
School Tax Law of 24th of March, 1851.

The fifth question is answered in my reply to the second.

Truly yours, etc.,

JOSEPH McCORMICK,
Attorney General of Ohio.

SCHOOL TAX LAW OF 24TH OF MARCH, 1851.

Attorney General's Office,
Columbus, May 24, 1851.

John Woods, Auditor of State for the State of Ohio:

SIR:—Your question as to “whether under the law of 24th March, 1851, taxes assessed for the tuition fund or payment of teachers should be entered on the duplicate by the county auditor and collected by the county treasurer,” has been by me carefully examined.

The first, second and sixth sections of the act of March 7, 1850, especially provide for the manner in which taxes for tuition purposes shall be voted, assessed and collected, but no provision is made by it for school house and library purposes.

The act of March 24, 1851, appears to be a new and more complete and efficient arrangement of the machinery used on creating and conducting common schools.

The fifth section of the act enumerates the purposes for which taxes may be voted, which include only the purchase or erection of school houses, the purchase or lease of school grounds, and the purchase of school library.

The tenth section prescribes the time and manner in which notice shall be given for the collection of the taxes voted under the provisions of the fifth section shall be made out.

The eighteenth section provides for collecting the taxes, on the duplicate made out in accordance with the

School Tax Law of 24th of March, 1851.

provisions of the twelfth section by the district treasurer, so far as he may be able so to do, by distraining personal property. In case, however, the district treasurer shall be unable to collect the taxes on his duplicate until after the expiration of three months then he shall return the delinquencies to the county auditor, who then places such delinquencies on the county duplicate, and they are collected by the county treasurer. That in no case is any tax assessed under the provisions of this act, placed on the auditor's duplicate or collected by the county treasurer, until it has been returned delinquent three months by the district treasurer.

The act of March 24, 1851, makes no provision for the creation or collection of a tuition fund, but merely designates the depository of that fund already provided for by former acts.

The twenty-third and twenty-fifth sections fully sustain this position; the first of which provides "that the township treasurer in each township shall be the treasurer of all the school funds for tuition purposes belonging to the township arising from lands, fines, interest, tax," etc., the last "that all monies arising from any source for school purposes in the township shall be paid over to the township treasurer and he shall apportion," etc.

In my opinion the act provides that the two funds—for tuition and school house and library—shall be kept distinct and apart in the hands of different officers; and in fact, are derived from different sources.

From all of which I infer there is no conflict between the first and second sections of the act of March 7, 1850, and the eighteenth section of the act of March 24, 1851, and that all taxes voted and assessed for tuition or common school purposes, are assessed and collected under the provisions of the former act.

Most respectfully yours, etc.,

JOSEPH McCORMICK,

Attorney General of Ohio.

PRINTING OF 1850; S. MIDAY.

Attorney General's Office,
Columbus, June 20, 1851.

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

“In making out his account for the printing of 1850, Col. Miday has charged the full price for two compositions. The first for the composition of the usual number of copies printed for the members and the second for the volume of documents. Is he legally entitled to double composition under the resolution and contract?”

The printing was given to Colonel Miday under a resolution containing the restriction that it should be “at any price not exceeding the prices paid by the last session of the General Assembly,” and direction to the clerk, “In making the contract for the printing of this house the clerk shall not pay any higher prices than the bid made by Samuel Miday on the 16th day of January, 1850.”

The facts before me do not show what prices were paid for printing at the “last session,” and the knowledge I have of the contract is derived from the bond of Colonel Miday.

Upon reference to the resolution under which the printing was done for the “last session” of 1848-49, it will be found to contain the same restriction or proviso referring to the “last session,” again until the printing is regulated by the law of 1845, which allows charge for double composition in only one instance, viz. : extra copies. It would seem, however, that this restriction or proviso was entirely disregarded as the bid of Samuel Miday of January 16, 1850, clearly justified a double charge for composition, as does also the condition of the bond under which the work was done on the bill for which your question is

Act of 1793, Law of Pennsylvania on Fornication and Bastardy.

raised, the language being "twenty-five cents per thousand ems for composition," unqualified.

The house being competent to make such contract, under their own resolution as to it seemed best, and having made a contract allowing charge for double composition, I am of opinion that Colonel Miday is legally entitled by his contract to double composition, if I am to understand the condition of the bond as correctly setting the contract forth.

This opinion would be modified or changed, however, if upon reference to the printing contracts of the "last" and former sessions, it should be found that the proviso of the resolutions contracting for the printing were adhered to and the prices governed by the law of 1845.

JOSEPH McCORMICK,

Attorney General.

To John Woods, Auditor of State.

ACT OF 1793, LAW OF PENNSYLVANIA ON
FORNICATION AND BASTARDY.

Attorney General's Office,

Columbus, June 18, 1851.

H. E. Frank, Private Secretary of the Governor, of Ohio:

SIR:—Yours of this date propounding the interrogatory "whether fornication and bastardy by the laws of Pennsylvania is a crime within the meaning of the act of congress of February 12, 1793," has been examined.

By the statute of Pennsylvania, fornication is punished within twenty-one stripes or two pounds fine, while the provisions of the bastardy act are somewhat analogous to those of Ohio.

Proceedings under this act are quasi-criminal, but not

An Alien Ineligible to Office.

strictly so. The putative father may be proceeded against for fornication alone, for bastardy alone, or for both.

The object of the first clause of section two, article four of the constitution, was evidently to secure the delivery of gross offenders to justice, and render the punishment of crime certain, but I cannot for one moment believe it was intended to operate or permit its powers to be invoked for the gratification of private feeling, as would be the case if ordinary misdemeanors were embraced in its contemplation.

The offense should be clothed with the dignity or turpitude of a crime injurious to the public at large and dangerous to the general welfare.

By the laws of Pennsylvania fornication and bastardy is not such a crime and is not embraced within the provisions of the law of 1793.

Respectfully yours, etc.,

JOSEPH McCORMICK,

Attorney General of Ohio.

AN ALIEN INELIGIBLE TO OFFICE.

Attorney General's Office,
Columbus, July 15, 1851.

Governor R. Wood:

SIR:—"Is an unnaturalized foreign resident eligible to the office of notary public under the laws of this state?" is a question submitted for my opinion from your office. I answer no.

The constitution of Ohio does not make the qualification of citizenship a requisite to office in express terms except in the instances of governor and member of the

Requisition for Negro Stealing.

general assembly, yet it has never been supposed that an unnaturalized resident was eligible to exercise the functions of the various state and judicial offices.

So also county and township officers are to be selected by qualified voters, without designating the qualifications of the officer voted for, yet it is hardly to be presumed he would be eligible if not possessed of equal franchises with the elector who casts the ballot.

Although unnaturalized foreign residents are not expressly disqualified and although the requisite of citizenship is not expressly made in a majority of the offices created by the constitution, yet the inference is fairly deducible from the tenor of the whole instrument, as also from the ———— and spirit of our institutions, that all officers shall be possessed of all the qualifications of the electors who appoint them.

The fourth section of the sixth article which provides for the appointment of officers created by law merely permits the law to designate the manner of appointment, and not to designate the qualifications of the appointee, but he must be possessed of the qualifications of an officer created by the constitution.

Notaries public are officers of law created under the authority of this fourth section, and must be possessed of the qualifications of electors.

Respectfully yours, etc.,

JOSEPH McCORMICK,

Attorney General of Ohio.

REQUISITION FOR NEGRO STEALING.

Attorney General's Office,
Columbus, September 25, 1851.

HONORED SIR:—The requisition and accompanying documents in the case of the State of Alabama vs. Orin

Requisition for Negro Stealing.

P. Billings, alias A. W. Blake, charged with stealing a slave man named Allen, having been submitted to me, and my opinion required of their sufficiency to authorize your excellency to grant the writ of arrest, I beg leave to submit the following :

As the theft of a man is a crime and well known to the common law, the question raised by my predecessor is not implicated, for I apprehend the principle is not altered by saying the man stolen was a slave.

The crime charged is recognized in, and is a part of the criminal code of the various States of the Union and indeed of all civilized nations, although the degree of punishment varies. By Toulman's Digest of the Laws of Alabama, page 208, the punishment is death.

The affidavit taken by competent authority and certified as authentic, sets forth the crime distinctly and also the locus in quo, Autauga County, Alabama and the requisition charges the defendant with having fled from justice, and taken refuge in Ohio.

There is one point in these papers, on which the opinions of my predecessor have not been uniform. He has in some instances advised the grant of the writ when the accompanying documents did not show the flight; in others he has advised the refusal of the writ because the accompanying documents did not make such showing. The law certainly does not require such showing in either an authenticated copy of an indictment, or in an authenticated affidavit. If the indictment or affidavit charges a crime and the demanding governor charges a flight, the requirements of the law are complied with.

In my opinion the papers submitted are sufficient in form and substance, and show a proper case for granting the writ of arrest.

JOSEPH McCORMICK.

Rhinehart—a Failure of Title Entitles the Vendee to Repayment Pro Tanta—Interest on Surplus Revenue to be Paid by Delinquent Counties After January, 1850.

RHINEHART—A FAILURE OF TITLE ENTITLES THE VENDEE TO REPAYMENT PRO TANTA.

Attorney General's Office,
Columbus, October 23, 1851.

SIR:—In your communication of October 20, you submit for my opinion whether Rhinehart “has a legal right to have a portion of the purchase money refunded,” the land having failed on remeasurement to “hold out” the quantity sold.

This question has been frequently determined by the Supreme Court of the State in one form or another, and by the last decision amounts to this, “When the title to a part of the premises sold and conveyed *fails*, the vendee may recover back a proportionate share of the purchase money paid.” *Michal and wife vs. Mills et al.*, 17 Ohio Rep. 601.

If the lands conveyed do not contain the quantity sold, there is undoubtedly a failure of title for the deficiency, and the vendee has a legal right to be refunded pro tanta. Respectfully yours, etc.,

JOSEPH McCORMICK,

Attorney General.

John Woods, Auditor of State.

INTEREST ON SURPLUS REVENUE TO BE PAID BY DELINQUENT COUNTIES AFTER JANUARY, 1850.

Attorney General's Office,
Columbus, December 4, 1851.

John Woods, Auditor of State:

SIR:—In yours of the 24th ult. you propose for my consideration and opinion the following question:

Interest on Surplus Revenue to Be Paid by Delinquent Counties After January, 1850.

“What rate of interest are the counties bound to pay upon the principal of the surplus revenue due by them after the first of January, 1850.”

It is somewhat singular that in the multiplicity of legislation on the subject of this revenue the rate of interest chargeable against a delinquent county should have been overlooked or omitted, and no statute expressly referring to that subject enacted, leaving public officers to infer from the general tenor of the acts what such counties are chargeable with.

I proceed then to an examination of the statutes to discover their language, meaning and intent. The third section, Swan's Stat. 883, devotes the net annual income arising from the surplus revenue “to the support and encouragement of common schools within the State and to such purposes as are hereinafter designated.”

The twenty-fourth section, S. S. 888, devotes “any amount exceeding five per centum which may accrue to any county from its proportion of the surplus revenue” as the absolute property of the county subject to appropriation at pleasure by the county commissioners.

Section twenty-nine, S. S. 890, modifies the preceding section and places the amount exceeding five per centum in the hands of the fund commissioners, to be by them invested in “profitable stocks or mortgages” and to fund annually to dividends and interest of the investments so made, to accumulate as a permanent fund for the support of schools, or for the promotion of internal improvements, or for the building of academies in their counties.

This section is unmodified by any subsequent act, and saving and excepting its repeal by the limitations created by other portions of the act to which I shall presently direct my attention, continues to be the law of the State.

Interest on Surplus Revenue to Be Paid by Delinquent Counties After January, 1850.

By the provisions of section 15, S. S. 886, if the State uses the fund, she shall "pay interest at a rate not less than five per centum annually on the whole amount to be distributed among the several counties according to law for the support of common schools."

Section eighteen, S. S. 887, provides that in case a county receives its proportion of the fund the treasurer thereof shall account with or pay over to the state treasurer "as for so much money received for his proper county for school purposes, such sum as shall be equal to five per centum on the amount received by such county."

The preceding section is modified by section twenty-eight, S. S. 887, which dispenses with the payment of the gross amount of interest at five per centum and only requires the actual payment of balances due thereon; and this is again slightly changed and payment secured by the provisions of section thirty-five, S. S. 891, which declares "that each county shall be held liable to pay into the state treasury for the support and encouragement of common schools five per centum per annum on the sums received from the state treasury under the act to which this is an amendment, and if any deficiency of this amount in the net annual income of the fund shall accrue in any county in any year, the same shall be paid from the county treasury."

Section thirteen, S. S. 886, provides that "each county receiving any part of this fund shall be held bound to the State for the amount received and not repaid," and by the provisions of section fourteen "no loan shall be made of said fund so as to fall due after the first day of January, 1850," at which time the fund commissioners shall have the principal of the fund in hand subject to the order of the state treasurer; which is reiterated in section five of the act "to provide for the payment of the domestic creditors of the State of Ohio," 41 O. L. 81.

Interest on Surplus Revenue to Be Paid by Delinquent Counties After January, 1850.

Section seven of the same act provides that money then in the hands of the fund commissioners shall not be reloaned, but paid into the state treasury as provided by the act; and by the provisions of section eleven, O. L. 41-82, upon all payments thus made by the counties to the treasurer of state, the State is required to pay to the counties five per centum per annum for school purposes, and one per centum to be invested in accordance with the provisions of section twenty-nine, S. S. 890, before referred to.

The foregoing are all the provisions of the law which relate to the interest payable by the counties or the State on the surplus revenue and from them it may justly be inferred that the funds of that revenue were not intended to become a source of revenue to the State prior to the first of January, 1850.

If the State retained the funds she paid the counties not less than five per cent. for common school purposes; or by the later provisions five per cent. for school purposes and one per cent. to the county cumulative fund for public purposes. In no instance does it appear that the State should be capable of receiving back from the counties prior to the year 1850 anything more than the principal originally loaned; all the proceeds or income arising from the loan before that year, being intended first for the benefit of common schools, and permanently to establish the common school system of the State on a solid basis, and secondly, to provide a revenue, by the cumulative fund to sustain in some degree the system of education thus established, after the fund itself should have been recalled by the State, and by her used to discharge her liabilities on her canal bonds and other securities, when the five per cent. interest would fail.

But the act distributing the surplus revenue among the counties, limits the duration of the loan to the year 1850; and the act of March 13, 1843, 41 O. L. 80, by the

Interest on Surplus Revenue to Be Paid by Delinquent Counties After January, 1850.

provisions of its sixth section, gives notice to the counties that on and after the first day of January of that year, the whole amount of the revenue funds should be collected in the hands of the county fund commissioners, and by them held subject to the order of the treasurer of state, to discharge the liabilities of the State, for which they were by that act specially pledged.

If then any county has failed to comply with the provisions of the original act, or the provisions of the act last referred to, and has not regarded the notice given by that act, and has failed to pay or hold, subject to the order of the treasurer of state the proportion of the surplus revenue received by her; that revenue has become and is a debt due by such county to the State. Section thirteen, S. S. 886.

By the law of this State, when no special contract is made, all debts draw interest at the rate of six per centum per annum. This conclusion is not avoided by the statute fixing the five per cent. as the amount to be paid into the state treasury. That amount was for school purposes which was continued as long as the loan existed, but was determined by the limitation of the loan. In other words, the act was repealed, and ceased to be law after the first day of January, 1850, by its own limitation.

That the general law regulating interest should be applied in the case proposed, is nothing more than justice. From and after January 1, 1850, the counties were not entitled to the one per centum, the school fund was not entitled to the five per centum, and all income to the counties from the revenue fund ceased. If before that period it had been paid into the state treasury, the State paid interest for it at the rate of six per centum, up to that date, but thereafter neither the counties nor the county fund commissioners were entitled to retain the possession thereof, except as depositories, holding the funds subject to the order of the state treasurer.

Tax of the Town of McConnellsville.

Meanwhile many of the counties have complied with the law and paid their proportion received in full, while others have accepted the provision for decennial payment, and paid a large part of their proportion and are no longer receiving any benefit from the fund. The State, however, is paying six per centum on her indebtedness for the payment of which this fund is pledged. Now, if our county still retains her proportion of this fund, and only pays five per cent. interest thereon, the one per cent. deficiency must be supplied by a general tax levied in all the counties, and those counties which have paid in whole or in part are burdened with an additional tax for the benefit of a delinquent county. This is so manifestly illegal and unjust that it should not be permitted.

Upon a careful inspection of the law, I am of opinion that the delinquent counties are chargeable with interest at the rate of six per cent. per annum on their proportion of the revenue fund; and if they are not chargeable at that rate, they are not chargeable at any rate.

JOSEPH McCORMICK,
Attorney General.

TAX OF THE TOWN OF McCONNELLSVILLE.

Attorney General's Office,
Columbus, December 5, 1851.

John Woods, Auditor of State:

SIR:—The case of Dr. S. A. Baker submitted for my opinion by yours of the 21st of October last presents no difficulty.

The eighth section of the act of incorporation provides for the election of a corporation assessor whose duties are specifically defined, who shall make returns of

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his proceedings on the first Monday of June, at which time the committee shall meet as a board of equalization.

Section nine provides "that for the general improvement and repair of streets, passages, alleys and sidewalks of said town, the town council shall have power to levy an annual tax on the valuation authorized by the preceding section of the act, not to exceed three mills on the dollar in such year."

It was under the foregoing provisions the property of Dr. Baker was assessed for and charged with the taxes complained of.

Section eleven provides for the collection of delinquencies and requires the corporation recorder to certify a copy thereof to the county auditor on or before the first Monday of June thereafter, whose duty it shall be to enter the same on the county duplicate, with the per cent. penalty which shall be collected by the county treasurer.

The papers transmitted to me do not show that the requisition of this section has been complied with. The returns of the recorder to the county auditor bears date "June 14." This may have been the "first Monday" or it may not. The presumption is that it was not, and as all laws of this nature require strict compliance on the part of officers, there is doubtless error in the record of this transaction.

I cannot agree with you that the thirteenth section of the act of February 22, 1848, 46 O. L. 72, repeals the clauses of the various acts creating and defining the duties of city and town assessors.

Unless an act be repealed by name, it becomes the duty of officers and courts giving construction to laws which apparently conflict to reconcile the conflict, and a subsequent law does not repeal a former one, merely by conflicting with its provisions. In order to constitute a repeal, there must be an entire incongruity. Such is not the case in this instance.

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Taxes for corporate purposes, taxes for school purposes, and taxes for a special and discriminating character, are very different from each other, a tax assessed and to repair roads, streets, alleys and sidewalks, is not a tax for corporate or school purposes, and such taxes must be levied and collected in accordance with the law of the charter of incorporation.

The record shows that the tax complained of has been so assessed, levied and collected except in the particular before referred to by the return of the delinquent list to the county auditor at the time prescribed in the act of incorporation.

For this reason, and for it alone, the collection of the tax was illegal, or rather not in strict conformity with law and might be recovered by Baker in a suit against the corporation. If, however, the 14th of June was the first Monday, proof of that fact would be admissible on the trial, and defeat the plaintiff, on the principle that that that is certain which is capable of being made certain.

Supposing, however, the corporation could not make such proof, and what is the result, and how would it affect the corporation and citizens thereof? Baker would recover a judgment for his tax and interest. Every other taxpayer possesses the same right, and suit by everyone would be instituted for the same purpose. The result would be that the corporation would be compelled to repay the whole tax collected with the interest and a large amount of costs. This would involve them in debt to pay which another tax would be levied, besides the relevy of the tax recovered, and the burdens of taxation thereby largely increased. He who would, upon a mere technical right, involve his fellow citizens in such a catastrophe, could have no very high claims to their regard, and it is no defense to this just indignation to say he also involves himself with them.

Had Dr. Baker paid the amount originally assessed,

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the difference between the amount collected and the amount he claims he ought to pay under the general tax law would have been insignificant, and that insignificant sum is not greatly increased by the ten per cent. penalty. All his fellow-townsmen were in the same category, and if any money was due it was for their common benefit. Under these circumstances the doctor should let the matter rest.

JOSEPH McCORMICK,
Attorney General.

TOLLS ON THE SANDY AND BEAVER CANAL.

Attorney General's Office,
Columbus, January 6, 1852.

His Excellency, Reuben Wood, Governor of Ohio:

SIR:—I have examined the question presented in the letter of David Beggs, president of the Sandy and Beaver Canal Company, to you of the 5th inst. which you did me the honor to hand to me for my opinion.

The Board of Public Works have paid the tolls on freight and passengers as granted to the Sandy and Beaver Canal Company by the third section of the amendment to the charter of that company, 32 O. L. L. 298, but refuses to pay or allow tolls on boats as claimed by that company.

In my opinion the Sandy and Beaver Canal Company have no legal right upon which to base their claim, the language of the act being "said company shall be entitled to collect and receive the tolls accruing on the Ohio Canal and all freight and passengers that may be transported thereon, and which have been transported," etc.

Freight and passengers are objects which are strictly transported, and boats are necessary to transport those