropriation amounting to \$20,000 had been made for repairing the buildings of the Ohio University. The state auditor declined to draw his warrant, and mandamus was resorted to, to compel him to do so. It was agreed, among other reasons, that there did not exist in the state treasury, at the date of the act, a fund to which said sum so appropriated can be added. The court, per McIlvaine, J., said: "This objection does not interfere with the reasonable and proper execution of the statute. If the General Assembly was mistaken concerning the state of the funds in the treasury, the intention to appropriate the sum named in the statute and for the purpose named is nevertheless clear."

It was also objected "that the statute in question did not make an appropriation of money in the State treasury from which a payment would be authorized." But the court said, "Although very loosely drawn, we think there can be no doubt but that the Legislature intended to set apart and appropriate, of the money in the treasury, the sum of \$20,000 for the purpose of repairing the buildings of the university."

I see no reason why this case does not furnish a comparatively safe rule to follow, and I am of the opinion that the state auditor can safely draw his warrant for the amount of the expenses created by the commissioners under the statute, payable out of the general revenue fund.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Schools; Ten and Four Year Certificates; Teachers in;  
Teachers; Qualification of.*

SCHOOLS; TEN AND FOUR YEAR CERTIFICATES;  
TEACHERS IN; TEACHERS; QUALIFICATION  
OF.

Attorney General's Office,  
Columbus, Ohio, May 14, 1888.

*Hon. Eli T. Tappan, Columbus, Ohio:*

DEAR SIR:—You recently submitted to me the following communication, and requested my opinion upon the questions therein contained.

“Office of the State Commissioner of Common Schools,

“Columbus, Ohio, April 26, 1888.

“DEAR SIR:—By the act of April 16, 1888, section 4066 is amended by omitting all that refers to certificates for ten years, leaving power to issue only life certificates. Sections 4073 and 4031 are amended by omitting all reference to four year and ten year certificates, leaving power to issue only certificates for one, two and three years, and in certain cases five years. The act contains no saving clause. Are any of these four year and ten year certificates now valid?

“Section 4074 is amended by adding this proviso: ‘provided that after January 1, 1889, no person shall be employed as a teacher in any common school who has not obtained from such board of examiners a certificate that he is qualified to teach physiology and hygiene.’

“An act passed a day or two after the above, has the following: Section 2. ‘No certificate shall be granted to any person on or after the first day of January, 1889, to teach in the common schools, or in any educational institution supported as aforesaid, who does not pass a satisfactory examination as to the nature of alcoholic drinks and narcotics, and their effects upon the human system.’

“Will certificates issued in March, 1888, be valid in February, 1889? They contain nothing of

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*Schools; Ten and Four Year Certificates; Teachers in;  
Teachers; Qualification of.*

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physiology. Must every common school teacher in Ohio be examined again before January 1, 1889?

"Yours very respectfully,

"ELI T. TAPPAN,

State Comm'r.

"Hon. D. K. Watson, Attorney General."

In reference to your first question, namely, whether any of the four year and ten year certificates are now valid, I have this to say: As to time I think they are. That is, as to the time which they have to run before expiring, I think they are good. But I do not think the Legislature, when it authorized the examiners to issue these certificates, thereby lost control of the subject so far as to preclude it from subsequently adding new branches to those already prescribed as proper subjects on which applicants to teach should be examined. The Legislature is presumed to act for the public good, and if in its judgment it is proper that new and additional branches of learning be taught from time to time in our public schools, I am of the opinion that they should not be excluded from certain schools because the teachers thereof hold long time certificates.

Your second question refers to section 2 of the act of April 11, 1888. This section provides that *no certificate* shall be granted on or after January 1, 1890, to teach in the common schools or in any educational institution supported as aforesaid, who does not pass a satisfactory examination as to the nature of alcoholic drinks and narcotics and their effects upon the human system.

It will be observed that the language of this section is different from that of section 4047 of the act of April 16, 1888. That section provides: "No person shall be employed as a *teacher* in any common school, etc.," while the section now under consideration says: "No *certificate* shall be granted to any person, etc." The language of the act is plain and unambiguous. It does not make an examination as to the nature of alcoholic drinks and narcotics and their

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*"The Cosmopolitan Charitable and Protective Association of U. S. A. No. 1"; Incorporation of. Corporations; "To Resist the Passing of Fanatical Sunday Laws by all Legal Means." Corporations; Legal Fee for Incorporating, Secretary of State; Fees of.*

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effects upon the human system a prerequisite to teaching after January 1, 1890, but makes it such prerequisite to issuing a certificate to teach after that time. That is to say, persons who hold certificates to teach on the first day of January, 1890, will not be required to pass the examination required in this section; but those who do not hold such certificate at the above date *will be* required to pass such examination.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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“THE COSMOPOLITAN CHARITABLE AND PROTECTIVE ASSOCIATION OF U. S. A. No. 1”; INCORPORATION OF. CORPORATIONS; “TO RESIST THE PASSING OF FANATICAL SUNDAY LAWS BY ALL LEGAL MEANS.” CORPORATIONS; LEGAL FEE FOR INCORPORATING, SECRETARY OF STATE; FEES OF.

Attorney General's Office,  
Columbus, Ohio, May 16, 1888.

*Hon. James S. Robinson, Secretary of State:*

DEAR SIR:—On the 8th inst. you submitted to me the articles of incorporation of “The Cosmopolitan Charitable and Protective Association of U. S. A. No. 1,” and requested an official opinion as to whether the *purposes* set forth in said articles were lawful. I have carefully examined the articles of incorporation and the purposes therein set forth. Among other purposes is the following: “To resist the passing of fanatical Sunday laws by all legal means.”

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*"The Cosmopolitan Charitable and Protective Association of U. S. A. No. 1"; Incorporation of. Corporations; "To Resist the Passing of Fanatical Sunday Laws by all Legal Means." Corporations; Legal Fee for Incorporating, Secretary of State; Fees of.*

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It is well established that companies can not be incorporated to resist the *enforcement* of the laws, and were it not for the limitation placed upon the above purpose by the word *legal*, I should advise you to decline to file these articles. If these articles were shorn of all purposes of their incorporation, except the one above quoted, the application would be to incorporate for the purpose of resisting the passing of fanatical Sunday laws by all *legal* means. This limitation, it seems to me, brings it within the application of section 3235, of the Revised Statutes of Ohio, which provides: "Corporations must be formed in the manner provided in this chapter for any purpose for which individuals may *lawfully* associate themselves, except, etc."

I suppose individuals might associate themselves together to *lawfully* resist the passing of any law; for as long as they acted lawfully, that is, in a lawful manner, they could not be said to be acting unlawfully, or doing an unlawful act. The term *legal* means lawful. When therefore the purpose of these incorporators is to resist the passing of certain laws by all *legal* means, they mean by all *lawful* means, and I think bring themselves within the fair construction of the statute, and consequently you should not refuse to file their certificate on this ground.

Your other question, viz: "What is the legal fee for incorporating this corporation?" has given me much trouble, and I am not sure I have reached the correct answer to it. I think, however, after a very careful examination of the act of May 15, 1886, Ohio Laws, Vol. 83, p. 165, it is controlled by the words "or such companies as are not organized for profit," and consequently a fee of \$2.00 should be charged.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*Road Tax; When Paid; Counsel Fees in Supreme Court, Assisting Prosecuting Attorney. Schools; School Directors; Contract With Teacher.*

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ROAD TAX; WHEN PAID; COUNSEL FEES IN SUPREME COURT, ASSISTING PROSECUTING ATTORNEY. SCHOOLS; SCHOOL DIRECTORS; CONTRACT WITH TEACHER.

Attorney General's Office,  
Columbus, Ohio, May 18, 1888.

*George G. Jennings, Esq., Prosecuting Attorney, Woodfield, Ohio:*

DEAR SIR:—Absence from the city, together with an unusual amount of litigation and other business in this office, has prevented me from answering your recent letters at an earlier date. I am unable to send you an official opinion on the first question submitted by you in your first letter; because you do not state therein whether your county comes within the exception mentioned on page 146, 85th Ohio Laws, or not.

In reference to your second question, I am of the opinion that all the road tax should be paid in December, irrespective of the June and December payment of the general tax.

Respecting the third question, which refers to the claim of W. E. Mallory (which I herewith return), the whole matter seems to be discretionary with the commissioners. If they refuse to allow Mr. Mallory more than \$100.00 I do not see how he is to obtain additional compensation.

Concerning the question submitted in your last letter, whether two school directors, against the consent of the third, can make a valid and binding contract with a school teacher, the term of whose school does not begin until the term of office of one of the directors expires, I am of the opinion they can. This is upon the presumption that due notice has been given to all the directors. The statute makes two directors a quorum for the transaction of business; and I am



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*Intoxicating Liquors; Dow Law; Agency for Brewers.  
Wholesale Druggists Should Pay Tax.*

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inclined to think that because the term of one of the directors expires before the term of school begins makes no difference.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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INTOXICATING LIQUORS; DOW LAW; AGENCY  
FOR BREWERS: WHOLESALE DRUGGISTS  
SHOULD PAY TAX.

Attorney General's Office,  
Columbus, Ohio, May 19, 1888.

*Henry Gregg, Esq., Prosecuting Attorney, Steubenville,  
Ohio:*

DEAR SIR:—An unusual amount of business in this office has delayed my opinion on the questions submitted by yours of the 4th inst. until this date.

In reference to your first question, namely: "Where firms which paid the Dow law tax are agents for foreign brewers, and sell and deliver their principal's beer to customers, and report their sales, money, etc., to their principals," I am of the opinion they are not required to pay an additional tax. This opinion is given with some hesitation, but I think on the whole is correct. Should I change my mind on the subject, will write you again concerning it.

As to your second question, namely: "Whether wholesale druggists who sell liquors strictly to the drug trade should pay the tax," my opinion is, they should. I think the decision in 44 Ohio State, page 661, includes them. That decision says that wholesale dealers in intoxicating liquors, who are not manufacturers, are liable to the tax. I am unable to see how wholesale druggists can escape the payment. There is nothing in the opinion which I can dis-

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*Groundhogs; Reward for Killing.*

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cover that limits the definition of "wholesale dealers" to one engaged *exclusively* in wholesale liquor business. My opinion is that all wholesale dealers in liquor are subject to this tax.

I will state, however, that I am reliably informed this question was recently before the Court of Common Pleas of Highland County, Ohio, that Judge Huggins held as I do; but the Circuit Court reversed him and the case is now on its way to the Supreme Court. I have learned this since coming to my conclusion.

I believe the Supreme Court will affirm the Common Pleas.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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GROUNDHOGS; REWARD FOR KILLING.

Attorney General's Office,  
Columbus, Ohio, May 19, 1888.

*Charles McConnell, Esq., Tiro, Ohio:*

DEAR SIR:—Replying to yours of the 19th inst., will say the act to which you refer provides that any one killing a groundhog and presenting its scalp to the township clerk where such animal was killed, shall be entitled to a certificate to the amount of twenty cents for each scalp so produced. The act makes it the duty of the clerk to destroy the scalp. He shall then issue his certificate to the person claiming the reward on the township treasurer for twenty cents. The treasurer shall pay the same out of the general fund of the township. It is not necessary for the trustees to sign the order.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*Intoxicating Liquors; Township Local Option Law; Where  
Election Held; Two Precincts.*

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INTOXICATING LIQUORS; TOWNSHIP LOCAL  
OPTION LAW; WHERE ELECTION HELD;  
TWO PRECINCTS.

Attorney General's Office,  
Columbus, Ohio, May 19, 1888.

*J. W. Hollingsworth, Esq., Prosecuting Attorney, St. Clairs-  
ville, Ohio:*

DEAR SIR:—Yours received, in which you ask the following question: "Where, under the Owens Township Local Option Law, a vote is to be taken in a township with two voting precincts, one of which is composed of parts of two townships, where shall the election be held, and who are qualified electors?"

The first section of the act to which you refer provides that "such special election shall be held at the usual place or places for holding township elections."

I am of the opinion that the elections, in the case put by you, should be held in the two precincts where the voting has usually occurred, and that no one should vote at such election who is not an elector of the township holding the election.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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*Probate Judge; Fees of, in Certain Criminal Cases.*

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## PROBATE JUDGE; FEES OF, IN CERTAIN CRIMINAL CASES.

Attorney General's Office,  
Columbus, Ohio, May 21, 1888.

*W. H. Barnhard, Esq., Prosecuting Attorney, Mt. Gilead, Ohio:*

DEAR SIR:—It has been impossible for me to answer yours of May 8th sooner. I have carefully looked into the matter submitted by you in your communication of that date, and am of the opinion that for services rendered under sections 7165 to 7169, inclusive, of the Revised Statutes of Ohio, the probate judge is not entitled to fees; but such services are controlled by section 6470 of the Revised Statutes which provides that the county commissioners may allow compensation to probate judges in criminal cases. It is true, that section 546 specifies fees which probate judges shall receive, and the following section, to wit, 547, provides: "for any other services not herein provided for, the same fees shall be allowed as for similar services in the court of common pleas." This refers, I think, to costs in civil matters. The next section, to wit, 548, would seem to indicate this beyond much controversy: for it provides for costs in *criminal* proceedings, and says what shall be done with them; thus carrying out the distinction which I think is clearly recognized in the statutes between costs in civil and criminal matters before the probate court. Gilmore, in his work on probate practice, on this subject, simply refers to section 6470, without commenting thereon; thus showing that in his opinion that section controls the allowance to be made to probate judges in criminal cases. I think you were clearly right in your opinion to the judge.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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*Intoxicating Liquors; Cider Under Dow Law—Canal Commission; Expenses and Salaries, How Paid.*

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INTOXICATING LIQUORS; CIDER UNDER DOW  
LAW.

Attorney General's Office,  
Columbus, Ohio, May 20, 1888.

*Disney Rogers, Esq., Prosecuting Attorney, Youngstown,  
Ohio:*

DEAR SIR:—Yours of the 18th inst. received. It has been repeatedly held in this office that when cider becomes so fermented, or so hard, as to intoxicate, it is included within the term "intoxicating liquors," as mentioned in the Dow law. I am not aware that the matter has ever been adjudicated in the courts. I have the full text of the Cleveland bank case, which I obtained from the clerk of the Supreme Court at Washington, by paying him \$3.00 for it.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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CANAL COMMISSION; EXPENSES AND SALARIES,  
HOW PAID.

Attorney General's Office,  
Columbus, Ohio, May 24, 1888.

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

DEAR SIR:—Your communication of the 23d inst. in which you ask my opinion relative to the payment of the expenses of one of the canal commissioners "out of the funds appropriated for the payment of the expenses of said commission," and in which you state that you "have no such fund on which you can issue a warrant, as at present advised," duly received and considered.

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*Canal Commission; Expenses and Salaries, How Paid.*

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On the 14th inst. I submitted to the canal commissioners at their request a written opinion upon substantially this question, in which I held that while the language of the act creating the canal commission was not as clear and plain as it might have been, nevertheless it was evidently the intention of the Legislature that the expenses of the commission should be paid out of the money in the general revenue fund which came from the canals; and although such fund may have been improperly designated in the act, that should not be allowed to defeat the intention of the legislature; and that inasmuch as the canal fund had been merged in and become a part of, the general revenue fund, it would be proper for the auditor of state to draw his warrant on the general revenue fund.

That opinion was based largely upon the decision of the Supreme Court of this State, in the case of *Ohio ex rel. vs. Oglevee*, 37 Ohio St., p. 1, to which your attention is respectfully called.

I see no reason for coming to a different conclusion upon the matter submitted by you, and notwithstanding the provisions of the appropriation bill passed April 16, 1888, to which you call my attention, I am of the opinion that you can safely pay the expenses of the canal commission out of the general revenue fund.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Adjutant General; Supplies for State Militia; Ohio Penitentiary—Inspector of Workshops and Factories; Expenses of, Deficiency Fund; Appropriation Necessary.*

ADJUTANT GENERAL; SUPPLIES FOR STATE MILITIA; OHIO PENITENTIARY.

Attorney General's Office,  
Columbus, Ohio, May 24, 1888.

*Hon H. A. Axline, Adjutant General, Columbus, Ohio:*

DEAR SIR:—Yours of the 22d inst. duly received. Replying thereto will say, I am of the opinion that the spirit of the act of February 27, 1885, Ohio Laws, Vol. 82, p. 61, relative to the purchase of blankets from the authorities at the Ohio Penitentiary, is broad enough to include your department, and that you should buy your blankets from that institution, provided, of course, you get as good an article, for the same money, as you can elsewhere.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

INSPECTOR OF WORKSHOPS AND FACTORIES;  
EXPENSES OF; DEFICIENCY FUND; APPROPRIATION NECESSARY.

Attorney General's Office,  
Columbus, Ohio, May 25, 1888.

*Hon. Henry Dorn, Inspector of Workshops and Factories, Columbus, Ohio:*

DEAR SIR:—Yours of recent date received, in which you ask me for an official opinion relative to your right to draw your traveling expenses in excess of the amount of \$200 which was appropriated by the partial appropriation act of

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*Inspector of Workshops and Factories; Expenses of, Deficiency Fund; Appropriation Necessary.*

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February 2, 1888. Replying to your inquiry will say I have carefully examined the statute in reference thereto.

The act of April 29, 1885, 82 Ohio Laws, pages 178-79-80-81, provides that there shall be appropriated for traveling expenses for each inspector the sum of \$500 per annum, and you undoubtedly would have been entitled to that sum for the purpose specified, had not the General Assembly omitted to make an appropriation therefor. See general appropriation bill, p. 310, late laws.

Article 2, section 22, of the constitution provides as follows:

“No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law, etc.”

In the case of the *State of Ohio vs. Medbery et al.*, 7 Ohio St., 522, in delivering the opinion of the court, Judge Swan, said as follows on page 529:

“The sole power of making appropriations of public revenue is vested in the General Assembly. It is the setting apart and appropriating by law a specific amount of the revenue for the payment of liabilities which may accrue or have accrued. No claim against the State can be paid, no matter how just or how long it may have remained overdue, unless there has been a specific appropriation made by law to meet it. Article 2, section 22.

“By virtue of this power of appropriation, the General Assembly exercised their discretion in determining, not only what claims against or debts of the State shall be paid, but the amount of expenses which may be incurred. If they authorize expenses or debts to be incurred, without an appropriation to pay them, and the expenses are incurred, those expenses created a debt against the State, and it must remain such, until payment under an appropriation afterward made.”



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*Prosecuting Attorney; May be Employed to Collect Back Taxes.*

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In view of the fact that no appropriation was made for your expenses except the partial appropriation above referred to, I do not see how you can draw money for your traveling expenses beyond that amount.

Should you choose to make a deficiency fund, trusting to the Legislature to reimburse you at their next session, you could probably do so with safety, and rely upon that portion of the above decision which says: "If they (referring to the Legislature) authorize expenses or debts to be incurred without an appropriation to pay them, and expenses are incurred, those expenses create a debt against the State, and it must remain such, until payment under an appropriation afterward made." But this lies wholly in your own discretion, and I have no suggestions to make concerning it.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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PROSECUTING ATTORNEY; MAY BE EMPLOYED  
TO COLLECT BACK TAXES.

Attorney General's Office.

Columbus, Ohio, May 25, 1888.

*J. H. Mackey, Esq., Cambridge, Ohio:*

DEAR SIR:—Yours of the 14th inst. duly received. I have been unable to answer it before today. You will have to apply to your county auditor for a copy of the law you refer to, as I understand from the secretary of state he has sent one to him, and has no more copies.

I am of the opinion that the commissioners, together with the auditor and treasurer, could employ you to do this work if they saw fit. Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*Assessor; Compensation of—Intoxicating Liquors; Dow Law; Section 8; Agencies.*

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ASSESSOR; COMPENSATION OF.

Attorney General's Office.  
Columbus, Ohio, May 25, 1888.

*George G. Jennings, Esq., Prosecuting Attorney, Woodsfield, Ohio:*

DEAR SIR:—Yours of the 24th inst. received. The matter of paying the assessor is purely in the discretion of the county auditor. If he is satisfied that the work has been fully and accurately done, he should issue his warrant on the treasurer. If not, he should not do so.

If you have such incompetent assessors, I think the penalty ought to be enforced.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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INTOXICATING LIQUORS; DOW LAW; SECTION 8; Agencies.

Attorney General's Office.  
Columbus, Ohio, May 31, 1888.

*John P. Bailey, Esq., Prosecuting Attorney, Ottawa, Ohio:*

DEAR SIR:—Yours of the 25th inst. received. Whether the establishment you refer to is liable to pay the Dow law tax or not depends entirely upon the facts of the case.

I am of the opinion that under section 8 of the Dow law, as it now stands, a person or manufacturing establishment, having a mere *distributing* agency, from which no sales take place of any character, either wholesale or retail, is not liable to the tax.

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*"New Buildings" Under Section 2753, Revised Statutes.*

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From what I gather of the facts in this case from your letter, I am of the opinion that no tax can be collected.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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"NEW BUILDINGS" UNDER SECTION 2753, REVISED STATUTES.

Attorney General's Office.  
Columbus, Ohio, May 31, 1888.

*Thos. H. Gillmer, Esq., Prosecuting Attorney, Warren, Ohio:*

DEAR SIR:—Yours of the 23d inst. duly received. In regard to the construction of the term "new buildings" or other structures, as used in section 2753 of the Revised Statutes, I am of the opinion that an old building remodeled to the extent of \$100 in value, comes within this section. That is to say, where a party owns a building and adds to it another story, or a wing, or otherwise adds to the building, I think the building comes within the requirements of the statute, and the assessor should make return thereof. The same may be true of a dwelling house, the value of which has been enhanced by the addition of a porch which exceeds the amount mentioned. I do not think that the mere painting or re-painting of a building is such an improvement as comes within the statute or that the assessor should return. In the first case, some new structure is added to one already existing. In the other case, nothing is added in the way of new structure. The painting is a mere means of preserving that which is already in existence. In assessing the value of such new structures, the assessor or board should deduct therefrom the value of any old structure which may have been destroyed to make room for the new one.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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*County Fish Wardens; Fees of—Boys' Industrial School;  
Superintendent; Term of Office.*

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COUNTY FISH WARDENS; FEES OF.

Attorney General's Office.  
Columbus, Ohio, June 2, 1888.

*F. R. Fronizer, Esq., Prosecuting Attorney, Fremont, Ohio:*

DEAR SIR:—Replying to yours of the 28th of May, in which you ask my opinion concerning the fees of county fish wardens as set out in the act of May, 10, 1888, amending section 409 of the Revised Statutes, I have this to say: It is the duty of the county warden to arrest wherever found all violators of the fish and game laws. Nothing is said as to who shall make the complaint, and who shall make the arrest, except as above stated. I take it that it is like any other violation of the law. I think it a fair inference, however, from the language of the statute, that the warden should file an affidavit; that he may be deputized even to serve the warrant. For all work which the warden does he is to receive the same fees which a sheriff would receive for performing similar services.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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BOYS' INDUSTRIAL SCHOOL; SUPERINTENDENT;  
TERM OF OFFICE.

Attorney General's Office.  
Columbus, Ohio, June 7, 1888.

*Charles Douglas, Esq., Superintendent, Etc., Lancaster,  
Ohio:*

DEAR SIR:—I have not been able before this to send you an opinion on the matter submitted in yours of May 25th.

*Boys' Industrial School; Superintendent; Term of Office.*

Among the minutes of the board of trustees of the Boys' Industrial School, I note the following :

"November 18, 1886.

*"To the Board of Trustees of the Boys' Industrial School:*

"GENTLEMEN :—I herewith tender my resignation as Superintendent of the Boys' Industrial School of Ohio, to take effect January 1st, 1887, or as soon thereafter as my successor is elected and qualified.

"Very respectfully,

"J. C. HITE, Supt.

"After balloting for several candidates, Mr. Charles Douglass, of Toledo, was unanimously elected superintendent by the three members present, to take effect January 1st, 1887."

The question submitted by you, and on which you desire my official opinion, is whether you were appointed for a period of four years from January 1, 1887, or whether you were simply appointed for the unexpired term of your predecessor.

It is a well settled principle of law that the tenure by which an office is held depends either upon the provisions of the constitution, or upon the provisions of the act creating the office.

There is nothing in the constitution of this State decisive of this subject, neither were you appointed to your office by virtue of any constitutional provision.

It is purely a statutory regulation, and the provisions of the statute must determine the matter. Section 638 of the Revised Statutes, as amended 77 Ohio Laws, p. 204, provides as follows: "The boards of trustees shall appoint superintendents to the institutions under their charge respectively, who shall hold the office for four years, unless sooner removed by the trustees, and until their successors in office are appointed." My opinion is, that under this section, the trustees have no power to appoint for a less term than four

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*Intoxicating Liquors; Dow Law; Section 8; Agencies.*

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years. The time which the superintendent is to occupy the office is fixed by statute. There is no provision by which the trustees would be authorized in making an appointment for any less or shorter time, and I am unable to see how the trustees could do so.

I am therefore of the opinion that you were appointed for the term of four years, to take effect January 1, 1887.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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INTOXICATING LIQUORS; DOW LAW; SECTION  
8; AGENCIES.

Attorney General's Office,  
Columbus, Ohio, June 9, 1888.

*Samuel C. Jones, Esq., Prosecuting Attorney, Troy, Ohio:*

DEAR SIR:—Yours of the 7th inst. received, in which you ask for an official opinion from me upon the following statement of facts: "The Jung Brewing Company of Cincinnati have an agent stationed in this county. They send to him (by the carload) beer as their agent, and he sells it out to the dealers, in quantities of one gallon or more." I have heretofore held that where brewing companies have storehouses, in counties other than the one in which they manufacture, from which storehouses they simply distributed beer to their customers, without making sales of any character whatever, but which were distributing agencies, they were not required to pay the tax in the counties where such agencies existed; but the case you state is different. According to your statement, they *sell* it in quantities of one gallon or more at the place of the agency. I am of the opinion that in such cases, they are required to pay the \$250 tax in each county where such an agency exists as described in your let-

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*County Commissioners; May Allow Fees to Justices; Justice of the Peace; Fees of.*

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ter. *Such* an agency is not exempt from this payment under the 8th section of the Dow law as amended, and as the law now stands.

Very respectfully yours,  
 DAVID K. WATSON,  
 Attorney General.

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COUNTY COMMISSIONERS; MAY ALLOW FEES  
 TO JUSTICES; JUSTICE OF THE PEACE; FEES  
 OF.

Attorney General's Office.  
 Columbus, Ohio, June 11, 1888.

*D. E. Jones, Esq., Prosecuting Attorney, Gallipolis, Ohio:*

DEAR SIR:—In yours of the 4th inst. you submit to me the following questions: "A justice takes security for costs in a misdemeanor case and binds over. The grand jury fails to indict. Can the commissioners allow the cost bill of the justice of the peace? Is the security for costs liable when the justice of the peace binds over the accused?"

Section 1309, Revised Statutes of this State, provides for two cases in which the commissioners may make allowance to certain officers (justices included) in lieu of fees. First—In cases of felony wherein the State fails. Second—in misdemeanors wherein the defendant proves insolvent. Said section further provides the amount which shall be paid said officers. Section 1311 provides substantially that when the county commissioners are satisfied that such officer exercised reasonable care in taking security for costs, they are to allow, in lieu of fees, the amount provided for in section 1309, to wit: One hundred dollars. This includes misdemeanors where the defendant proves insolvent. Concerning your question under section 7146 Revised Statutes, I am of the opinion that the words "on the complaint of the

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*Taxation; School Property; Colleges; Public Charity;  
Credits Not Taxable.*

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party injured" mean the particular person on whom the injury has been inflicted.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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TAXATION; SCHOOL PROPERTY; COLLEGES;  
PUBLIC CHARITY; CREDITS NOT TAXABLE.

Attorney General's Office.  
Columbus, Ohio, June 11, 1888.

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

DEAR SIR:—You recently asked me for an official opinion on the following statement of facts: "A college has endowed professorships, and the money received is invested by its treasurer in notes, mortgages, etc. (credits), drawing interest. The income is used to pay salaries of professors, etc. It also charges fixed rates of tuition for students, same as other colleges, and the institution is open to the public on those terms. Question: Are its credits taxable? Or is any of its personal property?"

Among other property exempted from taxation in this State by the provisions of section 2732, Revised Statutes, Vo. 1, is that mentioned in the sixth sub-division of said section, which provides as follows: "All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain and belonging exclusively to such institutions." The question arises, Is such a college as you describe, an institution of purely public charity?

In the case of *Gerke vs. Purcell*, 25 Ohio State, page



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*Taxation; School Property; Colleges; Public Charity;  
Credits Not Taxable.*

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229, *White, J.*, on page 243 says: "The meaning of the word 'charity,' in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purpose. 3 Steph Com., 229, Lord Camden described a charity as a 'gift to a general public use, which extends to the rich as well as the poor.' Amb. 1, 651. The maintenance of a school is a charity. Gifts for the following purposes have been declared to be charities: For schools of learning, free schools and schools of universities (2 Story's Eq. Jur., sec. 1160); to establish new scholarships in a college (*Attorney General vs. Andrews*, 3 Ves., 633); and in the case of the *American Academy vs. Harvard College*, 12 Gray, 594, it was said to be well established that a 'gift designed to promote the public good by the encouragement of learning, science, and the useful arts, without any particular reference to the poor, is a charity.' The syllabus of the case is this: 'A charity, in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, without any particular reference to the poor. Schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are 'institutions of purely public charity' within the meaning of the provision of the constitution which authorizes such institutions to be exempt from taxation."

In my opinion, this is decisive of the question submitted by you, and the credits of the college are exempt from taxation, on the ground that such an institution is a *purely public charity*.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

*"American Trust Company." No Power to Incorporate;  
Corporations—County Commissioners; Power to Buy  
Land to Alter County Road.*

"AMERICAN TRUST COMPANY;" NO POWER TO  
INCORPORATE; CORPORATIONS.

Attorney General's Office.  
Columbus, Ohio, June 11, 1888.

*Secretary of State:*

DEAR SIR:—I herewith return the articles of incorporation of the American Trust Company, which you submitted to me on the 7th inst. with the request that I examine the same and advise you if you should file them.

I am of the opinion that there is no provision of the statutes making it lawful to incorporate in this State, for the purposes set forth in these articles, and respectfully suggest that you decline to file the same.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

COUNTY COMMISSIONERS; POWER TO BUY  
LAND TO ALTER COUNTY ROAD.

Attorney General's Office.  
Columbus, Ohio, June 11, 1888.

*A Leach, Esq., Prosecuting Attorney, Jackson, Ohio:*

DEAR SIR:—Yours of the 7th inst. duly received, in which you desire my construction of section 4919, Revised Statutes of Ohio, as amended March 21, 1887, Ohio Laws, 84, page 187.

The question, as you state it, is: Have county commissioners the power, under the above section, to *buy land* to make an alteration in the county road?

Among other things, that section authorizes the com-

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*Intoxicating Liquors; Dow Law; Refunder Upon Discontinuing the Business.*

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missioners "to levy a tax at their June session of any sum, not exceeding five mills on the dollar, upon all taxable property of the county, to be expended under their direction in such manner as may seem to them most advantageous to the interests of the county for the construction, reconstruction, or repair of such road or roads, or any part thereof." I think this language is sufficiently broad to authorize the commissioners to make a purchase for the purposes set forth in the statute. It is a discretionary power which the statute confers upon them, and if, in their judgment, the interests of the county require it, I think they can use the money raised by the levy for such purpose. The question is not free from doubt, but on the whole, I am inclined to the above opinion.

Very respectfully yours,  
 DAVID K. WATSON,  
 Attorney General.

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INTOXICATING LIQUORS; DOW LAW; RE-  
 FUNDER UPON DISCONTINUING THE BUSI-  
 NESS.

Attorney General's Office,  
 Columbus, Ohio, June 13, 1888.

*Isaac S. Motter, Esq., Prosecuting Attorney, Lima, Ohio:*

DEAR SIR:—Absence from the city on official business, together with other matters, has prevented me from sending you an opinion in reply to yours of the 24th of May before this. I do not think the section to which you refer is by any means free from ambiguity and doubt. I saw the author of the bill a few days since, and he tells me that section 3 will likely be amended the coming winter. I have heretofore held that a person must pay \$25.00 tax, it makes no difference how short a time he is in the business. This is for the privilege

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*State Board of Health; Compensation of.*

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of carrying on the business, even for a short time. But where a person pays, or is charged with the full amount of said assesment, and afterwards discontinues the business, he is entitled to a refunder, but there must remain in the treasury of the county, out of the amount of his assesment, at least \$50.00.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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## STATE BOARD OF HEALTH; COMPENSATION OF.

Attorney General's Office.  
Columbus, Ohio, June 14, 1888.

*Thomas C. Hoover, M. D., Columbus, Ohio:*

DEAR SIR:—You recently submitted to me a communication, as a member of the State Board of Health, in which you desire an official opinion from me on substantially the following question: A member leaves his home on Wednesday morning, and attends two sessions of the board on the following day (Thursday), when the board adjourned, and said member took the 4:45 p. m. train Thursday afternoon, arriving home at midnight of that day, the whole time, as I understand from your communication, consumed in traveling to and from the meeting and attending the sessions being from 10 a. m. Wednesday until 12 p. m. Thursday.

The statute fixes the compensation of members of the State Board of Health at \$5.00 per day. They are also entitled to their traveling and other expenses, while employed on the business of the board. In the case put by you, it is my opinion that the member is entitled to \$5.00 per day for two days, in all \$10.00. Each member of the board should transact the business of the board with the same integrity and good faith to the State that he would his own

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*Intoxicating Liquors; Dow Law; Taxation Where Town  
Has Passed Prohibitory Ordinance.*

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private affairs. No member would have a right, after adjournment (when there is ample time to make the train) to "stay over" for the mere purpose of getting a good thing on the State.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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INTOXICATING LIQUORS; DOW LAW, TAXATION WHERE TOWN HAS PASSED PROHIBITORY ORDINANCE.

Attorney General's Office.  
Columbus, Ohio, June 20, 1888.

*M. Slusser, Esq., Prosecuting Attorney, Wauseon, Ohio:*

DEAR SIR:—Yours of the 18th inst. duly received. I have heretofore held that, in a town in which a prohibitory ordinance has been passed by the city council, no tax can be collected for the sale of liquors. That is to say, when a council passes an ordinance prohibiting the traffic in intoxicating liquors within the corporate limits of the town, and some one starts a saloon there notwithstanding the ordinance, the tax can not be recovered from the saloon keeper; because the ordinance is the law of the town, and the party who violates it must be punished accordingly, and you can not punish a man for violating the ordinance and at the same time tax him for carrying on the business contrary to the ordinance. The town authorities should either enforce the ordinance and thereby close the saloons, or repeal the ordinance and then get the tax.

Respectfully yours,  
DAVID K. WATSON,  
Attorney General.

*Intoxicating Liquors; Dow Law; Distributing Agent; Taxation.*

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INTOXICATING LIQUORS; DOW LAW; DISTRIBUTING AGENT; TAXATION.

Attorney General's Office.  
Columbus, Ohio, June 20, 1888.

*Disney Rogers, Esq., Youngstown, Ohio:*

DEAR SIR:—Yours of the 15th inst. duly received. I have heretofore held that where a manufacturer of beer has a distributing agent at some other point in the State, such distributing agent need not pay the tax. By the term "distributing agent" I mean a person who simply receives beer and delivers it to the regular customers of the manufacturer, and who does not sell it, either in large or small quantities. I do not understand from your letter that such an agent is operating in your city, but I do understand, from the case put by you, that the agent receives beer, bottles it and resells it at retail. I am of the opinion that such an agent should pay the tax. In this connection, I will call your attention to a decision of the Supreme Court, found on page 361, No. 22, Weekly Law Bulletin, published May 28, 1888, in the case of *Kauffman vs. Incorporated Village of Hillsboro*.

Should the Stanyard murder case come to the Supreme Court, I should be glad to confer with you about it.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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*Intoxicating Liquors; Dow Law; Distributing Agent; Taxation*

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INTOXICATING LIQUORS; DOW LAW DIS-  
TRIBUTING AGENT; TAXATION.

Attorney General's Office.  
Columbus, Ohio, June 20, 1888.

*J. A. Bope, Esq., Prosecuting Attorney, Findlay, Ohio:*

DEAR SIR:—Yours of the 16th duly received, containing my letter of the 14th to Mr. Lamport. I have heretofore decided that where a manufacturer of beer has a distributing agent in a remote place from the manufactory, such agent need not pay the tax under the present statute. By the term "distributing agent" I mean an agent who receives beer from the manufacturer and simply distributes it to customers of the manufacturer, without selling any portion of it himself. But in the case you put, as I understand your letter, the agent "sells the beer at wholesale, that is, by the keg, or, in case of bottled beer, by the case, to saloon keepers for sale or to families for consumption." I am of the opinion that in such case the agent should pay the tax. In this connection I will call your attention to the case of *Kauffman vs. Incorporated Village of Hillsboro*, reported on page 361, No. 22 Weekly Law Bulletin, May 28, 1888. The reason I did not give Mr. Lamport an official opinion is that miscellaneous correspondence generally leads to confusion. I endeavor to limit my official opinions to those officers whose legal adviser I am under the statute. I enclose the slip and my letter to him.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

*County Clerk; Fees of, for Indexing, Under Section 850 Revised Statutes—Intoxicating Liquors; Dow Law; Eating Stands, Supplying Liquors.*

COUNTY CLERK; FEES OF, FOR INDEXING  
UNDER SECTION 850 REVISED STATUTES.

Attorney General's Office.  
Columbus, Ohio, June 21, 1888.

*John W. Winn, Esq., Prosecuting Attorney, Defiance, Ohio:*

DEAR SIR:—Absence from the city has prevented an earlier reply to yours of the 12th inst. You ask for my construction of the words "and the clerk shall receive for indexing, provided for in this section, such compensation as provided for like services in other cases," found in section 850, as amended May 1, 1885, O. L., 82, p. 203 and 204.

There seems to be no definite compensation fixed for such indexing. By this I mean that the compensation provided by statute for similar services varies, and runs from a small to a higher sum.

I am of the opinion that in such case the clerk should receive such compensation, as, in the judgment of the commissioners, would be reasonable and just under all the circumstances of the case.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

INTOXICATING LIQUORS; DOW LAW; EATING  
STANDS, SUPPLYING LIQUORS.

Attorney General's Office.  
Columbus, Ohio, June 21, 1888.

*J. K. Southard, Esq., Prosecuting Attorney, Toledo, Ohio:*

DEAR SIR:—Your letter of the 19th inst. duly received. I am of the opinion that the party running the eating stand



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*Intoxicating Liquors; Dow Law; Eating Stands, Supplying Liquors.*

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should pay the tax. The case is one involved in considerable doubt, especially at first glance, but when you come to consider it, I think the better reason is in favor of my position. I do not see that it makes any difference whether the proprietor of such eating stand sells for profit or on commission. The statute provide (section 1, of the Dow law, as amended), that *every person*, corporation or co-partnership, engaged therein, and for each *place* where such business is carried on, *by or for such person, etc.* It will hardly be claimed that under this language the proprietor of the drinking stand, who you say pays the tax assessed against such stand, could have several places of the same kind on the Isle and pay but the one tax. Neither could he do this by having a number of agents selling for him at as many different places, and pay but the one tax. I think that the reasoning applies with equal force against a person who runs an eating stand, and who supplies the demand made at his stand for intoxicating drinks, although he keeps no supply in stock, and although he obtains it from the drinking stand at such times and in such quantities as his trade demands. If this be not so, we have a case where two persons, at different places are supplying their customers with the beverage under one tax, or one person, under one tax, is running two places; which, under section 1 of the Dow law, can not be done.

Suppose the proprietor of the eating stand supplied his trade with liquors from some dealer in Toledo, and sold either on commission or for a regular profit. If he was selling on commission he would be the agent of the Toledo party. The Toledo party would then be conducting such business in two places under one assessment (which, as we have seen, can not be done), or, the person running the eating stand would be carrying on the business himself without paying the tax. Other illustrations might be given why this rule should not be established, but it occurs to me that the above is sufficient to show the policy of the law, as well

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*Intoxicating Liquors; Dow Law; Apportionment of Tax  
Where a Person Buys Out an Old Place.*

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as the letter, requires that a proprietor of an eating house who furnishes liquors to customers, should pay the tax, whether he sells on commission, or in the regular way.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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INTOXICATING LIQUORS; DOW LAW; APPORTIONMENT OF TAX WHERE A PERSON BUYS OUT AN OLD PLACE.

Attorney General's Office.

Columbus, Ohio, June 23, 1888.

*J. H. Southard, Esq., Prosecuting Attorney, Toledo, Ohio:*

DEAR SIR:—Yours of the 20th inst. duly received, in which you ask my opinion upon substantially the following case: A person was engaged at the beginning of the present assessment year, in the sale of intoxicating liquors, and was charged with the assessment of \$250.00 upon such business. Subsequently he failed, or, for some reason, his business place was closed. After that, said business was sold to another person, who desires to pay the assessment made upon said business while carried on by said original party.

My opinion is that the party originally engaged in the business must pay into the treasury at least \$50.00; and that the person who succeeds to the business must pay a proportionate amount for the assessment year. After the original party goes out of the business, it is a new business when some one else commences, notwithstanding the place is the same. The tax is upon the *business*. The statute reads: "That upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, etc., \* \* \* \* \* and for each place where such business is carried on, etc."

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*Intoxicating Liquors; Dow Law; Taxation; Whole Tax  
Paid in One Installment.*

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The word "place" is here used to designate the spot at which some particular person carries on the business, but it does not mean that a particular place can only be taxed \$250.00, no matter how many persons may succeed each other in doing business there. If the word "place" was not used in the statute, in the manner it is, it might be claimed that there could be but one tax upon the *business* of dealing in intoxicating liquors, and in that way one person could carry on the business at different places under one tax, which can not be done. The word "place" is descriptive, in the sense that it is where the business is carried on.

The party quitting the business must pay his proportion, which must be at least \$50.00, and the party succeeding him must pay a proportionate amount for the remainder of the assessment year, notwithstanding the two payments exceed \$250.00. This, I think, is the true meaning and spirit of the statute.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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INTOXICATING LIQUORS; DOW LAW; TAXA-  
TION; WHOLE TAX PAID IN ONE INSTALL-  
MENT.

Attorney General's Office,  
Columbus, Ohio, June 25, 1888.

*J. H. Southard, Esq., Prosecuting Attorney, Toledo, Ohio:*

DEAR SIR:—Replying to your dispatch received Saturday night, in which you say: "Man commences under Dow law June 25th. Must he pay for balance of year in one installment?" I am of the opinion that, under section 3 of the

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*Ditches, Drains and Water Courses; Cleaning; County Commissioners to Clean Out Same.*

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amended Dow law, the whole of the assessment must be paid within ten days from the time of commencing business.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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DITCHES, DRAINS AND WATER COURSES;  
CLEANING; COUNTY COMMISSIONERS TO  
CLEAN OUT SAME.

Attorney General's Office.

Columbus, Ohio, July 5, 1888.

*W. H. Barnhard, Esq., Prosecuting Attorney, Mt. Gilead, Ohio:*

DEAR SIR:—Yours of the 3d inst. received, in which you ask the following question: "Under the act passed by the Legislature April 19, 1883, Vol. 80, p. 203, Ohio Laws, in the latter part of section 7 of said act, can land owners on the line of the ditch above and below such natural obstruction, be required in any way (this last word omitted in your inquiry) to contribute to the removal of such obstruction? If so, how?"

Your inquiry refers to the *natural* obstructions mentioned in section 7 of the act referred to. In my opinion, the removal of *such* obstruction is to be paid for according to the provisions of section 4 of said act. By that section it is the duty of the commissioners to make a levy annually for the purpose of "draining out such ditch and pay the costs and expenses accruing under this act, etc." Section 7 provides for the removal of certain obstructions at the expense of the land owners. This clearly does not refer to *natural* obstructions. There is no provision for compensation for removing *such* obstructions except by section 4 of said act.

*Intoxicating Liquors; Township Local Option Law; Election Under, Validity of; Intoxicating Liquors; Township Local Option Law; Notices of Election Not Posted.*

The fact that the commissioners are to make such annual tax as may be necessary to clean out such ditch, shows that the removal of natural obstructions is to be paid for out of the tax so raised. The tax is to be "according to the benefit derived from said improvements." If the land owners above and below such natural obstructions are benefited by the removal of the same, they should pay accordingly.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

INTOXICATING LIQUORS; TOWNSHIP LOCAL OPTION LAW; ELECTION UNDER, VALIDITY OF; INTOXICATING LIQUORS; TOWNSHIP LOCAL OPTION LAW; NOTICES OF ELECTION NOT POSTED.

Attorney General's Office.  
Columbus, Ohio, July 5, 1888.

*M. A. Daugherty, Esq., Prosecuting Attorney, Lancaster, Ohio:*

DEAR SIR:—Yours of the 2d inst., in which you ask my opinion concerning the validity of the election held in Liberty Township, Fairfield County, concerning township local option, duly received. In reply thereto, will say, I have no doubt from your statement of the case, about the validity of the election. The mere fact that the notices of the election were not posted by the constable, does not invalidate it, when in all other respects it was held in accordance with law. This provision of the statute is merely directory. Otherwise a constable by refusing to post the notices might render an election wholly invalid. I think the question

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*Board of Control; Power of, to Revise; Taxing Power of Commissioners; Taxation.*

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settled by our Supreme Court. See *Foster vs. Scarff*, 15 Ohio St., 537; also *Fry vs. Booth*, 19 Ohio St., 25.

Very Respectfully yours,

DAVID K. WATSON,

Attorney General.

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BOARD OF CONTROL; POWER OF, TO REVISE;  
TAXING POWER OF COMMISSIONERS; TAXATION.

Attorney General's Office.

Columbus, Ohio, July 9, 1888.

*John K. Duke, Esq., Portsmouth, Ohio:*

DEAR SIR:—Your letter of the 29th of June to General Hurst has been referred by him to me. I have examined the act of April 12, 1884, found in Vol. 81, p. 149, Ohio Laws, which I suppose to be the act under which the board of control of your county has proceeded. I do not find any such act by the reference which you have given us, and think you are in error about it, and that you mean the one to which I refer. At General Hurst's request I write. I am of opinion that before the levy made by the commissioners, to which you referred in a former letter, will be binding, it must be approved by the board of control. See sec. 4 of the act referred to, pp. 150, 151. The act seems to confer upon the board of control the power to revise the taxing power of the commissioners, and to adjust the levies made by the commissioners according to the views of the board of control, inasmuch as it requires the board to approve any levy made by the commissioners. The opinion of the prosecutor seems correct.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*County Commissioners; Special Sessions; Mileage; County Auditor; Compensation for Services Under Law Concerning Soldier's Relief.*

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COUNTY COMMISSIONERS; SPECIAL SESSIONS;  
MILEAGE; COUNTY AUDITOR; COMPENSA-  
TION FOR SERVICES UNDER LAW CONCERN-  
ING SOLDIERS' RELIEF.

Attorney General's Office.  
Columbus, Ohio, July 9, 1888.

*John Risinger, Esq., Prosecuting Attorney, Eaton, Ohio:*

DEAR SIR:—Official absence from the city, together with an unusual press of public business, has delayed my answering yours of June 9th until this time. In your communication of that date you ask my opinion upon four questions. I will state and answer them in the order in which they are submitted by you.

First—"Are commissioners entitled to mileage and expenses as provided in section 897 for services rendered under the provisions of Chapter I, Title 6, Part 2, sections 4447 to 4510, Revised Statutes, inclusive, or is their compensation limited to \$3.00 per day, as provided in section 4506?" I am of the opinion that for attending such meetings as are required by section 4447 to 4510, Revised Statutes, inclusive, the compensation of the commissioners is limited to \$3.00 per day, as provided in section 4506.

Second—"Our board in addition to the four quarterly sessions hold a special session in each month on the first Monday. Then they hold other sessions which they call *special sessions*, for the hearing of ditch and road matters, and also for the performance of other official acts as provided in section 853, Revised Statutes. Are the commissioners entitled to *expenses* and mileage for attending upon such special sessions, over and above their mileage for attending the twelve regular and monthly sessions? Are such special sessions to be classed as *called sessions* under section 897?" I do not think the commissioners are entitled to ex-

*County Commissioners; Special Sessions; Mileage; County Auditor; Compensation for Services Under Law Concerning Soldier's Relief.*

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penses and mileage for attending upon such special sessions. They are entitled to mileage, *only* in attending the twelve regular sessions.

Three—"One of our commissioners resides twelve miles from the office by pike and thirty miles by rail. The usual route traveled between the two points is by pike. How much mileage is he entitled to?" The commissioners are entitled to five cents per mile each way, and a commissioner should travel by the usual route in attending sessions of the board. It might occur, however, in the case you put that something would prevent the commissioner from traveling by pike and necessitate his going by rail. In such case his compensation should be allowed for the distance traveled each way. The determination of the route to be taken should be left to the commissioner, he exercising a fair and reasonable discretion.

Your fourth question is as follows: "I desire to know whether the county auditor is entitled to a reasonable compensation for services performed under the 'law concerning soldiers' relief', 84 O. L., 100, as amended, 85 O. L., 158, and can such compensation be paid out of the county fund or any other fund."

The general rule is that where a public officer is paid by salary or by fees, he is not entitled to compensation for new work required of him, unless the act specifically provides for the same. I am not able to find such a provision in the act or amendment, and do not think the auditor can receive compensation for such work.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.



*Benevolent Institutions; Asylum Trustees; Authority to Contract Beyond Amount Appropriated—Board of Health; Expenses of; Must Organize Before Appropriation Ordinance is Passed.*

BENEVOLENT INSTITUTIONS; ASYLUM TRUSTEES; AUTHORITY TO CONTRACT BEYOND AMOUNT APPROPRIATED.

Attorney General's Office.  
Columbus, Ohio, July 10, 1888.

*John Tod, Esq., Newburgh, Ohio:*

DEAR SIR:—I am of the opinion, as at present advised, that the asylum trustees would not have authority to let a contract beyond the amount appropriated by the act of April 16, 1888, Ohio Laws, 85, p. 315. This opinion is based upon the provisions of section 787, Vol. 1, Revised Statutes. It may be that there is some matter collateral to this, of which I am not advised, and which possibly would cause me to think differently. It might be advisable for you to write me fully or come here on Saturday next. Until further advised, I hold that you must come within the appropriation.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

BOARD OF HEALTH; EXPENSES OF; MUST ORGANIZE BEFORE APPROPRIATION ORDINANCE IS PASSED.

Attorney General's Office.  
Columbus, Ohio, July 13, 1888.

*C. O. Probst, M. D., Secretary State Board of Health,  
Columbus, Ohio:*

DEAR SIR:—You recently submitted to me the following inquiry:

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*Board of Health; Expenses of; Must Organize Before Appropriation Ordinance is Passed.*

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"The Ohio State Board of Health,  
Columbus, Ohio, July 2, 1888.

"*Hon. D. K. Watson, Attorney General:*

"DEAR SIR:—A board of health has been appointed in Zanesville, O., but refuses to organize without a special appropriation made by council for its expenses. Will you please inform me whether section 2140, Revised Statutes, contemplates the passage of the 'necessary appropriation ordinance' *before* or *after* the organization of a board of health? Your opinion will greatly oblige,

"Yours respectfully,  
"C. O. PROBST, Sec'y."

Upon examination of the section referred to by you, together with other sections of the statutes regulating boards of health, I am of the opinion that when a board of health has been appointed, it should proceed with the business which comes before it, and when it has incurred expenses, the council should pay the same as provided for in section 2140, Revised Statutes.

Under this section, the council is not, in my opinion, required to pass an appropriation ordinance to pay the expenses of the board until the board of health has organized and incurred expense and certified the same to the council.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

*Schools; Village District Created Within Sub-School District; School Children Attending; Board of Education; Duty of.*

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SCHOOLS; VILLAGE DISTRICT CREATED WITHIN  
SUB-SCHOOL DISTRICT; SCHOOL CHILDREN  
ATTENDING; BOARD OF EDUCATION; DUTY  
OF.

Attorney General's Office.  
Columbus, Ohio, July 14, 1888.

*Theo. K. Funk, Esq., Prosecuting Attorney, Portsmouth,  
Ohio:*

DEAR SIR:—I have been absent so much of the time that I have not before this been able to answer yours of the 28th of June last, in which you submitted the following question and desired my opinion thereon.

“Sub-school district No. 2 in Bloom Township, Scioto County, included in its bounds the town of Webster—which was afterwards incorporated under the name of ‘South Webster,’ leaving the greater portion of said district—as to territory—beyond the corporate limits. They then proceeded to organize a village district, and elected a village board. Does that prohibit the school children living out of the corporate limits, in said district No. 2 from attending school in South Webster? Or in other words, is that not territory annexed for school purposes?”

You do not state in your letter whether there is another school in the original sub-school district, except in the village district, or not; but I assume there is none. In the case of *Cist vs. State of Ohio*, 21 Ohio St., 339, the Court, in deciding a question similar to this says:

“When an incorporated village is formed within, or to include a material part of a sub-school district, no portion thereof is, by reason of such incorporation, withdrawn from the school jurisdiction of the township, but the whole continues to be a sub-school district, *until* the actual election or

*Sheriff; Fees of, in Criminal Cases in Probate Court.*

appointment of a separate school board; and the portion of the sub-school district not included within the limits of such incorporated village is 'territory annexed thereto for school purposes,' within the meaning of the statute of March 14, 1853, 'to provide for the reorganization, supervision and maintenance of common schools.' "

Under this decision it would seem that as soon as the village district elected a village board of directors, it became independent of the original sub-district, and it is quite probable that the scholars living out of the corporate limits of said village, but in said original district No. 2, would be prohibited from attending school in the village; but it is the duty of the proper board of education under section 4007 Revised Statutes to provide a sufficient number of schools for the education of the school children, and they should do so at once. It is probable that the matter could easily be adjusted between the proper authorities, under section 3893.

Some arrangement ought to be made whereby the children in the sub-district outside of the village district would have school privileges. They should not be deprived of such privileges by reason of the formation of the village district, and I suggest an adjustment of the matter under section 3893.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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SHERIFF; FEES OF, IN CRIMINAL CASES IN  
PROBATE COURT.

Attorney General's Office.

Columbus, Ohio, July 25, 1888.

*John C. Welty, Esq., Prosecuting Attorney, Canton, Ohio:*

DEAR SIR—Yours of the 9th inst. (which absence from the city has prevented me from answering sooner) submits

*Taxation; Credits Listed for Taxation Where Owner Resides.*

the following question, and asks an official opinion thereon: "Whether or not a sheriff is entitled to be paid by the county or State, in addition to the \$300.00 yearly allowance, for services rendered by him in subpoenaing witnesses for the State in criminal cases in the Probate Court, and where the case is afterwards dismissed, a verdict of not guilty, or defendant discharged for insolvency."

After an examination of the sections of the statutes bearing upon the question, I am of the opinion that the sheriff is not entitled to be paid by the *county or State* for such services. Section 1234, Revised Statutes, provides: "The sheriff, for performing the duties required by law, in the court of probate, shall receive the same fees as are allowed by law for similar services in the Court of Common Pleas, *to be taxed against the proper parties*, by the probate judge." I do not see, under this section, how the fees of the sheriff can be taxed against the county or against the State.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

TAXATION; CREDITS LISTED FOR TAXATION  
WHERE OWNER RESIDES.

Attorney General's Office.

Columbus, Ohio, July 27, 1888.

*F. A. Kauffman, Esq., Prosecuting Attorney, Delaware, Ohio:*

DEAR SIR:—You recently submitted to me the following communication: "A lady came to Delaware four or five years ago, but she has been listing her credits in Berkshire Township of this county, claiming that she was only here temporarily to school her children, and that she intended re-

*Criminal Law; Practice; Petition in Error Before Final Trial  
in Court Below.*

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turning to Berkshire Township after perhaps several years, as she has real estate there. She has her brother to act as her agent to return her credits in Berkshire. We would like to have your opinion as to where this property should be listed." I am of the opinion that, under section 2735, Vol. I, Revised Statutes, the credits belonging to the party mentioned in your letter should be listed for taxation in the city of Delaware.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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CRIMINAL LAW; PRACTICE; PETITION IN ERROR  
BEFORE FINAL TRIAL IN COURT BELOW.

Attorney General's Office.  
Columbus, Ohio, July 28, 1888.

*J. H. Mackey, Esq., Prosecuting Attorney, Cambridge, Ohio:*

DEAR SIR:—You recently sent me the following communication and asked my opinion thereon; "At the last term of our Common Pleas Court upon indictment a person was tried and convicted of a felony. The Court set the verdict aside and granted a new trial. The case now stands for trial at our next term of court. At the trial I excepted to three things in the charge of the judge to the jury. As the case now stands, can I, under sections 7305-6-7-8 take a bill of exceptions and test the charge of the court in the Supreme Court, or must I retry the case and get it to a judgment before I can avail myself of those provisions?"

After an examination of the question, I am inclined to the opinion that it would be at least better practice to get the case to judgment before proceeding with the questions of

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*Public Works; Private Individuals Can Not Compel State to  
Change Culvert; Ditches.*

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error. I feel, however, that the question is a very close one and by no means free from great doubt.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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PUBLIC WORKS; PRIVATE INDIVIDUALS CAN  
NOT COMPEL STATE TO CHANGE CULVERT;  
DITCHES.

Attorney General's Office.  
Columbus, Ohio, July 28, 1888.

*Board of Public Works, Columbus, Ohio:*

GENTLEMEN:—You recently submitted to me the following inquiry and requested my opinion thereon: "Can parties in digging a ditch for drainage of land compel the State to lower or change the foundation of an expensive and heavy culvert now, and for fifty years under the Ohio canal, and whose foundation is as low as the stream it crosses?"

I am of the opinion that the State can not be compelled to lower or change the foundation of the culvert referred to in your communication.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

*Intoxicating Liquors; Dow Law; Patent Medicine; "Bitters."*

INTOXICATING LIQUORS; DOW LAW; PATENT  
MEDICINE; "BITTERS."

Attorney General's Office.  
Columbus, Ohio, July 28, 1888.

*Cyrus Huling, Esq., Prosecuting Attorney, Columbus, Ohio:*

DEAR SIR:—You recently sent me the following communication, and desired my opinion thereon: "Is the sale of a 'patent medicine,' commonly called a 'Bitters,' composed in part of herbs having well known medicinal qualities, partly water and not to exceed fifty per cent. of cologne spirits, said spirits being necessary for and being used exclusively for preserving the said herbs and preventing fermentation, within the definition of the phrase 'Trafficking in Intoxicating Liquors,' contained in section 8 of the act of May 14, 1886, Ohio Laws, 83, p. 157, and is such sale illegal unless the seller pays the tax provided for in said act?"

The phrase "Trafficking in Intoxicating Liquors" is defined in the section of the act to which you refer, as "the buying or procuring and selling of intoxicating liquors otherwise than upon prescriptions issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof by the manufacturer of the same in quantities of one gallon or more at any one time."

If a person should sell such bitters as you describe upon prescription issued in good faith by a reputable physician in active practice, he clearly would not have to pay the tax. Neither would he if he brought himself within the other exceptions mentioned in the act. Bitters, which are recognized as medicine and commonly used as such, even though they contain a large per cent of alcohol, can not be regarded in the same category as intoxicating liquors, as that expression is ordinarily understood; nor do I think the Legislature intended



*County Commissioners; Power of, to Construct a "Ford"  
Across a Stream.*

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to include them within the term "intoxicating liquors" as used in the statute, and in my opinion the vender of such bitters need not pay the tax. On the other hand I do not think such a construction should be placed upon the language of the statute, as would allow the sale of a compound medicine, which contains sufficient alcohol to produce intoxication, if taken in a reasonable quantity, to be sold and drank as a beverage, without the payment of the tax. And the person who sells such compound as a beverage should be required to pay the tax, the same as other dealers in intoxicants. The question is at last largely one of good faith and intention on the part of the buyer and seller, and it is extremely difficult to lay down any rule to which there may not be exceptions.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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COUNTY COMMISSIONERS; POWER OF, TO CON-  
STRUCT A "FORD" ACROSS A STREAM.

Attorney General's Office.  
Columbus, Ohio, July 30, 1888.

*Samuel H. Nicholas, Esq., Prosecuting Attorney, Coshocton,  
Ohio:*

DEAR SIR:—You recently sent me the following communication: "I am instructed by the county commissioners of this county to ask your opinion on the following question: Can the county commissioners build a ford across a river, after the same has been destroyed?" Upon receipt of this communication I addressed you a letter asking for more explicit information concerning the question upon which you desired my opinion, whereupon you came to see me and brought with you a plat by which I was enabled to under-

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*County Commissioners; Power of, to Construct a "Ford" Across a Stream.*

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stand the question upon which you desired my opinion. It appears from your explanation that there had formerly been a *ford* across Walthonding River in your county at a point where a county road crossed the river; but which, owing to a change in the current and course of the river, caused by natural and artificial obstructions, had been abandoned for some years. I also learned, from your explanation of the plat which you exhibited, that the water at this time, at the point of the old ford, is of very considerable depth, and travel on the road has been prevented for that reason; and that it was the design of the county commissioners, if they had the power, to construct on each side of the channel a stone abutment, and to connect these by driving piles upon which stone and other material was to be placed; so that a *ford* would in this way be constructed across the river; but that it was not the design of the commissioners to have said ford come above or even to the surface of the water. The question, then, which you really submit to me, is whether the county commissioners have the power to make such a construction as I have above described. Section 860 of the Revised Statutes, Vol. 1, provides, among other things, that the county commissioners "shall construct and keep in repair all necessary *bridges over* streams and public canals on all State and county roads, etc." It was held, in 11 Ohio State, in the case of *Treadwell vs. Commissioners*, p. 190; "The board of commissioners of a county is a quasi corporation. And a grant of power to such a corporation must be strictly construed." Unless the structure, which you have explained to me it was the intention of the commissioners to build, comes within the definition of the term "bridge," in my opinion the commissioners would not be authorized to proceed with this work. In the case of free holders of *Sussex vs. Strader*, reported in 3 Harr (N. J.), 112, Judge Dayton, delivering the opinion, says: The term "bridge" conveys to my mind the idea of a passageway by which travelers and others are enabled to pass safely over streams and other

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*County Commissioners; Power of, to Construct a "Ford"  
Across a Stream.*

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obstructions. It was held in the case of *Props. Bridges vs. Hob'n L. Co.*, 2 Beas. Ch. (N. J.), 516, that the term "bridge" has always stood for a structure that had a pathway, a horse way, a wagon way, and a road way; that in no law paper or document was a structure which had not a *foot way* as its elemental idea ever denominated purely and simply a "bridge." See Angell on Highways, pp. 31-2, note 5.

Webster defines a bridge as being "A structure, usually of wood, stone, brick, or iron, erected *over* a river or other water course, or over a ravine, railroad, etc., to make a continuous road way from one bank to the other." Additional authorities might be cited to show that the word "bridge" as used in the statute, would not include a structure over which the water is intended constantly to flow, and which would consequently prevent foot travelers from passing over the same. A public bridge must be for the accommodation of so much of the public as desire to pass over the same, whether they travel by carriage, on horse or on foot. Applying the rule of construction to the powers of county commissioners, as cited above, I am of the opinion that the statute which authorizes the commissioners to construct a "bridge," does not warrant them in constructing such a passage way as they design in this case.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Infirmary Directors; Expenses of Pauper Kept by Township Trustees, Under Revised Statutes, 975*

INFIRMARY DIRECTORS; EXPENSES OF PAUPER KEPT BY TOWNSHIP TRUSTEES, UNDER REVISED STATUTES, 975.

Attorney General's Office.  
Columbus, Ohio, July 31, 1888.

*C. J. Smith, Esq., Prosecuting Attorney, Hamilton, Ohio:*

DEAR SIR:—Replying to your inquiry of the 26th inst., will say that under section 975, of the Revised Statutes, when the directors of an infirmary order and authorize the trustees of a township to keep a pauper and afford him such relief as such directors may prescribe, until the condition of said pauper warrants his removal from the care of said trustees, I am of the opinion that the board of infirmary directors should pay the bill of said trustees for the costs and charges incurred by them in affording relief to said paupers, after a complaint was made. I do not think that section 1530, Revised Statutes, means such services as are provided for in section 975. It speaks of "services in connection with the poor for any one year." Section 975 speaks of "costs and charges incurred by them (township trustees) in affording relief to said paupers." I do not think there is necessarily any conflict between the sections. I think they are both susceptible of a reasonable construction. A trustee might be called upon to render services in connection with the poor which would not necessarily be *such* services as is contemplated by section 975. In any event, I am of the opinion that section 975 should control, and the infirmary directors should bear the expense and not the township.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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*Intoxicating Liquors; Dow Law; Taxation; Whole Assessment Paid Within Ten Days.*

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INTOXICATING LIQUORS; DOW LAW; TAXATION; WHOLE ASSESSMENT PAID WITHIN TEN DAYS.

Attorney General's Office.  
Columbus, Ohio, July 31, 1888.

*Robert C. Miller, Esq., Prosecuting Attorney, Washington C. H., Ohio:*

DEAR SIR:—In yours of the 26th inst. you stated: "The auditor desires to know whether he shall certify and have the treasurer collect for the whole of the unexpired portion of the current year, or shall he only collect at this time the fraction from August to December." This inquiry referred to a case where a party had commenced the business of selling intoxicating liquors after the fourth Monday of May. Section 3 of an act passed March 26, 1888, Ohio Laws, 85, p. 117, provides: "That when any such business shall be commenced in any year after the fourth Monday of May, said assessment shall be proportionate in amount to the remainder of the assessment year, \* \* \* \*, and the same shall attach and operate as a lien as aforesaid, at the date of, and be paid within, ten days after such commencement."

In my opinion, the fair construction of this language is, that the assessment, for the balance of the year, must be paid within ten days after the time the business for the unexpired portion of the year is commenced.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

*Intoxicating Liquors; Township Local Option Law; Refunder Where Party Closed Out—Ohio Penitentiary; Warden; Duty of; Life Prisoner, Under Void Sentence; Prisoner, Having Served Twice Before for Felony, Sentenced for Life; Indictment Not Showing Former Convictions.*

INTOXICATING LIQUORS; TOWNSHIP LOCAL OPTION LAW; REFUNDER WHERE PARTY CLOSED OUT.

Attorney General's Office,  
Columbus, Ohio, July 31, 1888.

*S. D. McLaughlin, Esq., Prosecuting Attorney, Waverly, Ohio:*

DEAR SIR:—Replying to yours of July 27th, will say that in my opinion, where a party who was engaged in the liquor business in a township, has been closed out, by a vote against the sale of liquor in that township, he should be repaid for the unexpired portion of the year, according to the provisions of section 4 of the act passed March 3, 1888, p. 55, Ohio Laws 85, commonly known as the "Township Local Option Law," and not according to the provisions of the act commonly known as "The Dow Law."

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

OHIO PENITENTIARY; WARDEN; DUTY OF; LIFE PRISONER, UNDER VOID SENTENCE; PRISONER, HAVING SERVED TWICE BEFORE FOR FELONY, SENTENCED FOR LIFE; INDICTMENT NOT SHOWING FORMER CONVICTIONS.

Attorney General's Office,  
Columbus, Ohio, July 31, 1888.

*Hon. E. G. Coffin, Warden of Ohio Penitentiary:*

DEAR SIR:—On yesterday you sent me a communication

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*Ohio Penitentiary; Warden; Duty of; Life Prisoner, Under Void Sentence; Prisoner; Having Served Twice Before for Felony, Sentenced for Life; Indictment Not Showing Former Convictions.*

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setting forth that one David Cornwall was held by you as a prisoner in the Ohio penitentiary, under sentence from Jackson County, Ohio, for a definite term of three years. That said definite term has already expired. You further stated, in your communication, that it has been certified to you from the court sentencing said Cornwall, that he had been twice convicted of a felony and confined in the Ohio penitentiary prior to the term recently expired; that, in consequence of the third conviction, the court ordered that: "At the expiration of this sentence (being his third conviction) he be detained in the penitentiary during his natural life."

In the very recent case of *Patterson vs. The State*, the Supreme Court held that when the indictment failed to set out that the defendant had been twice previously convicted and sentenced to the penitentiary, the defendant could not be sentenced for life at the expiration of his then sentence. Subsequently to this decision a prisoner, who had been sentenced and confined for the third time in the penitentiary, and also sentenced for life, to begin at the expiration of his third term, made application to Hon. David F. Pugh, a judge of the Court of Common Pleas, to be discharged from his life sentence, on a writ of habeas corpus. The court, after a full hearing, granted the writ and discharged the prisoner upon the ruling laid down in *Patterson vs. The State*. Your communication informs me that the case of Cornwall is exactly similar to that of Patterson and the one decided by Judge Pugh, and that Cornwall now insists upon his discharge from prison without being put to the expense and delay of a trial, and you ask for instructions as to what you shall do in this and similar cases. I am of the opinion that where the record shows a state of facts similar to the Patterson case, that is, where it does not appear upon the indictment that the prisoner had been twice before sentenced and confined in the penitentiary, and where the third term of the prisoner has expired, that you should discharge him. The

*County Commissioners; Power to Repair Highways Damaged by Freshet, etc.; County Commissioners; Acting in Good Faith, Not Personally Responsible.*

State certainly should not keep a prisoner in the penitentiary under a sentence, which has been held by the Supreme Court to be illegal; and where the record shows that fact, it would seem a great hardship for the State to require a prisoner to undergo the expense and delay of a trial, when it is apparent what the result must be, as determined by the recent adjudications upon the subject. I am therefore of the opinion, as above stated, that where the record shows the cases to be similar to the Patterson case, the prisoners are entitled to a discharge upon the expiration of their sentence, and you would be justified in discharging them without an order from the court to that effect. Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

COUNTY COMMISSIONERS; POWER TO REPAIR  
HIGHWAYS DAMAGED BY FRESHET, ETC.;  
COUNTY COMMISSIONERS; ACTING IN GOOD  
FAITH, NOT PERSONALLY RESPONSIBLE.

Attorney General's Office,  
Columbus, Ohio, August 4, 1888.

*Samuel H. Nicholas, Esq., Prosecuting Attorney, Coshocton,  
Ohio:*

MY DEAR SIR:—When you came to see me a few days ago, and brought a map, showing the location of the ford across the Walhonding River, it certainly was my understanding, as the result of your explanation, that the only question which you submitted to my consideration, was whether such a structure as you said the commissioners contemplated placing in the river could be erected by the commissioners, under that section of the statutes which authorizes them to construct and keep in repair all necessary "bridges," etc., under section 860, Vol. I, Revised Statutes. It may



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*County Commissioners; Power to Repair Highways Damaged by Freshet, etc.; County Commissioners; Acting in Good Faith, Not Personally Responsible.*

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have been wholly my fault that I got this view of the question, but you will readily see, from the opinion I sent you, that this was the impression which I received. On August 1st you sent me the following: "Your favor of yesterday at hand. I wish to call your attention further to the Revised Statutes, section 4919, as amended, Ohio Laws, 82, 171, and ask you if what was formerly the ford was a part of the road, so far as to authorize the commissioners to repair the same, under the provisions of that act." The amended section, to which you refer, was subsequently amended in Vol. 84, p. 187; so that section 4919 now reads as follows: "When any one or more of the principal highways of any county, *or any part thereof*, (these last words not in amendment to which you refer) have been destroyed, or damaged by *freshet*, land slide, wear, or *water course*, or any other casualty, etc."

After a careful examination of this section, I am of the opinion that, if the commissioners consider the county road in question one of the principal highways in the county, they are authorized to proceed and repair such damages or make the changes or repairs in such road as are considered necessary. You further say, in your communication of August 1st: "Please answer the other question also as to the responsibility of the commissioners for damages, should any result from the careless or unskillful construction of same, in the event the court should take a view different from the one expressed by you."

This question I think is settled in the case of *Thomas vs. Wilton*, 40 Ohio State, 516, where it was held: "County commissioners, who act in their official capacity, in good faith, and in the honest discharge of official duties, can not be held to personally respond in damages."

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

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*Criminal Law; Costs, in Case Defendant Acquitted, or if Committed to Jail in Default of Payment, in Prosecutions; Criminal Law; Under Sections 6960, 6961-2, etc., Revised Statutes; For Killing Certain Birds.*

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CRIMINAL LAW; COSTS, IN CASE DEFENDANT ACQUITTED, OR IF COMMITTED TO JAIL IN DEFAULT OF PAYMENT, IN PROSECUTIONS; CRIMINAL LAW; UNDER SECTIONS 6960, 6961-2, ETC., REVISED STATUTES; FOR KILLING CERTAIN BIRDS.

Attorney General's Office,  
Columbus, Ohio, August 6, 1888.

*F. H. Fronizer, Esq., Prosecuting Attorney, Fremont, Ohio:*

DEAR SIR:—Yours of July 30th duly received, in which you ask for a construction of section 1 of Senate Bill No. 326, Vol. 85, Ohio Laws, p. 285, relative to what fund costs are to be paid out of, I suppose you mean, "in case the defendant is acquitted, or if he be convicted and committed to jail in default of payment of the fine and costs."

After an examination of this section, I am of the opinion that such costs should be paid out of the county fund.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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*County Auditor; Vacancy, How Filled, Where Auditor Elect Dies Before His Term Begins.*

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COUNTY AUDITOR; VACANCY, HOW FILLED,  
WHERE AUDITOR ELECT DIES BEFORE HIS  
TERM BEGINS.

Attorney General's Office,  
Columbus, Ohio, August 6, 1888.

*J. C. Elliott, Esq., Prosecuting Attorney, Greenville, Ohio:*

DEAR SIR:—You recently directed to me a communication setting forth the following facts: At the November election, 1887, an auditor was elected for your county, whose official term would commence in the September following, to wit: September, 1888, but on the 13th of July last he died.

As a result of the act of May 18, 1886, a vacancy occurred in the office of county auditor, which was an interim in the office, which interim was filled by appointment by the county commissioners, and which expires in September, 1888. So that on the 10th of September next (being the second Monday of the month), a vacancy will occur in the office of county auditor, and you desire my opinion upon the following points: First—How is the vacancy to be filled? Second—For what length of time? Third—When is a successor to be elected, and take his office? These in their order. Section 1017, Vol. I, Revised Statutes, provides as follows: "When a vacancy happens in the office of county auditor from any cause, the commissioners of the county shall appoint some suitable person, resident of the county, to fill such vacancy." The vacancy, then, is to be filled by appointment by the county commissioners, and the appointee is to take possession on the second Monday of September next.

Second—Section 11 of the Revised Statutes provides as follows: "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy; etc."

It is clear, from this section, that the successor must be

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*Intoxicating Liquors; Dow Law; Payment Under Protest,  
While Violating Village Ordinance.*

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elected at the coming November election; and the time when he goes into office, I think, is determined by section 1013 Revised Statutes, as amended, 83 Ohio Laws, p. 198, which provides as follows: "A county auditor shall be chosen, triennially, in each county, who shall hold his office for three years, commencing on the second Monday of September next after his election." And he will hold his office for a period of three years from the second Monday of September, 1889. In brief, the case is this: First—The county commissioners fill the vacancy by appointment, the appointee going into office on the 10th of next month. Second—He holds till the successor who is elected takes possession, to wit: in September, 1889. Third—The successor is to be elected next November, and goes into office on the second Monday of September, 1889, and holds for three years from that date.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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INTOXICATING LIQUORS; DOW LAW; PAYMENT  
UNDER PROTEST, WHILE VIOLATING VIL-  
LAGE ORDINANCE.

Attorney General's Office,  
Columbus, Ohio, August 7, 1888.

*Bruce P. Jones, Esq., Prosecuting Attorney, London, Ohio:*

DEAR SIR:—You recently sent me the following communication: "The village of London, in Madison County, has, by ordinance, prohibited places where intoxicating liquors are sold within the corporation. The ordinance remains a dead letter—no attempt to enforce it. Proprietors of places where intoxicating liquors are sold at retail pay the tax required by the law (Sec. 1, Vol. 85, page 117, O. L.)

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*Intoxicating Liquors; Dow Law; Payment Under Protest,  
While Violating Village Ordinance.*

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under protest and go right along with their business regardless of the village ordinance. If a demand by any such proprietor is made upon the proper authority to refund the amount of the tax so paid in by him under protest, should the amount of the tax be refunded?"

In my opinion, the authorities have no right to accept the tax; neither was the taxpayer bound to pay it. But having paid it, his right to get it back is a different matter. The real question is, the right of a person to recover an illegal tax, which has been paid; and this depends entirely on the circumstances of the payment. The question of payment under protest was very thoroughly considered by our Supreme Court, and a very elaborate decision announced by Judge Johnson, in the case of *Stephan, Treas., etc. vs. Daniels, et al.*, in 27 Ohio State, page 527. This decision was followed in the case of *Western Union Tel. Co. vs. Mayer, Treas.*, 28 Ohio State, p. 521. Both these cases follow the case of city of *Marietta vs. Slocum*, 6 Ohio St., 471. From an examination of these authorities, it will appear that the right to recover the taxes paid depends upon what was done by the taxpayer at the time the payment was made. It is not sufficient for him to say, at the time of the payment: "I protest against this payment." But if he paid the tax to prevent his property from being sold, and protested that he made the payment upon that ground alone, he has brought himself within the law, and can recover. In the *Marietta* case referred to, Judge Scott, delivering the opinion, on page 472, says: "No summary process was allowed, to enforce the collection, without first giving the party his day in court. He had his choice, either to pay the claim which the city preferred against him, or contest its validity. With full knowledge of all the facts, he chose to purchase his peace by payment. This payment was, it is true, made under protest; but there was no duress in the case; there was no reason why the litigation, if intended, should not precede, rather than follow, the payment. In the eye of the law, it was, under the circumstances, a voluntary act; and being

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*Intoxicating Liquors; Dow Law; Payment Under Protest,  
While Violating Village Ordinance.*

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done with a full knowledge of the facts, it ends the controversy.”

In the case of *Mays vs. City of Cincinnati*, 1 Ohio State, 268, it was held: “To make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party having the apparent authority to do so, without resorting to an action at law.” Judge Ranney, in considering this point, on page 278, says: “Where he (the tax payer) can only be reached by a proceeding at law, he is bound to make his defense in the first instance; and he can not postpone the litigation by paying the demand in silence, and afterwards suing to recover it back.”

The question, as I have before intimated, turns upon what was actually done at the time the taxes were paid by the party paying them. If he merely remonstrated against their collection by the treasurer, or said to him, “I protest against the payment of these taxes,” or “I want you to remember I pay under protest,” or words to that effect, and thereupon handed the money over, he can not recover; but if he paid in order to prevent his property from being sold, the payment was involuntary, and I think he can recover. In the case submitted by you, I do not think the officer should refund the tax, until it has been judicially determined whether the payment was voluntary, or under protest.

Very respectfully yours,

D. K. WATSON,  
Attorney General.

*Paupers; Unknown Persons, Found Dead; Burial of—  
Schools; Commissioners Appointed by Probate Court;  
Power of to Locate Site for School House.*

PAUPERS; UNKNOWN PERSONS, FOUND DEAD;  
BURIAL OF.

Attorney General's Office,  
Columbus, Ohio, August 9, 1888.

*John H. Lochary, Esq., Prosecuting Attorney, Pomeroy,  
Ohio:*

DEAR SIR:—You recently submitted the following to me: "In Vol. 84, on p. 29, is a law in regard to burial of certain persons. I hold it applies only to 'unknown' persons, not residents of the township, who were 'found dead.' Am I right?" I do not think you are.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

SCHOOLS; COMMISSIONERS APPOINTED BY  
PROBATE COURT; POWER OF TO LOCATE  
SITE FOR SCHOOL HOUSE.

Attorney General's Office,  
Columbus, Ohio, August 9, 1888.

*E. W. Maxon, Esq., Prosecuting Attorney, Ravenna, Ohio:*

DEAR SIR:—You recently submitted the following to me, and desired my official opinion thereon: "Under section 3934, of the Revised Statutes and those following, by proceedings in the Probate Court, a joint sub-district is formed. Of course, the prior conditions as to calling the boards of the several townships together, has been done and the boards have failed to act in the matter. The board of commissioners appointed by the Probate Court have gone out and have

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*Schools; Commissioners Appointed by Probate Court;  
Power of to Locate Site for School House.*

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formed a joint sub-district, and by virtue of section 3941 have selected a site for the school house. Report is made to the court and the court confirms the finding and decision of the committee. Then a meeting is had of the members of the new joint sub-district and a board of directors is elected as provided by law. Can that board of directors so elected change the site of the school house as selected by the board of commissioners sent out by the Probate Court? What do you say as to the effect of section 3989 upon the point in question?"

In my opinion, the board of commissioners appointed by the Probate Court, under section 3941, have the final power in locating the site of the school house.

Section 3928, of the Revised Statutes, provides *one* way in which joint sub-districts may be established. This section also provides how, in certain contingencies, the boards of education of townships "shall designate a site whereon to erect a school house." Section 3941 provides that the commissioners appointed by the Probate Court shall report in writing to the probate judge whether or not a joint sub-district ought to be established, and their reasons therefor. 2. If they find in favor of the establishment of such sub-district, they shall do certain things, one of which is: "They shall designate a site whereon to erect such buildings." You will notice this language is the exact language employed in section 3928, above referred to, concerning the location of a site for a school building by township boards. I do not see why the power of the commissioners to locate a site should not be as ample and final as that conferred upon township boards of education. The power of such township boards under section 3928, are quite as broad, if not broader, than the powers of such boards under the act of March 14, 1853, as found in Vol. 51, Ohio Laws, p. 433, section 11.

In the case of *Hughes vs. the Board of Education*, 13 Ohio St. 336, the powers of township boards of education



*County Commissioners; Where Claim for Sheep Killed by  
Dogs is Rejected, Not to Pay Costs; Witness Fees.*

were fully considered in reference to the question of location of a site for a school house, and decided as follows: "Under the school act of March 14, 1853, the township board of education has the power to designate the particular place where school houses in sub-districts shall be built; and the power which, in this respect, the statute confers on the local directors of a sub-district, are to be exercised in subordination to the paramount authority of the township board of education." I am, therefore, of the opinion that the action of the commissioners is final, and can not be disturbed by the action of the board of directors of the sub-district. I do not think that section 3989 has any effect on the question. There is not necessarily any conflict between that section and section 3941. Very respectfully yours,

D. K. WATSON,  
Attorney General.

COUNTY COMMISSIONERS; WHERE CLAIM FOR  
SHEEP KILLED BY DOGS IS REJECTED, NOT  
TO PAY COSTS; WITNESS FEES.

Attorney General's Office,  
Columbus, Ohio, August 10, 1888.

*L. P. Barrows, Esq., Prosecuting Attorney, Chardon, Ohio:*

DEAR SIR:—Yours of August 7th duly received, in which you submit the following: Under the act of March 21, 1887, Vol. 84, Ohio Laws, p. 231, "a claim is presented and rejected by the board of county commissioners. Question: Are the commissioners authorized to pay the witness fees from the dog tax fund?"

I am of the opinion that when the claim is rejected by the commissioners they are not authorized to pay the witness fees.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

*Intoxicating Liquors; Dow Law; Refunder, When it Would Not Amount to \$50.00; County Auditors; Settlement Sheets.*

INTOXICATING LIQUORS; DOW LAW; REFUNDER, WHEN IT WOULD NOT AMOUNT TO \$50.00; COUNTY AUDITORS; SETTLEMENT SHEETS.

Attorney General's Office,  
Columbus, Ohio, August 11, 1888.

*George G. Jennings, Esq., Prosecuting Attorney, Woodsfield, Ohio:*

MY DEAR SIR:—You recently submitted to me the following questions: "Has the county auditor authority to issue refunding orders to persons who were engaged in the retail liquor business, and paid the assessment for the year beginning on the fourth Monday of May, 1887, and ending on the fourth Monday of May, 1888, who quit the business before the fourth Monday of May, 1888, and after the amendments to the Dow Law were passed (March 26, 1888) and the proportionate amount of said Dow Law tax coming to the person so engaged in said business does not amount to \$50.00? Does the original law (see Ohio Laws, Vol. 83, p. 158, section 3,) or amendment (see O. L. Vol. 85, page 117, section 3,) govern such cases?" I am of the opinion that the amendment governs, and there should be no refunder.

Your second question is as follows: "The blanks sent the county auditor (by the auditor of state) for him to make out settlement sheet, under Dow Law tax, only includes taxes after the fourth Monday of May. Must county auditors report additional Dow Law tax collected after passage of the amendments to Dow Law (March 26, 1888) and prior to fourth Monday of May, 1888, or will the apportionment be made under old law?" The only report the state auditor desires, as he informs me, is for business done after the fourth Monday of May.

Very respectfully yours;

D. K. WATSON,

Attorney General.

*Intoxicating Liquors; Dow Law; No Right to Collect Tax, After Passing Prohibitory Ordinance—Intoxicating Liquors; Dow Law; Township Local Option Law; Distribution of Fines.*

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INTOXICATING LIQUORS; DOW LAW; NO RIGHT TO COLLECT TAX, AFTER PASSING PROHIBITORY ORDINANCE.

Attorney General's Office,  
Columbus, Ohio, August 10, 1888.

*J. W. Jones, Esq., West Union, Ohio:*

DEAR SIR:—Yours of the 9th inst. duly received. I am of the opinion that when a town passes a prohibitory ordinance, it amounts to a suspension of the statute, and as long as the ordinance is unrepealed no tax can be collected from the dealer.

The statute and ordinance can not be enforced at the same time, and the ordinance is presumably in force till repealed.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

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INTOXICATING LIQUORS; DOW LAW; TOWNSHIP LOCAL OPTION LAW; DISTRIBUTION OF FINES.

Attorney General's Office,  
Columbus, Ohio, August 11, 1888.

*V. C. Lowry, Esq., Prosecuting Attorney, Logan, Ohio:*

DEAR SIR:—Yours of the 1st inst. duly received, in which you submit to me the following questions: "Does not the fine imposed for violations of sections 2 of 'an act to further provide against the evils resulting from the traffic in intoxicating liquors. by local option in any township in

*Intoxicating Liquors; Dow Law; No Right to Collect Tax,  
After Passing Prohibitory Ordinance.*

the State of Ohio' (O. L. Vol. 85, page 55) go to the county fund as fines in other misdemeanors do?" After an examination of this section of the statute, I am of the opinion that the fines paid under this section go to the county fund.

Your second question is as follows: "Does the fine imposed for a violation of section 11, of the Dow Law go to the county fund, or is it distributed under section 9, of said Dow Law as amended, Vol. 85, page 116, of Ohio Laws?" The fines imposed by virtue of section 11, of the Dow Law, are to be distributed under section 9, of that act.

Very respectfully yours,

D. K. WATSON,

Attorney General.

INTOXICATING LIQUORS; DOW LAW; NO RIGHT  
TO COLLECT TAX, AFTER PASSING PROHI-  
BITORY ORDINANCE.

Attorney General's Office,  
Columbus, Ohio, August 11, 1888.

*W. H. Snook, Esq., Prosecuting Attorney, Antwerp, Ohio:*

DEAR SIR:—Yours of the 9th inst. duly received, in which you submit the following question: "Where a municipal corporation has prohibited ale, beer, porter houses and other places where intoxicating liquors are sold, under the Dow Law, and notwithstanding the ordinance of the village prohibiting the same, one continues to sell and in fact does sell intoxicating liquors in such village, can such a person so selling be compelled to pay the Dow tax?"

I have heretofore held that in cases like the one stated in your letter, the party selling intoxicating liquors can not be compelled to pay the tax; for the reason that the ordinance amounts to a suspension of the statute, and as long as the ordinance is unrepealed, it is presumably in force, and

*Criminal Law; Costs Include Jury and Witness Fees in Case Defendant Acquitted or if Committed to Jail in Default of Payment, in Prosecutions Under Sections 6960-1-2, Etc., R. S., for Killing Certain Birds.*

you can not have the ordinance and statute in force at the same time.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

CRIMINAL LAW; COSTS INCLUDE JURY AND WITNESS FEES IN CASE DEFENDANT ACQUITTED OR IF COMMITTED TO JAIL IN DEFAULT OF PAYMENT, IN PROSECUTIONS UNDER SECTIONS 6960-1-2, ETC., R. S., FOR KILLING CERTAIN BIRDS.

Attorney General's Office,  
Columbus, Ohio, August 22, 1888.

*F. R. Fronizier, Esq., Prosecuting Attorney, Fremont, Ohio:*

DEAR SIR:—Yours of the 20th inst. duly received, in which you ask for another construction of Senate Bill No. 326, Ohio Laws, 85, pages 285 and 286, as to whether, in case of acquittal of the defendant, or of his conviction and committal in default of payment of fine and costs, the word "costs" includes jury and witness fees. I think it does. I am aware there is some ground for the point you make as to the word "officers" as used in the section; but upon a careful reading of the whole statute, I do not see why your construction of the term "officers" should control, and I think that on the whole the term "costs" includes witness and jury fees.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

*Interest; State to Pay Interest Under Special Act—County Treasurers; Fees of; When Entitled to, for Collecting Special Tax; Taxation; Special Tax.*

INTEREST; STATE TO PAY INTEREST UNDER SPECIAL ACT.

Attorney General's Office,  
Columbus, Ohio, August 21, 1888.

*Hon. Wm. W. Beatty, Huntsville, Ohio:*

DEAR SIR:—When I arrived at my office yesterday, after a week's absence on professional business in Illinois, I found yours of the 17th inst. awaiting me.

The resolution to which you refer, to-wit: House Joint Resolution, No. 37, provides, among other things, that the board of public works "are hereby recommended and required to settle with McBride for the balance of \$400.28, with interest from the first day of November, 1884."

He is therefore entitled, in my judgment, to interest on that sum from the above date.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

COUNTY TREASURERS; FEES OF; WHEN ENTITLED TO, FOR COLLECTING SPECIAL TAX; TAXATION; SPECIAL TAX.

Attorney General's Office,  
Columbus, Ohio, August 22, 1888.

*J. W. Hollingsworth, Esq., Prosecuting Attorney, St. Clairsville, Ohio:*

DEAR SIR:—Yours of the 18th inst. received, in which you submit the following, and ask my opinion thereon. "When it becomes necessary for the commissioners of a

*Corporations; No Power to do Both Life and Accident Insurance Business; Insurance Companies; Secretary of State; Discretion of; Odd Fellows, M. A. & Accident Association; Change of Name.*

county to anticipate the collection of a special tax for the restoration of county bridges under 'an act passed March 21, 1887,' Vol. 84-224, and the treasurer on the notes of the county, borrows and covers the same into the county treasury, is he entitled, under section 1117, as amended, to recover his per centum? If so, how much?"

I am of the opinion that if the treasurer is entitled to recover anything at this time, it would be five-tenths of one per cent. of the amount realized on the notes. This is upon the ground that the money is raised by virtue of a special tax levy for a particular purpose.

The other question is more difficult to determine; but after a careful examination of the subject, I am of the opinion that the treasurer is not entitled to his fee out of the amount realized from the notes, but is entitled to it as it is collected on the duplicate.

Very respectfully yours,

D. K. WATSON,

Attorney General.

CORPORATIONS; NO POWER TO DO BOTH LIFE AND ACCIDENT INSURANCE BUSINESS; INSURANCE COMPANIES; SECRETARY OF STATE; DISCRETION OF; ODD FELLOWS, M. A. & ACCIDENT ASSOCIATION; CHANGE OF NAME.

Attorney General's Office,  
Columbus, Ohio, August 11, 1888.

*Hon. James S. Robinson, Secretary of State:*

DEAR SIR:—YOU recently submitted to me "the matter of the change of name of the 'Odd Fellows Mutual Aid As-

*Corporations; No Power to do Both Life and Accident Insurance Business; Insurance Companies; Secretary of State; Discretion of; Odd Fellows, M. A. & Accident Association; Change of Name.*

sociation' of Piqua, to the 'Odd Fellows Mutual Aid and Accident Association.'"

Your communication advised me that the "Odd Fellows Mutual Aid Association," of Piqua, was an old "corporation formed under section 3630, Revised Statutes, and that at the time of its formation, corporations formed under that section could *not* do an accident business, and that section 3630 was subsequently amended."

Your communication further advises me that subsequent to the passage of this amended section, the name of the "Odd Fellows Mutual Aid Association," of Piqua, was, by a decree of the Court of Common Pleas of Miami County, changed to that of the "Odd Fellows Mutual Aid and Accident Association," and that said company had forwarded to your office, to be filed therein, a copy of the petition and decree in said case. Thereupon you submitted the following questions to me, and requested my official opinion thereon: "Can a company formed under section 3630, R. S., do both a life and accident business, or does the use of the word 'or' in the Statute indicate that they must choose between the two kinds of business? This corporation was incorporated January 9, 1882, 'for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of *deceased* members of the association, in accordance with the rules and by-laws of the association.' Nothing is said about payments to persons injured. The articles have never been amended. Has the corporation ever had power to do an accident business? Has it now? If it has not, does not the name as amended tend to mislead the public into believing that such corporation has power to do both a life and accident business?"

"If such company has no power to do an accident business, has the secretary of state power and is it his duty to refuse to file such record under section 3589, or any other



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*Corporations; No Power to do Both Life and Accident Insurance Business; Insurance Companies; Secretary of State; Discretion of; Odd Fellows, M. A. & Accident Association; Change of Name.*

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section of the Revised Statutes, or on the ground of public policy (see opinion of Attorney General Lawrence in the matter of the incorporation of the 'American Tontine Society')?"

Section 3630, as amended May 14, 1886, O. L. 83, p. 161, provides, among other things as follows: "A company or association may be organized to transact the business of life *or* accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association, etc."

I do not think a company, incorporated under section 3630, or under that section as above amended, could do both a *life and accident* business. The word "or" as used in the amended section does not mean "and" the company may do either the one or the other kind of insurance, but not both.

Although it follows, from what I have said, that the present name of the company is well calculated to mislead, and give the public the impression that it can do both kinds of insurance, when it can not; yet I am of the opinion that you would not be justified in refusing to file the decree of the court, changing the name of this association, under our existing statutes. They do not, in my judgment, confer upon you such discretionary power, an omission, it may be, much to be deplored.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

*Schools; Village School District; Treasurer of Board of Education Need Not Be Member of Board; Schools; Village School District; Election of Treasurer.*

SCHOOLS; VILLAGE SCHOOL DISTRICT; TREASURER OF BOARD OF EDUCATION NEED NOT BE MEMBER OF BOARD; SCHOOLS; VILLAGE SCHOOL DISTRICT; ELECTION OF TREASURER.

Attorney General's Office,  
Columbus, Ohio, August 27, 1888.

*W. W. Savage, Esq., Prosecuting Attorney, Wilmington, Ohio:*

DEAR SIR:—You recently submitted to me the following facts and questions and desired my official opinion thereon:

“We have here what is known as a village school district. Under section 3908 we hold our election on the first Monday of April each year, and elect two members to serve for three years, from the third Monday of April. On the third Monday each year the newly elected members are sworn in, and the board organizes under section 3980, by choosing one of its number president, and one clerk, and we have also been choosing one treasurer, to serve for the ensuing year. You see there is a new board and a re-organization each year. Section 4042 as it stood before the amendment of last winter provided (see last clause) “and in each *village* and special district the board of education shall choose its own treasurer.” This clause as amended last winter (see Vol. 85, p. 194) reads as follows: “And in each *village* and special district the board of education shall choose its own treasurer, *whose term of office shall be for one year beginning on the first day of September.*”

“Questions: 1. When does the term of office of our treasurer elected last Spring expire? 2. Can a board of education elect a treasurer to serve beyond the third Monday in April of any year? There is a new board and a new organization each third Monday annually. 3. Must the

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*Schools; County Treasurer Also Treasurer of City School  
Fund Must Give Bond as Such.*

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treasurer elected be a member of the board? 4. Suppose a member is elected to serve for one year from September 1st, and that same member is not re-elected *to the board*, if his time expires the following April? Does he cease to be a treasurer? 5. Is our board required to elect a new treasurer to commence with September 1st? 6. The law went into effect April 11th, 1888. Our election took place April 16th. What effect does this have? 7. Does section 3, page 196 apply to treasurers of village and special districts?"

1. I am of the opinion that the treasurer elected by your board is not a *de jure* treasurer. 2. The treasurer need not be a member of the board, but he can be. 3. If a member of the board is elected treasurer and his term as member expires before his term as treasurer, and he is not re-elected a member of the board, he nevertheless continues to be treasurer until the expiration of his term as such. 4. I think your board should elect a new treasurer, whose term of office should comply with the new statutes. 5. The new act, to-wit: That of April 11, 1888, repealed the old act, so far as the election of a treasurer is concerned. 6. Section 3, p. 196, does not apply to treasurers of village and special district.

Very respectfully yours,

D. K. WATSON,

Attorney General.

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SCHOOLS; COUNTY TREASURER ALSO TREASURER OF CITY SCHOOL FUND MUST GIVE BOND AS SUCH.

Attorney General's Office,  
Columbus, Ohio, September 7, 1888.

*E. P. Middleton, Esq., Prosecuting Attorney, Urbana, Ohio:*

DEAR SIR:—Your letter of the 6th inst. just received, in which you submit the following question and ask my opinion thereon:

*Schools; County Treasurer Also Treasurer of City School Fund Must Give Bond as Such.*

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“Whether, under sections 1708 and 1721 and 4042 and 4043, R. S. O., the county treasurer of a county containing a city of the second class, is ex-officio treasurer of the school fund of such city, and whether in case the school board fails to select one of its number school treasurer, the county treasurer is compelled to give bond as treasurer of the school fund before entering upon his duties as such county treasurer?”

In answering the above question I assume that the city of the second class to which you refer, is for school purposes *a city district of the second class*, according to the provisions of section 3885 of the Revised Statutes. This being so, under section 4042 (the amendment of this section last winter by the Legislature not affecting it in this respect) the treasurer of a city district is also treasurer of the school fund. Under section 1708 your county treasurer is also your city treasurer, and *may be* treasurer of the city school fund depending upon the action of the school board in appointing a treasurer from its own members. If it fails to do so, then the county treasurer becomes treasurer of the city school funds.

Under section 4043, “each school district treasurer, or county treasurer who is ex-officio treasurer of the school district, etc., shall give bond.”

This covers your case, and your county treasurer should give bond according to the Statute as treasurer of the school fund of the city.

I find in “Ohio School Laws” published in 1883, by the state school commissioner, a note to section 4043, in which the above view is sustained as correct.

Very respectfully yours,

D. K. WATSON,

Attorney General.

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*Schools; County Commissioners; Power to Appoint Superintendent When School Board Fails to Do So.*

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SCHOOLS; COUNTY COMMISSIONERS; POWER  
TO APPOINT SUPERINTENDENT WHEN  
SCHOOL BOARD FAILS TO DO SO.

Attorney General's Office,  
Columbus, Ohio, September 8, 1888.

*Hon. Eli T. Tappan, State Commissioner of Public  
Schools:*

MY DEAR SIR:—You today submitted to me a letter from Alliance, Ohio, which sets forth that the school board of that city have been unable to elect a superintendent of the public schools for the reason that there was a tie vote in the board. The letter further states that the school commences next Monday and further sets forth the urgent necessity of some action in reference to the superintendency. You further ask my opinion whether or not, under section 3969, of the Revised Statutes of Ohio, the commissioners of the county have power in this case to appoint a superintendent.

I have carefully examined the section referred to, and submit to you the following opinion: I have great doubt if the section authorizes the commissioners to make the appointment; but if I were one of the county commissioners I would resolve the doubt in favor of the board and proceed with the appointment of a superintendent.

Very respectfully yours,

D. K. WATSON,

Attorney General.

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*Intoxicating Liquors; Dow Law; Agencies.*

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INTOXICATING LIQUORS; DOW LAW;  
AGENCIES.

Attorney General's Office,  
Columbus, Ohio, September 25, 1888.

*Isaac S. Motter, Esq., Prosecuting Attorney, Lima, Ohio:*

DEAR SIR:—Your letter of the 10th inst. was received during the rush of Grand Army week, when it was impracticable to answer. Since then I have been sick most of the time and could not answer before today. You submit the following question for my official opinion. A firm of brewers in Cincinnati have an agency in the city of Lima for the sale of their beer. They have a building in Lima in which their beer is stored, and from which it is sold in quantities of one gallon or more. They pay their agent a commission on the beer sold, he selling only as a commission agent of said firm.

In my opinion the agent should pay the tax. By section 1, of the Dow Law "every person, etc." engaged in the business must pay the tax. The claim which you say the brewers make, namely, that a fair interpretation of section 8 would make the sale by their commission agent the same as a sale "at the manufactory," is not well taken. Section 8 of the act of May 14, 1886, omitted the words "at the manufactory," and at once the brewers began establishing just such agencies as has been done in your city, under the same claim as is now made in this case. At the following session of the Legislature the words "at the manufactory" were inserted in section 8. See Ohio Laws, 1887, page 224. The object of such an amendment was to prevent the very scheme which they are now trying to carry out. The tax should be collected.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.

*Jury Fees; In Criminal Case Before Justice, Under Act of April 16, 1888, O. L. 85, pp. 285-6; County Auditor; Power to Draw Warrant for Jury Fees; Under Act of April 16, 1888, O. L., 85, pp. 285-6; Talesmen and Regular Juror.*

JURY FEES; IN CRIMINAL CASE BEFORE JUSTICE, UNDER ACT OF APRIL 16, 1888, O. L. 85, PP. 285-6; COUNTY AUDITOR; POWER TO DRAW WARRANT FOR JURY FEES; UNDER ACT OF APRIL 16, 1888, O. L., 85, PP. 285-6; TALESMEN AND REGULAR JUROR.

Attorney General's Office,  
Columbus, Ohio, October 1, 1888.

*C. J. Smith, Esq., Hamilton, Ohio:*

DEAR SIR:—You recently submitted to me the following question: "Under that law (referring to the act of April 16, 1888, found on pages 285-6, Ohio Laws, Vol. 85) can the auditor draw his warrant for fees due a juror? If so, how much is the juror who is regularly summoned entitled to for each day's attendance, and how much is a juror called from the by-standers entitled to for each day's attendance?"

I am of the opinion that the auditor can draw his warrant on the treasurer for fees due each juror, and that each juror in a trial before a *justice of the peace* is entitled to receive fifty cents for each day's service. The old act provided that it was 50c for each case, but the amendment passed April 27, 1886, Ohio Laws 83, p. 94, makes it fifty cents for each day. I do not think that it makes any difference whether a juror is "regularly summoned" or whether he is "taken from the by-standers." This whole act is involved in great obscurity, and it is difficult to arrive at any satisfactory conclusion, but I am unable to see why the provision governing the matter of compensation to jurors in ordinary cases should not control in a case of this kind.

Very respectfully yours,

D. K. WATSON,  
Attorney General.

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*Ohio Penitentiary; Parole of Prisoner Serving Under Two Sentences.*

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OHIO PENITENTIARY; PAROLE OF PRISONER  
SERVING UNDER TWO SENTENCES.

Attorney General's Office,  
Columbus, Ohio, October 4, 1888.

*Hon. E. G. Coffin, Warden of Ohio Penitentiary, Columbus, Ohio:*

DEAR SIR:—You have submitted to me the following facts and requested my official opinion thereon. A prisoner was sentenced to a definite term in the penitentiary. At the same time he was sentenced for another definite term for another offense, the second term to begin at the expiration of the first. He had never been in prison in the penitentiary prior to his service under the first sentence. His first sentence has expired and he is now serving his second sentence. You desire to know if such a prisoner can be paroled. Section 8 of the Parole Statute as amended May 4, 1885, Vol. 82, p. 236, provides among other things: "And who has not previously been convicted of a felony, and served a term in a penal institution, may be allowed to go upon parole, etc."

In my opinion the facts submitted by you show that the prisoner in this case "has not previously been convicted of a felony and served a term in a penal institution" within the meaning of the above act, and it is therefore in the power of the board of managers of your institution to parole him.

Very respectfully yours,  
D. K. WATSON,  
Attorney General.



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*Benevolent Institutions; Trustees of, Interested in Contract For; Benevolent Institutions; Ohio Soldiers' and Sailors' Home.*

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BENEVOLENT INSTITUTIONS; TRUSTEES OF,  
INTERESTED IN CONTRACT FOR; BENEVO-  
LENT INSTITUTIONS; OHIO SOLDIERS' AND  
SAILORS' HOME.

Attorney General's Office,  
Columbus Ohio, October 9, 1888.

*Hon. I. F. Mack, Sandusky, Ohio:*

DEAR SIR:—YOURS of October 5th duly received, in which you submit the following question: "Is there legal objection to the ordering of printing, which may be needed by the officers of the home, at the office of the Sandusky Register on account of my connection with that office and membership on this board? You are a member of the board of trustees of the Ohio Soldiers' and Sailors' Home. That institution is classified among the benevolent institutions of the State, as I understand it. Section 628, of the Revised Statutes of Ohio, as amended, Ohio Laws, Vol. 83, p. 6, reads as follows: "No trustee or officer of any benevolent institution may be, either directly or indirectly interested in any purchase for, or contract on behalf of such institution, and in addition to the liability of any trustee, or officer violating this inhibition to respond in damages for any injury sustained by the institution by his act, he shall be forthwith removed from office." I am of the opinion that in the light of this section there would be legal objection to the official printing of the Home in your office.

Very respectfully yours,

D. K. WATSON,  
Attorney General.

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*County Treasurer; Proceedings Against, For Violation of  
Provisions of Section 1114, R. S.*

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COUNTY TREASURER; PROCEEDINGS AGAINST  
FOR VIOLATION OF PROVISIONS OF SEC-  
TION 1114, R. S.

Attorney General's Office,  
Columbus, Ohio, October 9, 1888.

*S. M. Winn, Esq., Prosecuting Attorney, Zanesville, Ohio:*

DEAR SIR:—I have carefully examined the matter of the report of the special examiners of the treasury of your county made on the 6th of September last, together with the different sections of the Statutes which apply thereto. This examination was made with special reference to some official action being taken by you in the event it was considered that the State would be warranted in doing so. The result of my consideration of the question is that the report of the special examiners does not make a case sufficiently strong against the treasurer to justify criminal proceedings against him. It is true that according to the report the whole amount of *money* which should have been in the treasury on the day the examination was first made was not there in money; but the deficiency was "explained by the treasurer as having occurred because of checks, certificates and tax receipts carried by him and not cashed until a later period," and the report does not show that this was not true; although they say the checks, certificates and receipts referred to by the treasurer were "not found by or exhibited to us." This might be true, and yet the checks, certificates and receipts have been in the office.

There is not sufficient evidence here, in my opinion, to show that the treasurer is guilty of having violated section 1114, of the Revised Statutes to which you refer. There is no direct evidence that he ever made any *loan* of this money. It may be the treasurer was negligent in his official duties, but I can not see, from the facts submitted to me,

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*Elections; Township Officers; Separate Ticket and Separate  
Ballot Box.*

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where he has been guilty of such a violation of the Statute as renders him liable to prosecution.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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ELECTIONS; TOWNSHIP OFFICERS; SEPARATE  
TICKET AND SEPARATE BALLOT BOX.

Attorney General's Office,  
Columbus, Ohio, October 22, 1888.

*Byron M. Clendening, Esq., Prosecuting Attorney, Celina,  
Ohio:*

DEAR SIR:—Yours of the 7th inst. was awaiting me upon my return to this city. I do not think that township officers should be placed on the same ticket with presidential, state, judicial and county officers.

Township officers are not mentioned in the act of March 24, 1886. I think they should be on a separate ticket, and there should be a separate ballot box.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

*Probate Court; Indexes, Separate; No General Index Authorized—Elections; Abstracts of Votes Sent Secretary of State; Secretary Has No Power to Change.*

PROBATE COURT; INDEXES, SEPARATE; NO  
GENERAL INDEX AUTHORIZED.

Attorney General's Office,  
Columbus, Ohio, October 24, 1888.

*M. Slusser, Esq., Prosecuting Attorney, Wauseon, Ohio:*

DEAR SIR:—Replying to yours of the 18th inst. will say that section 528, Revised Statutes of Ohio, does not authorize “a *general* index of the records of the Probate Court” to be kept. It specifies what the records of this court shall be, and then provides: “To each of these books shall be attached an index, etc.” I do not think the Statute contemplates that any additional index shall be made.

I am of the opinion that when the separate volume index, referred to in the above section, is destroyed by mutilation or otherwise, the costs of restoring the same can be paid out of the county treasury upon the order of the probate judge, under section 528, as supplemented by section 528c, Vol. 81, Ohio Laws, p. 162.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

ELECTIONS; ABSTRACTS OF VOTES SENT SECRETARY OF STATE; SECRETARY HAS NO POWER TO CHANGE.

Attorney General's Office,  
Columbus, Ohio, November 21, 1888.

*Hon. James S. Robinson, Secretary of State:*

DEAR SIR:—You advise me that you recently received the following communication:

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*Elections; Abstracts of Votes Sent Secretary of State; Secretary Has No Power to Change.*

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*"Hon. Jas. S. Robinson, Secretary of State, Columbus, Ohio:*

"DEAR SIR:—In the abstract from this (Fulton) county, you will find that Gaylard M. Saltzgaber, Representative, has 144 votes in Fulton Township, the tally sheet from that township shows that he had 154 votes, the township clerk in carrying out the vote in figures made it 144, when it should be 154, making Saltzgaber's vote in the county 1,957 instead of 1,947, please correct and oblige.

"The justices called it to me 144 and the mistake was not discovered until this morning.

"Yours truly,

"Jas. C. King, Clerk."

You desire my opinion as to whether you have the power to make the correction in accordance with the above letter.

I have carefully examined the question and am of the opinion you have no such power. The Statute evidently requires you to count the votes as shown by the abstract sent you by the county clerk and you would not be warranted in adding to or deducting from the vote as shown by the abstract thus sent you, upon the mere statement of one member of the board. In this connection see 21 Ohio St., p. 216.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Elections; Fees of Judges and Clerks—Juries; Exemption  
From Serving on; Contributing Member of Militia  
Company Exempt.*

ELECTIONS; FEES OF JUDGES AND CLERKS.

Attorney General's Office,  
Columbus, Ohio, November 24, 1888.

*S. R. Gotshall, Esq., Prosecuting Attorney, Mt. Vernon,  
Ohio:*

DEAR SIR:—I have been so occupied in the court and absent so much on official business that I have not been able to answer yours of the 31st of October sooner. In yours of that date you ask me the following: "Will you please write me your opinion as to the amount of fees to be received by each of the judges and clerks of the coming election?"

By referring to section 2963, Vol. 84, Ohio Laws, p. 217, you will find the compensation as I understand it, fixed at \$2.00.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

JURIES; EXEMPTION FROM SERVING ON; CONTRIBUTING MEMBER OF MILITIA COMPANY EXEMPT.

Attorney General's Office,  
Columbus, Ohio, November 26, 1888.

*Hon. H. A. Axline, Adjutant General:*

MY DEAR SIR:—You recently submitted to me the question whether the holder of a certificate as a *contributing* member to a military company was exempt from serving on a jury, if he is past the age of forty-five years.

Section 5189, L. Williams' Revised Statutes, Vol. III, p. 339, provides among other things as follows:

*Ohio Penitentiary; Parole of Prisoner Serving Several Terms Under One Sentence.*

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“Active and contributing members of all military companies and batteries shall be exempt from serving on juries.”

In my opinion the Legislature had the power to enact the above Statute, and having chosen to pass such a law, contributing members of military companies are entitled to its benefits, and the fact that such member is past forty-five years of age does not deprive him of the benefit of this section. He is therefore entitled to exemption from jury service if he chooses to claim it.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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OHIO PENITENTIARY; PAROLE OF PRISONER  
SERVING SEVERAL TERMS UNDER ONE  
SENTENCE.

Attorney General's Office,  
Columbus, Ohio, November 26, 1888.

*Hon. E. G. Coffin, Warden of Ohio Penitentiary:*

DEAR SIR:—You recently submitted to me the following communication: “F. B. Jones, Serial No. 18195, was received at this institution April 3, 1886, from Clark County, on four charges for embezzlement, the sentence of the court was four, three, two and one, making in all ten years, all given on the same day. This being the first offense of said Jones, when was he, or when will he be eligible to parole?”

On October 4th, last, I submitted to you an official opinion relative to the powers of the board of managers under the Parole Statute, in which I held that the board had the power to grant the parole. I am unable to distinguish any difference between this case and that one and am conse-

*Ohio Penitentiary; Parole of Prisoner Serving Under  
Several Sentences; Avisability of Granting Parole.*

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quently of the opinion that the board can grant the parole in the present case.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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OHIO PENITENTIARY; PAROLE OF PRISONER  
SERVING UNDER SEVERAL SENTENCES; AD-  
VISABILITY OF GRANTING PAROLE.

Attorney General's Office,  
Columbus, Ohio, November 26, 1888.

*J. W. Clements, Esq., Secretary, Board of Managers, Ohio  
Penitentiary:*

MY DEAR SIR:—You recently submitted to me a communication stating that the board of managers of the Ohio Penitentiary desired my opinion as to the eligibility of B. F. Sheridan to parole. Sheridan is now a prisoner in the penitentiary. In your communication you submitted the following facts: "Sheridan was received in the institution from Scioto County, February 18, 1885, having been convicted of the crime of horse stealing and sentenced by the Court of Common Pleas of that County as follows: On the first count for a term of three years; on the second count for a term of one year; and on the fourth count for a term of one year. Sheridan was taken out of prison on May 7, 1885, and taken to Pike County and tried there and found guilty of horse stealing and sentenced by the court to two terms of imprisonment of two years each." Section 8, of the act of March 24, 1884, commonly called the "Parole Statute," as amended May 4, 1885, provides as follows: "Said board of managers shall have power to establish rules and regulations under which any prisoner who is now, or hereafter may be, imprisoned under a sentence other than for murder in the



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*Ohio Penitentiary; Parole of Prisoner Serving Under Several Sentences; Avisability of Granting Parole.*

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first or second degree, who may have served the minimum term provided by law for the crime for which he was convicted, and who has not previously been convicted of a felony and served a term in a penal institution, may be allowed to go upon parole, etc." The minimum term in this State for horse stealing, as prescribed by section 6857, R. S., is one year, so that from your communication it is apparent the prisoner has already served the minimum term for the offense for which he was first convicted. It also appears from your communication that the term of sentence for the second crime committed by the prisoner has not yet commenced. I assume that the term of imprisonment which Sheridan was serving at the time of his conviction in Pike County was his *first* imprisonment in a penal institution.

Resting the question solely upon the provisions of the eighth section of the parole act, I am of the opinion the prisoner is eligible to parole. There are other provisions of this act, however, to which the attention of the board of managers should be called in this connection. While it was the evident intention of the Legislature to induce the reformation of the prisoner by conferring the power to parole upon the board of managers to such convicts as in their judgment merited parole, it is also clear from the act that the power should not be exercised in such manner that the parole of a prisoner should be "incompatible with the welfare of society," and it is the duty of the board, under section 7, of the above act, to so exercise the parole power as that society shall not suffer. As above expressed I am of the opinion that the board has the legal power to parole in this case, but whether it is prudent and wise to exercise that power in such a case as your communication discloses, is a wholly different question, and one which I remit to the sound discretion of the board.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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*Elections; "Majority of Votes Cast" on a Given Question at General Election.*

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ELECTIONS; "MAJORITY OF VOTES CAST" ON A GIVEN QUESTION AT GENERAL ELECTION.

Attorney General's Office,  
Columbus, Ohio, November 30, 1888.

*E. P. Middleton, Esq., Prosecuting Attorney, Urbana, Ohio:*

DEAR SIR:—You recently submitted to me the following communication, and asked my official opinion thereon: "On November 6th, at the general election, our county commissioners submitted a proposition to the electors of our county, to levy a tax, to aid in purchasing a county fair ground, under sections Nos. 3703 and 3704 of the R. S. P. The question now arises whether a majority of all the votes cast at such general election is necessary to authorize the commissioners to levy the tax, or only a majority of the yes or no votes."

I have examined the provisions of section 3704, to which you refer, (the construction of which determines the question), with as much care as my official duties would permit, and am of the opinion that a fair construction of its language means a majority of the votes cast on the given question, and not a majority of all the votes cast at that election. I think your construction of the Statute as shown by your letter is correct.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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*Probate Judge; Not Entitled to Compensation for Furnishing Statistical Information to Secretary of State.*

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PROBATE JUDGE; NOT ENTITLED TO COMPENSATION FOR FURNISHING STATISTICAL INFORMATION TO SECRETARY OF STATE.

Attorney General's Office,  
Columbus, Ohio, December 8, 1888.

*Hon. J. S. Robinson, Secretary of State:*

DEAR SIR:—You recently submitted to me the question whether a probate judge is entitled to compensation for furnishing *statistical* information to your department. Section 140, Revised Statutes, provides: "Every state, county, and other officer under the laws of this State shall answer fully and promptly *without compensation*, such special and general questions as the secretary may propose with the view of obtaining statistical information, etc." I have not been able to find that this provision has been changed by subsequent legislation, and the question would therefore seem to be settled against the right of the probate judges to charge for such services. I regret, however, that the Statute is not more liberal in its provisions. I have no doubt that it requires a great deal of time and careful labor to procure such statistics as this section provides shall be furnished you, and I know no reason why the officers furnishing it should not receive compensation therefor, except that the Statute says they shall not. In my opinion the Legislature should amend the section and allow the laborer a reasonable compensation for his hire.

Very respectfully yours,

DAVID K. WATSON,  
Attorney General.

*Schools; Teachers of Special Branches, Music, Painting, Etc., Not Required to be Examined for Physiology or Hygiene.*

SCHOOLS; TEACHERS OF SPECIAL BRANCHES,  
MUSIC, PAINTING, ETC., NOT REQUIRED TO  
BE EXAMINED FOR PHYSIOLOGY OR HY-  
GIENE.

Attorney General's Office,  
Columbus, Ohio, December 8, 1888.

*Samuel Findley, Esq., Akron, Ohio:*

MY DEAR SIR:—Yours of the 4th inst. duly received, in which you submit the following question to me and ask my opinion thereon: "Does the concluding clause 'provided that after January 1, 1889, no person shall be employed \* \* \* who has not obtained \* \* \* a certificate that he is qualified to teach physiology and hygiene' apply to teachers of special branches, such as music, drawing, etc.?"

Section 4074, Revised Statutes, as amended April 5, 1882, was repealed and the act of March 21, 1888, Ohio Laws, Vol. 85, p. 93, took its place. (This is evidently the act to which you refer.) Subsequently and at the same session of the General Assembly, to-wit: April 16, 1888, section 4074 was again amended. See Ohio Laws, Vol. 85, pp. 330, 333. But the language in both sections amending the original section 4074, is substantially the same, and makes "a certificate that a person is qualified to teach physiology and hygiene" a prerequisite for teaching a *common school only*. A person therefore who teaches special branches or studies, such as French, music, drawing, painting, penmanship, German or gymnastics is *not* required to have a certificate to teach physiology or hygiene.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

*Benevolent Institutions; Trustees or Officers of Not to be Interested in Any Contract for Such Institution.*

BENEVOLENT INSTITUTIONS; TRUSTEES OR OFFICERS OF NOT TO BE INTERESTED IN ANY CONTRACT FOR SUCH INSTITUTION.

Attorney General's Office,  
Columbus, Ohio, December 10, 1888.

*Charles Douglass, Esq., Superintendent, Lancaster, Ohio:*

MY DEAR SIR:—You recently submitted to me the following question, and asked my official opinion thereon: "The Corner Manufacturing Company, of Columbus, has long operated a brush shop in the institution under a contract requiring the company to have a representative who should attend to the shipping, furnishing orders, etc., while the State should place a disciplinarian over the boys. The company's agent has resigned and the position has been tendered an officer of this school who can look after their interests eight hours a day and control a family or company of boys in the mean time. This will be entirely satisfactory to all parties interested providing it does not conflict with the statute. He is not a contractor nor is he interested in the Columbus corporation. His work would consist in ordering various kinds of brushes, shipping stock, receiving material, etc. The question is, can we employ this agent a part of the time, allowing him to serve the company the remainder?"

Section 628 of the Revised Statutes as amended, Vol. 83, p. 6, reads as follows: "No trustees or officer of any benevolent institution may be, either directly or indirectly interested in any purchase for or contract on behalf of such institution, etc." You state that the person to whom this position has been tendered by the company is an *officer* of your school, and I infer from your letter, that it is the intention to have that relation continued.

Due regard and consideration for the spirit, if not the very positive language of the statute, compels me to say that the same person should not, in my opinion, occupy the dual relation which your statement of the facts suggests. In ad-

*Schools; Examiners; Members of County Board Not Connected With Any Normal School, Etc.*

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dition to this statute, the whole spirit of the common law in questions of this character is based upon this idea, for which we have such supreme authority, that no man can serve two masters, etc.

As I told you the other day, I am not prepared to say, that the statute positively forbids such an arrangement as your communication contemplates, and it may be that you would be within the letter of the statute in carrying out that arrangement; but it is not in my opinion in harmony with the spirit of the statute surrounding the government of our benevolent institutions to do so.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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SCHOOLS; EXAMINERS; MEMBERS OF COUNTY BOARD NOT CONNECTED WITH ANY NORMAL SCHOOL, ETC.

Attorney General's Office,  
Columbus, Ohio, December 11, 1888.

*Hon. William S. Matthews, Chief Clerk:*

DEAR SIR:—You recently submitted to me the following question and desired my official opinion thereon: "Can a member of a county board of examiners be connected with, or interested in, a normal school, or school for the special education or training of persons for teachers, as a paid teacher or official?"

The matter is controlled by section 4069, Revised Statutes, as amended, Ohio Laws, Vol. 85, pp. 330, 331, which provides as follows:

"There shall be a board of examiners for each county, which shall consist of three competent persons to be appointed by the probate judge; such persons shall be residents

County Commissioners; Annual Report; Who to Publish.

of the county for which they are appointed, and shall not be connected with or interested in any normal school or schools for the special education of persons for teachers; if an examiner becomes connected with or interested in any such school, his office shall become vacant thereby, etc.”

You also advise me that the Hon. Eli T. Tappan, late state school commissioner, gave an opinion to the effect that such examiner could not be connected as a paid official with any normal school, or school for the special education or training of persons for teachers, and that being so connected operated as a vacation of their office.

I unhesitatingly concur in this opinion.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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COUNTY COMMISSIONERS; ANNUAL REPORT;  
WHO TO PUBLISH.

Attorney General's Office,

Columbus, Ohio, December 13, 1888.

*D. R. Crissinger, Esq., Prosecuting Attorney, Marion, Ohio:*

DEAR SIR:—Replying to yours of the 8th inst., will say I am not able to agree with you concerning who has the right to publish the annual report of the commissioners under section 917, Revised Statutes, but think the right lies with the commissioners. After I had come to this conclusion I examined the records of this office, and found that on the 17th of January, 1882, Hon. Geo. K. Nash, who was then attorney general, gave an opinion to the prosecuting attorney of Carroll County, in the following language: “I think that section 917 confers upon the *commissioners* the power to make the contract for printing their annual report, and that the power is not vested in the auditor.” You will see by this that my interpretation of the statute agrees with that of

*County Commissioners; May Subscribe for One Newspaper  
of Each Political Party.*

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Judge Nash. As to your question under the third section of the Dow Law, I am of the opinion, in the case stated by you, that the party is not entitled to a refunding order.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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COUNTY COMMISSIONERS; MAY SUBSCRIBE  
FOR ONE NEWSPAPER OF EACH POLITICAL  
PARTY.

Attorney General's Office,  
Columbus, Ohio, December 22, 1888.

*W. H. Barnhard, Esq., Prosecuting Attorney, Mt. Gilead,  
Ohio:*

MY DEAR SIR:—In yours of the 20th inst. you submit to me the following questions:

*“First—Does section 895 of the Revised Statutes authorize the county commissioners to subscribe for more than one paper, i. e., the leading paper of each political party?*

*“Second—Under said section are the commissioners authorized to subscribe for more than one paper of each political party?”*

It is difficult to distinguish any difference between these questions, and I shall give my construction of section 895, R. S., referred to in these questions, without special reference to them.

Under that section I am of the opinion that the commissioners are authorized to subscribe for “one copy of the leading newspapers of *each* political party printed and published in their county;” but the number of copies for which they can subscribe is limited to *one of each kind* of paper.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.



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*Insurance Companies; Foreign Company Has No Power to Do Business in This State Unless the Entire Amount of Capital Stock is Paid Up and Invested as Required by the Laws of the State Where Organized.*

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INSURANCE COMPANIES; FOREIGN COMPANY HAS NO POWER TO DO BUSINESS IN THIS STATE UNLESS THE ENTIRE AMOUNT OF CAPITAL STOCK IS PAID UP AND INVESTED AS REQUIRED BY THE LAWS OF THE STATE WHERE ORGANIZED.

Attorney General's Office,  
Columbus, Ohio, December 26, 1888.

*Hon. Samuel E. Kemp, Superintendent of Insurance, Columbus, Ohio:*

DEAR SIR:—You recently submitted to me the following communication and desired my opinion thereon: "The Reading Fire Insurance Company, of Reading, Pennsylvania, has made application for admission to do joint stock fire insurance business in Ohio. Its authorized capital stock is \$300,000.00, only \$250,000.00 of which is paid up in cash. Does this condition of the company, as to its capital stock, bar its right to admission, under the provisions of section 3656 of the Revised Statutes?"

From the language of your communication I assume that the Pennsylvania company seeking to do business in Ohio is incorporated under the statutes of Pennsylvania as a "joint stock company," though there is no direct statement of this character in your inquiry. Section 3656, Revised Statutes of Ohio, Vol. I, p. 751, among other things, provides as follows: "Nor shall any company, association or partnership, organized under the laws of any other state, take risks to transact business of insurance in this State, directly or indirectly, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this chapter, nor unless the entire capital stock is

*Schools; Repairs of School Building; Power of Board of Education to Make Special Levy.*

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fully paid up and invested as required by the laws of the state where it was organized.”

The Pennsylvania statute controlling this subject provides: “As soon as the whole amount of the capital stock of a joint stock company, \* \* \* has been paid in, etc.”

It appears from your communication that \$50,000.00 of the capital stock of the Reading Fire Insurance Company, of Reading, Pennsylvania, has not been paid in, as required by the laws of that state. Such being the case, I am of the opinion that the provisions of section 3656 of our statutes prevent the above named company from transacting its business in this State. I will add, however, that the question is one of doubt and surrounded with some uncertainty, but I think the views I have above expressed to be correct.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

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SCHOOLS; REPAIRS OF SCHOOL BUILDING;  
POWER OF BOARD OF EDUCATION TO MAKE  
SPECIAL LEVY.

Attorney General's Office,  
Columbus, Ohio, December 27, 1888.

*E. W. Maxson, Esq., Prosecuting Attorney, Ravenna, Ohio:*

DEAR SIR:—In your favor of December 3d, you state: “The board of education of the Kent village schools some time since found that the building was unsafe for the reason that the roof was liable to fall, and found it necessary to make immediate repairs which cost about \$3,000. The cost of this was paid out of their school fund. Now they find themselves short of funds to pay teachers and expenses. It is necessary for them to raise the money to make up this de-

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*Schools; Repairs of School Building; Power of Board of Education to Make Special Levy.*

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iciency made by the use of the money above mentioned used for repairs. What power have they to borrow the money or make a special levy above what the law allows next year without a special act of the Legislature to enable them to do so? Has the Legislature power to pass such an act?"

You do not state whether the \$3,000 was paid out of the "state funds" or the "contingent fund." Section 3958, of the Revised Statutes, as amended and published in "Ohio School Laws," 1883, provides: "Each board of education \* \* \* shall annually at a regular or special meeting to be held between the third Monday in April and the first Monday in June, determine by estimate as nearly as practicable the entire amount of money necessary to be levied as a contingent fund, \* \* \* to erect, purchase, lease, *repair* and furnish school houses, and build additions thereto, and for other school expenses." This would seem to indicate that money paid for "repairs" of a school building must come from the contingent fund alone.

Section 3959, Revised Statutes, (as I interpret it) fixes the rate of taxation for such contingent purposes at seven mills on the dollar. If this sum is exceeded, for repairs or other lawful purposes, I am inclined to think the board should be authorized by special act to make a levy sufficiently high to cover any needed outlay.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Taxation; To Whom Treasurer to Look for Payment,  
Where One Insurance Company Returns Premiums  
Earned by Another.*

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TAXATION; TO WHOM TREASURER TO LOOK  
FOR PAYMENT, WHERE ONE INSURANCE  
COMPANY RETURNS PREMIUMS EARNED  
BY ANOTHER.

Attorney General's Office,  
Columbus, Ohio, January 5, 1889.

*Hon. Samuel E. Kemp, Superintendent of Insurance:*

MY DEAR SIR:—You recently submitted to me a communication relative to the payment of taxes upon certain insurance policies. The question seems to have arisen in this way. The Washington Fire and Marine Insurance Company, of Boston, transacted business in this State till December 31, 1887, at which time their outstanding risks were reinsured in the National Fire Insurance Company. It appears that in returning the premiums for taxation some of the agents of the last named company have included eight months premiums received by the Washington F. & M. Insurance Company, to-wit: From May 1st to December 31st, 1887, and you desire my opinion as to which company is liable for the tax on the premiums from May 1st, 1887, to December 31st, 1887.

The case, as I understand it, is like this. The agents of the National Company have returned for taxation premiums which were earned during the last eight months of the existence of the Washington Fire and Marine Company. Let us suppose this was an error. The question is not one as between the two companies, (I would not be justified in expressing an opinion upon that question) but the question for me to determine is, to whom must the proper county officers look for the payment of taxes now charged on their books against the National Company. I do not see how the county treasurer can look to any company except the National. It is his duty to collect the taxes as certified to him by the auditor.

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*Constitutional Law; Fish and Game Law Unconstitutional.*

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If a mistake has been made, there is a proper way to correct it; but the treasurer must look in the first instance to the person charged upon his books, who in this case I suppose to be the National Company.

Very respectfully yours,  
DAVID K. WATSON,  
Attorney General.

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CONSTITUTIONAL LAW; FISH AND GAME LAW  
UNCONSTITUTIONAL.

Attorney General's Office,  
Columbus, Ohio, January 8, 1889.

*Hon. C. V. Osborn, Dayton, Ohio:*

DEAR SIR:—I have examined the question submitted in your recent communication concerning the constitutionality of section 6968, Revised Statutes, as amended by the act of the General Assembly passed April 14, 1888, Ohio Laws, Vol. 85, p. 271.

The act makes it unlawful for any person to "draw, set, place or locate any trap, pound, net, seine or any device for catching fish as this section forbids," and further provides, that any "nets, seines, pounds, or other devices for catching fish, set or placed in violation of the provisions of this section, shall be confiscated wherever found, and the same shall be sold to the highest bidder, at public outcry, at a place to be selected by the fish commissioner, and the proceeds derived from such sale shall be placed to the credit of the fish and game fund and subject to the warrant of such commissioner." And it is further provided in said act as follows: "Any person convicted of a violation of any of the provisions of this act shall be fined for the first offense not less than twenty-five dollars, nor more than one hundred dollars, and in case of neglect or refusal to pay said