INTOXICATING LIQUORS—CAN THE LEGISLATURE AUTHORIZE TOWNSHIPS TO VOTE ON SALE OF.

The State of Ohio,
Office of the Attorney General,
Columbus, January 20, 1870.

His Excellency, R. B. Hayes, Governor of Ohio:

SIR:—The communication from E. J. Whitney, addressed to you, inquiring "whether the legislature has power to pass a law authorizing the people of any township to decide by ballot whether intoxicating liquors shall be sold in such townships," was received this morning.

In reply I have to say that in my judgment the legislature has no such power.

In the case of Miller and Gibson against the State (3d Ohio State Reports), the Supreme Court intimate the opinion that the legislature has not the power to prohibit absolutely the sale of liquors under the constitution, and what it cannot do itself, it can authorize no one else to do.

The legislature can only provide by law against the evils resulting from the traffic in intoxicating liquors.

Again, by the twenty-sixth section of article II of the constitution as interpreted by the Supreme Court, in the case of C. W. & S. R. R. Co. vs. Clinton County (1st Ohio State Reports, pages 87, 88 and 89), it is declared that "the General Assembly cannot surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body."

Very respectfully,

F. B. POND,
Attorney General.

Requisitions for Abraham Bloom and George Harrison; False Prctenses; Obtaining Property Under.

REQUISITIONS FOR ABRAHAM BLOOM AND GEORGE HARRISON; FALSE PRETENSES; OBTAINING PROPERTY UNDER.

The State of Ohio,
Office of the Attorney General,
Columbus, January 26, 1870.

To His Excellency, the Governor of Ohio:

SIR:—I have examined the requisition of the Governor of Indiana for the surrender of Abraham Bloom, together with the accompanying documents. It appears from these that Bloom has been indicted in the Circuit Court of Franklin County for "obtaining personal property by false pretenses." A copy of the indictment certified by the Governor of Indiana as duly authenticated in accordance with the laws of Indiana, is exhibited.

The papers in form are in accordance with the act of Congresss.

I had some doubt at first as to whether the offense charged in the indictment belonged to the class specified in the constitution of the United States, and the act of Congress relating to fugitives from justice; but upon careful examination I am satisfied that it belongs to that class.

The constitution of the United States (Sec. 2, Art. 4), provides "that any person charged in any state with treason, felony *or other crime*, who shall flee," etc., "shall be delivered up," etc.

The Article of Confederation, article 4, provided "that if any person guilty of, or charged with, treason, felony or high-misdemeanor * * * shall be delivered up," etc.

The committee who drafted and reported the constitution of the United States, reported the same phraseology indicating the class of crime, leaving out the word "other." And in the constitution the words "high misdemeanor" were stricken out, and the words "other crimes" inserted in their stead, leaving it clear to my mind that the framers of the

constitution intended to embrace within the meaning of the provision all classes of crimes without distinguishing between the different grades.

It is well settled that the character or grade of the offense is to be determined by the laws of the place where it was committed. (See 4th Johnson's Chancery Reports, 111.)

The Indiana statute is as follows:

> "If any person with intent to defraud another shall designedly, by color of any false token or writing, or any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer notes, bond, receipt *or thing of value*, such person shall upon conviction thereof, be imprisoned in the State's prison not less than two nor more than seven years, and be fined not exceeding double the property so obtained."

The indictment seems to me to sufficiently charge the offense described in this statute, and while I am advised that this proceeding is sometimes instituted for other purposes than appears from the papers submitted, I cannot well see how a warrant can be legally refused.

In the matter of George Harrison, the papers are regular in form in all respects.

Very respectfully,

F. B. POND,
Attorney General.

Indictments for Burglary Taking Place in a Building Used as a Dwelling and Storehouse.

INDICTMENTS FOR BURGLARY TAKING PLACE IN A BUILDING USED AS A DWELLING AND STOREHOUSE.

The State of Ohio,
Office of the Attorney General,
Columbus, February 4, 1870.

Henry E. Jones, Esq., Prosecuting Attorney, Portsmouth, Ohio:

SIR:—If the burglary took place in the part of the building where the store is kept, I should have no hesitation in saying it is the "storehouse." If in the other part, as the "dwelling house;" and if there is any doubt as to where the breaking occurred charge it as "storehouse and dwelling house," but I think it better to charge it as one or the other, if possible.

As to the second inquiry the words "an election duly held under the laws of the State of Ohio" will be sufficient description of the election in both the cases referred to.

Very respectfully,
F. B. POND,
Attorney General.

Indictments When Assistant Prosecuting Attorney was Before the Grand Jury—County Records Open to Examination of All.

INDICTMENTS WHEN ASSISTANT PROSECUTING ATTORNEY WAS BEFORE THE GRAND JURY.

The State of Ohio,
Office of the Attorney General,
Columbus, February 4, 1870.

C. W. Johnson, Esq., Prosecuting Attorney, Elyria, Ohio:

SIR:—Yours of the 3d inst. is at hand, inquiring if an indictment found at your last term of court when an assistant Prosecuting attorney appointed by the court generally was before the grand jury in examining witnesses, is good.

In reply I have to say that I have no doubt that the indictment is good under the seventy-third section of the Criminal Code. (O. L. 66, page 298.)

Very respectfully,
F. B. POND,
Attorney General.

COUNTY RECORDS OPEN TO EXAMINATION OF ALL.

The State of Ohio,
Office of the Attorney General,
Columbus, February 7, 1870.

James Irvine, Esq.:

SIR:—Your favor of the 5th inst. came to hand this morning, and in reply I have to state:

That the records of the county are, in my opinion, open to the use of any and all persons who may see fit to examine

Personal Property; No Lien on for Taxes Until Levy is Made.

them, free of charge; and that the recorder is only authorized to charge the fees fixed by the statute when called upon to perform the duties for which they are to be paid.

Very respectfully,

F. B. POND,
Attorney General.

PERSONAL PROPERTY; NO LIEN ON FOR TAXES UNTIL LEVY IS MADE.

The State of Ohio,
Office of the Attorney General,
Columbus, February 5, 1870.

Lewis Anderson, Treasurer Washington County, Ohio:

SIR:—In answer to your inquiry I have to state:

That there is no lien for taxes upon *personal property* under our statutes until one is created by levy.

If, therefore, personal property is sold in good faith before levy on it for taxes, the collector would have no right to proceed against it for the vendor's taxes.

Very respectfully,

F. B. POND,
Attorney General.

CONSTITUTIONALITY OF ACT AUTHORIZING CITIES OF FIRST CLASS TO BUILD RAILROADS.

The State of Ohio,
Office of the Attorney General,
Columbus, February 6, 1870.

D. J. Martin, Esq.:

SIR:—Yours of the 4th inst. came to hand yesterday, asking:

First—Whether the act of March (May) 4, 1869, is constitutional or not.

It is a matter of grave doubt as to whether the act is constitutional. It seems to me to be an attempt to evade the provisions of the article of the constitution to which you refer, and the question will ultimately have to be settled by the courts.

But there is a great difference between this act and what you desire.

You wish the townships along the line of the proposed road to be allowed "to take stock in and of" a proposed railroad. This would be clearly unconstitutional.

The difference is this: The law referred to authorizes cities of the first class *"to build and lease or operate railroads"* out and out; not to aid any other company or corporation in building; and it is claimed that a city may, under the constitution, do this as well as she can build hospitals, infirmaries, or grade and pave streets and highways.

In other words, if one of the townships you speak of desires to build a railroad *itself*, "according to this theory it may do so, but it may not aid or take stock in any other company or corporation for that purpose.

Very respectfully,

F. B. POND,
Attorney General.

Prosecuting Attorney; Compensation of; Examiners of County Commissioner's Report; Compensation.

PROSECUTING ATTORNEY; COMPENSATION OF; EXAMINERS OF COUNTY COMMISSIONER'S REPORT; COMPENSATION.

The State of Ohio,
Office of the Attorney General,
Columbus, February 7, 1870.

W. H. Gates, Esq., Prosecuting Attorney, Ashland County:

SIR:—Your favor of 3d inst. came to hand yesterday. On examination I find a letter addressed to me, dated December 31st. I did not take office until January 9th, and this came into the hands of my predecessor. Supposing he had answered it, I gave it no further attention.

Supposing this to be the letter you refer to in yours of the 3d inst., I have to state:

First—In my judgment, upon the statement you make, the prosecuting attorney is entitled to a commission of ten per centum upon the amount of both fine and costs, which should be paid to him out of the general fund by direction of the county commissioners. With this the clerk of your court has nothing to do, and has acted properly in his disposition of the moneys collected. It matters not whether these moneys came into the hands of the prosecuting attorney *personally*, or not. He, as attorney for the State, obtained the judgment for these fines and costs, and that judgment has been paid during his continuance in office, and is substantially *his collection* within the meaning of the statute.

Second—The persons appointed to examine the report of the county commissioners in connection with the prosecuting attorney, are appointed by the court, and the statute provides that the court shall "cause" them to make this investigation. And upon application, I am satisfied that the proper court ought to and will direct what amount shall be paid to each for his services as proper costs of the investigation. I am satisfied that the prosecuting attorney is not

entitled to pay for services upon this committee, as I regard it part of his official duty.

Very respectfully, etc.,

F. B. POND,
Attorney General.

SEDUCTION; REQUISITION FOR JASPER KENNEDY ON CHARGE OF.

The State of Ohio,
Office of the Attorney General,
Columbus, February 7, 1870.

His Excellency, R. B. Hayes, Governor of Ohio:

SIR:—I have examined the requisition of Governor Geary, of Pennsylvania, for the rendition of Jasper Kennedy, and the accompanying papers, submitted to me by you, and I am of the opinion that the request ought not to be granted for the following reasons:

In Pennsylvania, as in Ohio, one of the material facts to be established to constitute the crime of seduction is that the connection was had "under promise of marriage;" and the Pennsylvania statute, as does also that of Ohio, substantially provides "that the promise of marriage shall not be deemed established unless the testimony of the female seduced is corroborated by other evidence either circumstantial or positive." In other words, the evidence of the person claiming to have been seduced shall not upon the trial make a "prima facie" case against the accused.

The affidavit in this case is that of the pretended victim of seduction entirely unsupported. It appears to me that the affidavit of a witness so *disabled* cannot be the full affidavit contemplated by the act of Congress.

Again, the affidavit is in itself a very singular one. It seems that from a connection had in August, 1869, she has

already had a bastard child, and it is not assumed that she was of good repute at the date of the seduction.

Very respectfully,

F. B. POND,
Attorney General.

INSURANCE COMPANIES; WHAT THEY MUST DO BEFORE COMMENCING BUSINESS.

The State of Ohio,
Office of the Attorney General,
Columbus, February 20, 1870.

Thomas Lavan, Esq.:

SIR:—Your favor of the 19th inst. came to hand this morning, and in reply I have to say:

First—That under the provisions of the act of the General Assembly, passed May 7, 1869, Ohio Laws, Vol. 66, page 325, before an insurance company can commence operations, the stock subscriptions must have been "paid in," unless it be on the mutual plan, in which case the bona fide engagements for insurance, and other provisions regarding such mutual company, stipulated in section three of the act of April 15, 1867, (S. & S., page 306) must have been fully entered into and complied with (in your letter you do not state whether you propose to go in on the mutual or purely stock plan).

Second—Before you can elect directors you must have an amount of stock subscriptions bona fide equal to the amount of capital stock stated in your "certificate" and, of course, before you can do any other business. (Sec. 4, S. & S., page 206.) The word "filed" in that section should read "filled."

Very respectfully, your obedient servant,

F. B. POND,
Attorney General.

BRIDGE AT TAYLORSVILLE, MUSKINGUM COUNTY.

The State of Ohio,
Office of the Attorney General,
Columbus, March 1, 1870.

Robert Silvey, Esq.:

SIR:—Your favor of the 24th inst. came to hand day before yesterday, but pressure of business prevented my reply.

I have now to say in answer that I have serious doubts if under the ordinance of 1787, you can build a bridge at Taylorsville across the Muskingum River without a draw.

The bridges at Zanesville have never been disturbed because it has never been practicable to pass up over the dam there in the highest water (as I have examined).

Trouble might not arise, but if it should become a question, I am of opinion that a bridge without a draw at the point you speak of, would be held to be an infringement of the ordinance referred to.

The legislature in that case could not help you.

When you are in Zanesville, please examine carefully the case of Hogg against the Zanesville Canal and Manufacturing Company in fifth volume of Ohio Reports, page 210.

Very respectfully,
F. B. POND,
Attorney General.

Allemania Fire Insurance Company; Certificate Defective —City Councils Not Entitled to Pay Except for Judging at Elections.

ALLEMANIA FIRE INSURANCE COMPANY; CERTIFICATE DEFECTIVE.

The State of Ohio,
Office of the Attorney General,
Columbus, March 1, 1870.

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

SIR:—The certificate of the Allemania Fire Insurance Company, presented to me by you for examination, is defective in my judgment in this:

In stating the objects of the desired corporation, it should have been confined to one of the "objects" enumerated as "first," "second," etc., in section 8 of the act of the General Assembly (S. & S., page 207).

All else that such a corporation may do under that act are incidents that *by law* attach to it as the result of its becoming a corporation, and should not be included in the certificate.

This certificate also, it seems to me to attempt to obtain power not warranted by the statute.

Very respectfully,
F. B. POND,
Attorney General.

CITY COUNCILS NOT ENTITLED TO PAY EXCEPT FOR JUDGING AT ELECTIONS.

The State of Ohio,
Office of the Attorney General,
Columbus, March 29, 1870.

J. H. Phillips, Esq., Springfield, Ohio:

SIR:—In reply to your favor of the 21st inst., I have to say that in my opinion section 91 of the Municipal Code

(Vol. 66, Ohio Laws, page 164), applies to all city councils; and that, therefore, the councils of cities of the second class have no authority to vote pay to themselves, except to pay them for judging at elections.

Very respectfully,

F. B. POND,

Attorney General.

COUNTY CLERKS CANNOT DEMAND THE PAYMENT OF FEES IN ADVANCE.

The State of Ohio,
Office of the Attorney General.
Columbus, March 30, 1870.

S. B. Drouillard, Clerk Scioto County:

SIR:—In my judgment a clerk has no legal right to pay for services until they shall have been rendered, and consequently I cannot well see how a clerk can have a legal right to demand his fees in advance. I am aware that a different theory prevails to some extent, and also that the rule operates harshly in many cases upon the officer; but, without additional legislation, I cannot well see how the matter can be determined in any other way. Fees were not known at common law, and are mere creatures of legislation, and I cannot make our statutes mean any different from what I have above stated.

As to your second question, I am satisfied that the proper township should pay the judges of and clerks of an election for justices of the peace.

Very respectfully,

F. B. POND,

Attorney General.

Commutation and Reprieve of Sentences Exclusively Under the Control of the Governor.

COMMUTATION AND REPRIEVE OF SENTENCES EXCLUSIVELY UNDER THE CONTROL OF THE GOVERNOR.

The State of Ohio,
Office of the Attorney General,
Columbus, March 30, 1870.

To His Excellency, The Governor:

SIR:—It appears to me that the power of the Governor to commute a sentence is *derived* directly from section 11, article 3, of the constitution, and, in all the details regulating application for it, and the exercise of the power, the Governor is to be governed by his *own discretion alone,* in which it is not designed that he should be controlled in any way by legislation. It will be observed that the section relating to this matter has been materially changed from the provisions of the old constitution (Sec. 5, Art. 2, Const. 1802). The word "commutation" does not occur in the old constitution, and the principle of commutation seems to be entirely a creation of the new, and is left entirely in the sound discretion of the executive.

The matter of reprieve in the new constitution seems also, to me, to stand in the same situation, and not to be a subject for legislative interference. The statute of 1818 to which you refer, might have been proper enough under the old, but seems to me out of place under the new constitution; and, in my judgment, the General Assembly would not have re-enacted it, as they did (O. L. Vol. 66, page 320. secs. 214, 215 and 216,) if those drafting the criminal code had noticed the difference between the old and the new constitutions.

Very respectfully,
F. B. POND.
Attorney General.

Pittsburg, Fort Wayne and Chicago Railroad Company Has No Corporate Existence in Ohio.

PITTSBURG, FORT WAYNE AND CHICAGO RAILROAD COMPANY HAS NO CORPORATE EXISTENCE IN OHIO.

The State of Ohio,
Office of the Attorney General,
Columbus, April 4, 1870.

Hon. D. J. Callen, Chairman of the Standing Committee on Railroads of the House of Representatives of the General Assembly of the State of Ohio:

SIR:—I have examined as far as my limited time will allow, the subjects spoken of in House Resolution No. 66, submitted to me by your committee, and have the honor to reply as follows:

First and Second—The Ohio and Pennsylvania Railroad Company and the Ohio and Indiana Railroad Company were originally two corporations of the State of Ohio, authorized and organized under the railroad act of 1848, and, of course, under the old constitution.

Under the act of 1852 (S. & C., 280) and the act of May 1, 1856 (S. & C., 327), these two companies were, in August, 1856, with the Fort Wayne and Chicago Railroad Company, consolidated, and the new company took the name of the Pittsburg, Fort Wayne and Chicago Railroad Company. This act of consolidation, I am satisfied, merged all the property, rights, privileges and franchises of said two Ohio companies with the Fort Wayne and Chicago company, except the franchise of corporate existence. This right or franchise *to be a corporation*, as I think, remained with the old companies undisturbed, notwithstanding the agreement for consolidation, believing that under the new constitution the *new company* could not, even with the aid of such legislation as then existed, or any other legislation, acquire the right to *corporate existence* in this way.

In 1861 suit was instituted by the mortgagees of the

Pittsburg, Fort Wayne and Chicago Railroad Company Has No Corporate Existence in Ohio.

different companies forming the new company, in the United States District Court for the Northern District of Ohio, and a decree rendered directing that the property, rights and franchises of these corporations should be sold, and under that decree sale was made of all the property, rights and privileges of the old companies and the new company that could be sold or upon which the mortgagees could have a lien by virtue of their mortgages. The franchise of *corporate existence* was *not then the subject of lien as property*, and therefore, did not pass by the sale, but remained where it originally was. Lanier and others *bought what was sold and no more.*

Lanier and others, in 1862, sold to the Pittsburg, Fort Wayne and Chicago Railroad Company what they bought and no more, for they had no more to sell.

This last company, to whom Lanier and others sold, is a foreign corporation, created by the legislature of Pennsylvania, and owns the property bought by it of Lanier and Company, and operated that part of its line of road lying in Ohio (prior to its lease to the Pennsylvania Central Railroad Company), or claimed to operate it under the seventh section of the act of April 11, 1861. That statute expressly provides that such company "shall exercise no power, privilege, faculty or franchise within this State, inconsistent with the laws thereof, and that such part of such railroad shall be subject to all regulations of law in the same manner as railroads in this State in like cases, and that the corporation owning the same shall be subject to all duties imposed by law and to be sued," etc., "in the same manner as a corporation of this State might be sued," etc. (See proviso to sec. 7.)

So far then it seems clear that the present Pittsburg, Fort Wayne and Chicago Railroad Company is without corporate existence under the *constitution and laws of Ohio.*

Under the constitution and laws of Pennsylvania, it cannot exercise corporate power in Ohio.

A franchise to be a corporation is originally a part of

the sovereignty of the State. The State grants to persons desirous of exercising corporate powers a portion of this sovereignty. This sovereignty in its original position, or when so granted, cannot exist outside of the State to which it belongs. It follows that this company has no corporate existence in Ohio.

Upon principles of comity it is permitted to operate that portion of its railroad in Ohio, subject in all respects to the general laws of Ohio regulating railroads.

It is a grave question and I do not now propose to discuss it—how far this principle of *comity* ought to be extended to a foreign corporation—whether it should be allowed to exercise the right of eminent domain, or even to own real estate in Ohio, or to operate and monopolize its great thoroughfares.

It may be claimed that under the act of May 4, 1863, (S. & S. 131) this new company has "*acquired the franchise to be a corporation.*" If this be the case, then it seems to me section 1, article 13, of the constitution is of but little avail; or section 2 of the same article either.

Here is a foreign corporation by the statute vested with the *special* privilege of acquiring corporate existence as a ocrporation in Ohio by a *special mode*. This section of the constitution cannot be held, it seems to me, to warrant the perpetuation of special privileges in this way.

Third—I can find no official evidence of the lease of this road to the Pennsylvania Central Company, nor do I know any authority under which such a lease can effect the portion of said line in Ohio, unless it be implied from section 7 of the act of 1861 above referred to.

Fourth—The present operators of said railroad have no general office in Ohio so far as I can ascertain. As to mode of service see S. & S. 542, act of April 30, 1868; also S. & S., 118 and 119, secs. 46 and 47.

Fifth—I have no data to determine anything as to the increase of capital stock referred to.

Sixth—The Attorney General has full power to proceed

when complaint is properly made against any corporation, etc. (See S. & C., page 89, sec. 8 et seq., act of May 1, 1852.) And until some person shall show himself *aggrieved,* it is hardly necessary to order the Attorney General to institute proceedings. This is, however, a matter purely in the discretion of the General Assembly.

Very respectfully,

F. B. POND,
Attorney General,

BOARD OF JURORS; WHO IS TO PAY FOR THE SAME.

The State of Ohio,
Office of the Attorney General,
Columbus, April 16, 1870.

C. W. Johnston, Esq., Prosecuting Attorney Lorain County:

SIR:—Your favor of the 9th inst., would have been answered sooner but that I was absent from the city.

There is no statute to my knowledge requiring in direct terms the county commissioners to pay for the meals of jurors while engaged in the trial of a criminal; but the criminal code, section 164, provides that the jury shall not separate in felonies after being sworn, and in misdemeanors after being charged by the court until discharged. In such case I am of opinion that the county should pay for the necessary meals of the jury.

The jury is compelled to come together *by law* to take part in transacting the business of the county. The jurors are compelled to remain together, and are not permitted to select the manner in which they shall receive their necessary food, but must take it together, deprived entirely of liberty of choice in the matter. It is not the policy of our law that they should suffer for want of proper food, and in my judgment the law contemplates that the county should be liable

for and pay their expenses. If the commissioners refuse to allow such a claim, an appeal from their decision to the Court of Common Pleas would result in requiring them to take the necessary steps to pay it.

Very respectfully,

F. B. POND,
Attorney General

VILLAGE COUNCILMAN; BALLOTS SHOULD SPECIFY THE LENGTH OF TERM.

The State of Ohio,
Office of the Attorney General,
Columbus, April 16, 1870.

John Schreiner, Esq.:

SIR:—Unfortunately I have been absent from the city and did not get your letter until today. I am sorry this has happened.

I am satisfied that the *term* for which any person is a candidate for the village council should be indicated upon each ballot cast for him, and that tickets that do not indicate this ought not to be counted. By section 85 of the Municipal Code (O. L., page 163) three of the council shall be *elected* to serve "for two years, and three shall be *elected* to serve" for one year. The length of the term is therefore essential in casting each ballot for the candidate, and unless the ballot is cast for the parties, for either the long or short term, *specifically indicated upon the ballot,* it seems to me it is not cast for any effect at all.

Very respectfully,

F. B. POND,
Attorney General

Township Pounds; How Many Can Be Erected—Justice of the Peace a Township Officer; Road Supervisors; Compensation of.

TOWNSHIP POUNDS; HOW MANY CAN BE ERECTED.

The State of Ohio,
Office of the Attorney General,
Columbus, April 19, 1870.

A. S. Carpenter, Esq., Galena, Ohio:

SIR:—In answer to yours of yesterday I have to say:

I am not entirely clear that the trustees of a township may erect more than one pound in a township, and have each one a legal pound, protected specially by law. I am inclined to think, however, that they may, so that the cost of all does not exceed $100, under act of April 19, 1867, (O. S. 127). If upon further consideration I come to a different conclusion, I will write.

Very respectfully, etc.,
F. B. POND,
Attorney General

JUSTICE OF THE PEACE A TOWNSHIP OFFICER; ROAD SUPERVISORS; COMPENSATION OF.

The State of Ohio,
Office of the Attorney General,
April 19, 1870.

S. W. Peck, Esq., Eaglesville, Ohio:

SIR:—In my judgment a justice of the peace is a township officer within the meaning of the act of April 6, 1866. (S. & S. 54.)

Second—I am also satisfied that supervisors of roads and highways are entitled to pay for *all the time they are necessarily employed in the duties of their office*, whether in

warning hands, overseeing the work, or settling with the trustees.

Very respectfully,

F. B. POND,
Attorney General

COSTS OF WITNESSES BEFORE A GRAND JURY CANNOT BE CHARGED TO THE DEFENDANT.

The State of Ohio.
Office of the Attorney General,
Columbus, April 29, 1870.

A. B. Johnston, Esq., Prosecuting Attorney:

SIR:—On account of affliction at home I have neglected to answer yours of April 1st, which is the only one I ever received.

In reply I have to state that in my judgment the costs of witnesses before the grand jury are not costs that may be legitimately charged to the defendant upon a judgment against him for costs.

These costs accrue in determining whether the charge shall be preferred against him, and no more belong to him than a pro rata share of the expenses of the grand jury itself would.

Very respectfully,

F. B. POND,
Attorney General

CLERKSHIP OF MONTGOMERY COUNTY; CONTEST FOR.

The State of Ohio,
Office of the Attorney General,
Columbus, May 5, 1870.

His Excellency, the Governor:

SIR:—In the matter of the application of D. W. Reese for a commission as clerk of the Court of Common Pleas of Montgomery County submitted to me by you, I have to say:

First—It appears that Sinks has regularly received a commission.

Second—Since then Reese, the opponent of Sinks as a candidate for that office, has proceeded to contest in the Court of Common Pleas of said county the right of Sinks to that office, claiming that he, Reese, was lawfully elected thereto, and that Sinks was not; and upon the hearing of the cause said court held that Sinks was not legally elected to said office and that Reese was. Had the matter ended here, I should have had no hesitancy in saying that the commission of Sinks was vacated by this judgment of the Court of Common Pleas; and that upon producing to the Secretary of State the "legal certificate" of that judgment, a commission ought to be issued to Reese.

Third—But since the above judgment of the court, Sinks has obtained leave to file, and has filed, his petition in error in our Supreme Court, claiming substantially that the court below erred in so deciding said cause. This cause has been by the Supreme Court taken up out of its order, and in all probability will soon be determined; and while I admit that this proceeding in error does not vacate or suspend the judgment of the court below, yet it seems to me a commission ought not to issue until the Supreme Court shall have determined whether the court below erred or not.

Very respectfully,
F. B. POND,
Attorney General

CITY COUNCILS; MEMBERSHIP OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 13, 1870.

W. W. Little, President, etc.:

SIR:—Yours of the 9th inst. came to hand this a. m., and in reply I have to say:

First—Section 85 of the Municipal Code, so far as it regulates the election of members of council from wards, does apply to cities of the second class, in my judgment, as well as incorporated villages.

Second—The election of members of the Second and Third Wards in your city without designating *upon the ballot the term for which each was elected,* is not, in my opinion, in accordance with the meaning of the code. It seems to me that the *length of the term* is as essential and material to be expressed upon the ballot and voted for as the office itself, inasmuch as no other mode is pointed out in the code for determining it but the choice of the people voting. It is true that section 88 makes the council the judge of qualifications, etc., of its members, but I can hardly conceive that this will authorize the council to determine what it is clear the code intends shall be determined by the vote alone.

Third—By the ninety-third section of the code it is clear that a person holding an office under the government of the corporation at the date of the election is *ineligible*—i. e., *incapable of being chosen*—as a member of the council, and in my judgment votes cast for such a person for that office are void.

Very respectfully,
F. B. POND,
Attorney General

County Auditor of Seneca County; Expiration of Term of —County Auditors; Extension of Term of Office of.

COUNTY AUDITOR OF SENECA COUNTY; EXPIRATION OF TERM OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 18, 1870.

Messrs. Locke & Blymer:

GENTLEMEN:—Under the fifth section of the act of April 18, 1870, I am satisfied that the person filling the office of auditor of your county, by appointment, will hold such office until the second Monday of November next; and that at the next October election it will be necessary to elect for the *full term*, commencing on the second Monday of November next.

Very respectfully, etc.,
F. B. POND,
Attorney General

COUNTY AUDITORS; EXTENSION OF TERM OF OFFICE OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 18, 1870.

W. W. Hamilton, Esq., Auditor of Wayne County:

SIR:—Yours of the 17th inst. received this morning, and in reply I have to say that under the act of April 18, 1870, your term of office is extended until the second Monday of November, 1871, and at the October election of 1871, an election will be held to fill the places of those who took office in March, 1869. The word "biennially" is intended to apply to elections to be held after the first election under the act, to-wit: In 1871 and 1872, as the case may be, the

Costs for Removing a Lunatic Payable Out of General County Fund.

proviso in the first section being doubtless intended to bridge over the change in term of taking office from March to October.

As to the constitutionality of extending the term of an elective office by legislative action, it is perhaps not necessary to discuss, as practically there may be no difficulty about it. Very respectfully,

F. B. POND,
Attorney General

COSTS FOR REMOVING A LUNATIC PAYABLE OUT OF GENERAL COUNTY FUND.

The State of Ohio,
Office of the Attorney General,
Columbus, May 19, 1870.

A. W. McCormick, Probate Judge, Etc.:

SIR:—Yours of 23d April came to hand a day or two since. It was sent to McConnelsville, and inadvertently overlooked by those who took it out of the office in my absence.

Upon examination of the statute, I am satisfied that where the probate judge issues his warrant as provided in section 27, S. & C., page 845, to the sheriff or other person to go for *any* person about to be discharged, and the warrant has been duly executed and returned to the judge, the judge should certify the costs, viz.: mileage, 10 cents per mile, and 75 cents per day for support of person removed (See Sec. 40, page 847), to the county auditor who must draw his order therefor on the treasurer of the county, and the money is by him to be paid out of the general county fund. This seems to me to be the clear intendment of the statute in such cases.

Very respectfully,

F. B. POND,
Attorney General

ASSESSMENT OF RAILROAD PROPERTY FOR TAXATION.

The State of Ohio,
Office of the Attorney General,
Columbus, May 23, 1870.

Daniel Murphy, Auditor of Highland County:

SIR:—Yours of 21st inst. came to hand this morning, and in reply to your questions I have to say:

First—In my judgment the words "value of such property, moneys and credits" in section 5 of the act of May, 1862, (S. & S., 767) first line, covers the property which the board are required to "ascertain" by the provisions of the forty-fourth section of same chapter (S. & S., 768).

Second—The words "stationary personal property" I understand to mean *all personal property* except the *rolling stock* of the company.

Third—The rolling stock of the company in value is to be apportioned to each district, county, city, village or township in proportion to the number of miles of road in each.

Fourth—All other property (than rolling stock) values being equalized by the board, is to be apportioned to the county, city, village, township or district where it is found without regard to miles of road.

The above is the only sensible construction I can put upon this statute.

Very respectfully,
F. B. POND,
Attorney General.

REFORM SCHOOL FOR GIRLS, AND SOLDIERS' AND SAILORS' ORPHANS' HOME.

The State of Ohio,
Office of the Attorney General,
Columbus, May 24, 1870.

His Excellency, the Governor:

SIR:—I have carefully, at your request, examined the communication addressed to you by the trustees of the Reform and Industrial School for Girls, and the statutes relating to such school, and the "Soldiers' and Sailors' Orphans' Home" and have arrived at the following conclusions:

First—It was not the intention of the act of April 14, 1870, for the present to impair the full right of the trustees of the "Reform and Industrial School for Girls" to use so much of the White Sulphur Springs property as such trustees might think necessary for the full and complete success of such school, as contemplated by the act establishing the same, passed May 5, 1869. (O. L., Vol. 66, page 116.)

Second—The act of April 14, 1870, does contemplate that the trustees of the "Reform and Industrial School for Girls," and the managers of the "Ohio Soldiers' and Sailors' Orphans' Home" shall both use the Sulphur Springs property in the interests of their respective institutions (they agreeing upon the suitable division of it, always reserving the five acres and the Burnet House for the Reform and Industrial School for Girls), so far as such joint use shall not conflict with the use of the same for the successful conduct of the "Reform and Industrial School for Girls."

Third—Whenever the managers of the Ohio Soldiers' and Sailors' Orphans' Home "shall *ascertain* that the capacity of" the property above spoken of, consistently with the use thereof by the school for girls as above indicated, "shall be insufficient to accommodate, etc., * * * they will be authorized and empowered to accept and receive,"

etc., * * * as indicated in that part of section 4 of the act of 1870, applying to the location of the children of the soldiers and sailors at some other point.

It has been difficult for me to make good sense out of some portions of the act of 1870, especially the first part of section 4, and the above is the best judgment I can arrive at in giving a construction to the legislation on this subject.

Very respectfully,
F. B. POND,
Attorney General.

COUNTY AUDITORS: EXTENSION OF THE TERM OF.

The State of Ohio,
Office of the Attorney General,
Columbus, May 22, 1870.

SIR:—Your favor of the 18th inst. came duly to hand, and I have not answered it before because I had some doubt as to how it ought to be answered.

As I understand you, your regularly elected auditor died April 6, 1870, and April 9th following the commissioners of the county appointed Mr. Allen to fill the vacancy, and he *took office* prior to April 18, 1870, and the question is, "Is there an auditor to be elected in your county" the coming fall?

This appointment was then made under the act of 1859, VI Sec., S. & C., 97, and the appointee under that act would have held his office until the next annual election (October, 1870), "and until his successor should be elected and qualified."

The act of April 18, 1870, (Sec. 1, O. L., Vol. 67, page 103) provides "that *all auditors* now (i. e., 18th April) in office shall continue to hold their offices until two years from

the second Monday in November next after *taking possession of their said offices,*" making no distinction, auditors elected or appointed.

This statute then, as I understand it, would make the appointee in your county auditor until the second Monday in November, 1872, a term of two years and seven months. So much for the statute of 1870.

Now the term of office of a county auditor is fixed by statute at two years, except that in making the change in the time of taking the office from March to November, the General Assembly has provided for extending the term of incumbents holding at the date of the last act (1870) for eight months longer. Section 2, article X of the constitution clearly makes this office *elective* and simply empowers the legislature to provide the mode of election and the length of term not exceeding three years. Two years has been fixed by the old as well as the new statute, as the "term" for which the office may be filled by election. It is not necessary to discuss here whether under this section of the constitution the General Assembly has power to extend the term of an auditor *elected* beyond the time for which he was *elected*, because the incumbent in your county was never elected at all.

The case then stands as follows:

Mr. Allen has been appointed to fill a term in an office made *elective* by the constitution for a term longer by seven months than the elective term fixed by the General Assembly. Two regular October elections will pass over before the people can say by a vote whether they chose this man as their auditor, a man *never elected* by them. This is the place in which this last statute seems to me to leave the matter, and the question is, does this statute so far as it seeks to effect this consist with the section of the constitution above cited? It appears to me that it does not.

The legislature has fixed by law the *manner* in which the election for this office shall be held and have fixed the length of term at two years.

The act of 1870 is but a re-enactment of the old act so

far as this question is concerned, except that part of it which extends the term of office of the present incumbents (i. e., April, 1870). The old as well as the new act makes the election for the office biennial. The constitution makes the office elective. Taking the whole matter into consideration, I am satisfied that an election for auditor should be held in your county next October.

Very respectfully,
F. B. POND,
Attorney General.

ZANESVILLE BRIDGE BONDS; NO APPROPRIATION FOR PAYMENT OF.

The State of Ohio,
Office of the Attorney General,
Columbus, June 17, 1870.

Col. John A. Blair:

SIR:—In reply to your favor of the 6th inst., I have to say:

The constitution of the State, article 2, section 20, provides, "No money can be drawn from the treasury except in pursuance of a *specific appropriation* made by law." The Supreme Court in the case of The State vs. Medberry et. al., 7th O. S. R. 528, uses the following language: "No claim against the State can be paid, no matter how just it is, unless there has been a *specific* appropriation made by law to meet it. And this is true, although sufficient means has been provided for debts, prospective, or accruing or past due." No *specific* appropriation has been made to pay the portion of the Zanesville bridge debt now due. It follows that it cannot be paid now.

The third section of the appropriation bill of April 16, 1870, (O. L., Vol. 67, page 67) provides as follows:

Zanesville Bridge Bonds; No Appropriation for Payment of —Fees of Judges of Special Election Held for Justices of the Peace.

> "For superintendence and repairs on the National Road for one year from the 15th day of February, 1870, there is hereby appropriated whatever sums may be collected and paid into the State treasury to the credit of the National Road fund, during said period, of one year, together with the unexpended collections of the year previous applicable to the same purpose."

This appropriation is specifically for the "superintendence and repairs" on the National Road for one year from and after the 15th day of February, 1870, "and can be used for no other purpose, not even to pay debts contracted for superintendence and repairs" contracted prior to February 15, 1870. It cannot be used to pay the Zanesville bridge debt, either principal or interest.

Very respectfully,

F. B. POND,
Attorney General.

FEES OF JUDGES OF SPECIAL ELECTION HELD FOR JUSTICES OF THE PEACE.

The State of Ohio,
Office of the Attorney General,
Columbus, July 5, 1870.

DEAR SIR:—Yours of 3d June, by some unaccountable mistake, was mislaid, hence this late answer. In reply to it I have to say:

First—In my judgment the office of justice of the peace is a township office, and the fees of the judges of the election should be paid out of the township treasury, except the fee for taking in the returns of the election as indicated in section 14, S. & C., 765.

Second—The fees of judges of such an election as you

speak of (in a special election held for the purpose of electing a justice of the peace only), are, as I think, fixed by the statute clearly at $2.00 per day for each of them.

Very respectfully,

F. B. POND,
Attorney General.

WHO TO PAY COSTS IN CHANGE OF VENUE.

The State of Ohio,
Office of the Attorney General,
Columbus, July 15, 1870.

Jno. S. Pearce, Esq., Prosecuting Attorney, etc.:

SIR:—Your favor of June 25th was in my absence from the city mislaid, and came to my hand yesterday.

Section 122 of the criminal code (O. L., Vol. 66, page 305), takes place of the section to which you refer, and is substantially a re-enactment of it. The section is unfortunate in its language, but I can see no other meaning for it than as follows:

The county from which the venue is changed must pay all the costs of prosecution. The jury fees to be charged to that county can be but the usual fees taxed in costs, to-wit, $6.00.

Very respectfully,

F. B. POND,
Attorney General.

Stationery for County Boards of School Examiners to be Furnished by County Auditors.

STATIONERY FOR COUNTY BOARDS OF SCHOOL EXAMINERS TO BE FURNISHED BY COUNTY AUDITORS.

The State of Ohio,
Office of the Attorney General,
Columbus, July 16, 1870.

Hon. J. C. Evans, Probate Judge, Etc.:

SIR:—In reply to your inquiry of the 9th inst. as to who shall pay for blank books, printed questions and certificates for county boards of school examiners, I have to say, that in my judgment all blank books necessary for the use of school examiners, as well as all printing, whether notices, questions or certificates, should be furnished by the county auditor, and paid for out of the general county fund.

The law intends that the work of the examiners shall be faithfully and *efficiently* done, and that all material necessary to that end shall be furnished by the auditor, and I think it is all included in the words *"blank books and stationery,"* which sec. 9, S. & S., page 709, provides the auditor shall furnish.

Very respectfully,
F. B. POND,
Attorney General.

A Militia Company Must be Composed of Residents of Same County—State House Superintendent; Duties and Powers of.

A MILITIA COMPANY MUST BE COMPOSED OF RESIDENTS OF SAME COUNTY.

The State of Ohio,
Office of the Attorney General,
July 22, 1870.

J. A. Scarritt, Assistant Adjutant General of Ohio:

SIR:—Your communication of this date is received, asking my "opinion as to whether under the provisions of an act entitled an act to organize and regulate an independent militia, passed April 18, 1870, a company may be organized having for its membership residents of different counties in the State."

In reply I have to state that in my judgment the first and second sections of said act limit the membership of such company to the "members of the regularly enrolled militia" in a county having a city or town with a larger population than three thousand. I, therefore, do not think that a company under that act can be legally organized composed of residents of two or more different counties.

Very respectfully,
F. B. POND,
Attorney General.

STATE HOUSE SUPERINTENDENT; DUTIES AND POWERS OF.

The State of Ohio,
Office of the Attorney General,
Columbus, July 22, 1870.

Charles Ridgway, Esq., Superintendent of State House:

SIR:—Section 2 of the act of April 21, 1862, S. & S., page 737, so clearly defines the duty of state house superin-

tendent that I cannot add anything in way of construction or explanation that would make that duty any plainer than the statute has already done.

The General Assembly may undoubtedly and has in one or two instances, especially directed some other officer to look to and superintend certain improvements, repairs about the property; but outside of what authority is thus specially delegated no other officer or person has any legal right to interfere in any way with your duties as laid down in the section of the statute above referred to.

Very respectfully,

F. B. POND,
Attorney General.

FEES OF COUNTY CLERKS FOR REPORTING CRIMINAL STATISTICS.

The State of Ohio,
Office of the Attorney General.
Columbus, July 25, 1870.

Geo. H. Harmon, Esq., Clerk Richland Common Pleas:

SIR:—Yours of 23d inst. came duly to hand, and in reply I have to say:

That in my judgment the act of April 17, 1868, S. & S., 737. does not interfere in any way with the provisions of the act of February 21, 1867, S. & S., 74.

The act first named seems to me to have been intended to establish a bureau of *general statistics*. The last named act only refers to *statistics of crime*, and especially provides that each clerk shall be paid for the labor required of him thereunder. The "questions" spoken of in section 2 of the act of 1868, would seem to be such as might be asked for the purpose of obtaining more complete information than is provided for by the statutes already in force.

I am satisfied you are entitled to the fees provided for in the act of 1867.

Very respectfully, etc.,
F. B. POND,
Attorney General.

POWER OF THE GOVERNOR TO PARDON OR COMMUTE.

The State of Ohio,
Office of the Attorney General,
Columbus, July 29, 1870.

His Excellency, the Governor:

SIR:—It seems clear to me that where any person has been prosecuted for the violation of any criminal law of this State and has been convicted, that the Governor has full power to pardon the offender or commute his sentence (*vide* Sec. 11, Art. III of the Constitution); nor can it make any difference as to what court exercises jurisdiction in the cause, or what was the character of the sentence. Such pardon, if full, must relieve the convict from the further execution of the sentence imposed, or such commutation change the character of the punishment as the Governor may direct.

It follows, I think, that a person *convicted* in the police court of Cincinnati of a violation of a criminal law of this State and sentenced to the House of Correction, under section 242 of the statute, S. & S., page 871, is a proper subject for the exercise of that power by the Governor, if the circumstances in his judgment warrant it.

Very respectfully,
F. B. POND,
Attorney General.

MALT AND INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS MAY REGULATE; CAN NOT PROHIBIT.

The State of Ohio,
Office of the Attorney General,
Columbus, September 1, 1870.

P. B. Miller, Esq., Mayor, Gettysburgh, Ohio:

SIR:—Your letter of the 25th ult., addressed to the Hon. W. H. West, has been by him transmitted to me, and is just received. In reply to your inquiries I have to say:

The Supreme Court of the State in the case of Thompson vs. The City of Mt. Vernon (Ohio State Reports, Vol. 11, page 688), have decided that "the ordinance of a municipal corporation prohibiting the sale of pure Ohio wine, ale, beer and cider to be drank where sold, and prohibiting the sale of such liquors in less quantities than one gallon, is void, because inconsistent with and against the policy of the general statute of May 1, 1854," etc. This decision until reversed is conclusive. The same doctrine is also laid down by the court in the case of The City of Canton against Nist (9th Ohio State Reports, page 440).

This is upon the principle that the legislature having by a general law (viz., act of May 1, 1854) declared the general policy of the State directly, would not, and cannot be presumed to intend by the provisions of the Municipal Code you refer to, authorize such corporations to adopt ordinances inconsistent with what the legislature had enacted itself.

While you cannot, therefore, prohibit such sale, I think you may regulate, restrain and perhaps prohibit the shops. For example: You may prohibit the opening of such shops on Sunday; or say, between certain hours, as for instance, between 6 p. m. and 6 a. m.; and in case they become resorts for noisy tippling, or intemperance, close them entirely, upon the same principle that you may regulate your markets or

other places of sale to make it or them consist with the well being of your village.

Again, by chapter XIV of the Municipal Code (Ohio Laws, Vol. 66, page 180), you will see that by the proper ordinance you may have a jury in your mayor's court so that if one should be demanded by the accused, or he should plead not guilty, a jury may be empaneled in that court to try him and close the matter up.

Very respectfully,

F. B. POND,
Attorney General.

SHERIFF'S FEES FOR TAKING LUNATICS TO THE ASYLUM.

The State of Ohio,
Office of the Attorney General,
Columbus, September 12, 1870.

John W. Broomsberger, Sheriff of Wood County:

SIR:—Yours of 2d inst., directed to Mr. West but doubtless intended for me, would have been answered sooner but for sickness.

Section 40, S. & C., Vol. 1, page 847, regulates the fees of sheriffs in taking lunatics to asylum. By it, as I understand it, sheriffs receive ten cents going and returning, and seventy-five cents per day for maintaining lunatic and no more. If an assistant is required, that assistant is entitled to five cents per mile and no more. No other fees in this behalf can be legally charged by the sheriff as far as I am advised.

Very respectfully,

F. B. POND,
Attorney General.

Compensation of Prosecuting Attorneys—Coroners; Duties of.

COMPENSATION OF PROSECUTING ATTORNEYS.

The State of Ohio,
Office of the Attorney General,
Columbus, September 12, 1870.

T. W. Hampton, Prosecuting Attorney Gallia County:

SIR:—Your letter asking my opinion as to compensation of prosecuting attorneys would have been answered sooner but for my ill health.

Your county, I take it for granted, contains 20,000 inhabitants and over.

In that case it appears to me that any installment of your salary which became payable, according to the time fixed by the commissioners before the census for your county was completed, would be regulated by the census of 1860, and any installment payable after that by the census of 1870.

Very respectfully,
F. B. POND,
Attorney General.

CORONERS; DUTIES OF.

The State of Ohio,
Office of the Attorney General,
Columbus, September 16, 1870.

W. H. Rase, Esq., Coroner of Richland County, Mansfield, Ohio:

DEAR SIR:—Owing to sickness I have not been able to answer your letter of August 3d until now, and in reply I have now to say:

The duties of a coroner are generally too little appreciated in their consequences upon society. The great objects of the inquest of the coroner are: First—The more ef-

fectually and certainly to secure the conviction and punishment of murderers and other offenders against the lives of citizens; and second, to protect innocent persons from criminal accusations.

It will be readily seen then, that it is of the utmost importance that in every case where the statute requires it, this inquest should be held, and that when held all the evidence tending to throw light upon the cause of the death should be elicited with the utmost care, written down in the proper form and preserved: First—As above indicated, to furnish the authorities with the means for pursuing the real criminal, if such there be; and second, the no less important purpose of relieving the innocent from causeless imputations and vexations and wrongful prosecutions.

It is difficult to lay down any fixed rule to guide the coroner as to when he shall hold an inquest and when not. The statute (S. & C., page 1400, sec. 8) has the following language: "That whenever information shall be given to any coroner that the dead body of any person *supposed to have come to his or her death by violence*, has been found within his county, it shall be the duty of such coroner," etc. From this it would seem that when such information reaches the coroner as will lead him as a reasonable man to suppose, or to suspect that the death has been caused by violence, the coroner should issue his warrant. It would seem also that the violence should be supposed to be the immediate cause of the death. Death may not have followed the blow upon the instant, as the victim may have lain in any insensible state for days after a blow upon the head, or other reason may have supervened, but the death must have resulted proximately from the violence. The violence may have been of different character. It may have been by blows inflicted, by poison administered, by the explosion of a kerosene lamp, by drowning, or by many other modes that death resulted, in all of which cases the evidence ought to be preserved; e. g., in case of an explosion of a lamp whereby death is caused, the vendor of the oil may, under our statute, have been guilty of manslaughter.

Coroners; Duties of.

In short, whenever the information is such that the coroner, as a reasonable man, supposes the death to have been caused by violence, he should hold his inquest under the penalties provided in the tenth section of the act above referred to.

When the coroner has determined that an inquest is necessary, he should make it thorough. All evidence of the facts attending the matter, which can be obtained, should be carefully taken, and especially should scientific and medical men be examined to fully fix the cause of the death; and if it should, in the opinion of such men, be necessary to throw any light upon the case, *post mortem* examination should be had whether the friends of the deceased object to it or not.

When the body is taken out of the county before the warrant issues for the jury, the inquest should in my judgment be held in the county and by the coroner of the county to which the body may have been taken.

I have answered as fully as I can, as I understand the subject, the questions you put. I appreciate the difficulties that surround the coroner in some cases, and yet public justice requires that these duties should be performed with as much care and faithfulness as any that are imposed by the law.

Very respectfully,

F. B. POND,
Attorney General.

Green Township (Hamilton County) Section Sixteen School Fund.

GREEN TOWNSHIP (HAMILTON COUNTY) SECTION SIXTEEN SCHOOL FUND.

The State of Ohio,
Office of the Attorney General,
Columbus, September 15, 1870.

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

SIR:—Your favor of the 8th inst. covering other papers, including statement of State Auditor Godman, was duly received in my absence, and would have received attention sooner, but for press of business occasioned by my late ill health.

I have now to say that I have examined the matter you submit, as far as I can, and am compelled to say that I find nothing unfair as against your county and the several townships thereof, in the adjustment of the Green Township matter made by the Auditor of State.

It would seem from the books in the auditor's office that in 1850 the county of Hamilton had a credit on account of the principal of section 16 school fund in excess of the amount actually paid into the State Treasury of $2,964.15. Upon this sum the State has regularly paid interest to Hamilton County for the benefit of the several townships amounting to $4,091.82; the sum amounting for principal and interest to $7,055.97.

Here then we have $4,091.82 paid by the State to the county by mistake, of money to which the county was not entitled and which the State has the right to reclaim.

The county has also a credit on account of principal of section 16 fund, to which it is not entitled of $2,964.15, and which the State has a right to balance by any claim the county may have against the State of equal amount.

In 1850 it would seem that Green Township in your county, through the default of some one in your county,

Green Township (Hamilton County) Section Sixteen School Fund.

lost a credit to which it was entitled upon the State Auditor's books on account of principal of section 16, of $2,619.36.

In 1867 the legislature authorized the Auditor of State to adjust the account of section 16, Green Township, so that the full amount of the principal and interest of the money arising from the sale of said section should be credited and paid to it by the State.

Here, then, Green Township is entitled to a credit of $2,619.36 on account of principal. The interest on that sum from 1850 is $2,896.04. This must be paid to the township by the State.

But the county owes the State on account of the excess of principal above referred to, $2,964.15. The auditor credits Green Township on account of principal, as he is required to do by the act above referred to, with the above $2,619.36; and charges it to the county to balance in part the credit the county has erroneously received.

The county (the different townships thereof in proportion) owes the State for interest erroneously paid to it by the State, $4.091.82. The auditor charges the county, through its different townships in proportion, in part to balance the above, with the sum of $2,986.04 interest due Green Township as above stated, collects the money and pays Green Township.

The Auditor of State is fully authorized, in my judgment, and more it is his duty, when errors have crept into the accounts, to correct them, and if made against the State to collect the amount of the error, and if against any other party and in favor of the State, to make such party whole out of the State treasury.

This adjustment, it appears to me, to be such a one as the auditor could make, and if the books are correct in showing what they appear to show, it is such an adjustment as he ought to make, unless he may have been too liberal in allowing Hamilton County to retain the excess of principal and interest which she has received by mistake, after deducting the Green Township matter.

As advised now I can see no way in which such an adjustment can be disturbed.

Very respectfully,
F. B. POND,
Attorney General.

PROBATE JUDGE; ELECTION OF.

The State of Ohio,
Office of the Attorney General,
Columbus, September 16, 1870.

Lewis S. Gordon, Probate Judge, etc.:

SIR:—Owing to ill health your letter has remained unanswered until now. In reply to it I have to say:

That under the act of March 21, 1865, Swan and Sayler, page 501 (Sec. 1.), I am satisfied that at the next October election it will be necessary to elect a judge to fill the remainder of the term for which Judge Cobb was elected, and that as soon after as he can be commissioned and otherwise properly qualified he will take his office.

Very respectfully,
F. B. POND,
Attorney General.

INDICTMENT FOR MURDER; HOW TO BE WORDED.

The State of Ohio,
Office of the Attorney General,
Columbus, September 28, 1870.

S. T. Sutphen, Esq., Prosecuting Attorney, etc.:

SIR:—Yours of 22d inst. came to hand yesterday. In my judgment the indictment you present, while it is very inartificially drawn, would, if properly punctuated, be held good. You have substantially charged an assault (not battery for you use the word "she" where you should have used the word "her"), and that while the accused were in the commission of said unlawful act, they unlawfully did kill and slay the woman.

I should prefer, however, the form I give you for charging the crime. After the word "aforesaid" in the eleventh line of your indictment say "in and upon the body of one Elizabeth Buckmaster, unlawfully and in a menacing manner, did make an assault, and her, the said Elizabeth Buckmaster, did then and there unlawfully strike, wound, abuse and ill treat, and whilst the said William Troxel and Charles Tagget were engaged in the commission of the unlawful act herein above charged against them, they, the said William Troxel and Charles Tagget, her, the said Elizabeth Buckmaster, did unlawfully kill and slay."

I am sorry this could not reach you as soon as you desire, but hope it is not yet too late to be of service.

Very respectfully,
F. B. POND,
Attorney General.

Prosecuting Attorneys Not Entitled to Extra Compensation Under the School Law of 1853.

PROSECUTING ATTORNEYS NOT ENTITLED TO EXTRA COMPENSATION UNDER THE SCHOOL LAW OF 1853.

The State of Ohio,
Office of the Attorney General,
Columbus, September 29, 1870.

J. M. Dalzell, Esq., Prosecuting Attorney, Noble County:

SIR:—Your communication to General Sherwood is just read, and in answer to your question therein, I have to say:

By section 65 of school act of 1853 (S. & C., 1365), it is provided that "any suit either in favor of or against *any school board or other school officers,* shall be prosecuted or defended as the case may be, by the prosecuting attorney of the proper county as *a part of his official duties.*"

Section 1 of the act of April 13, 1865, (S. & S., 633) provides that "the prosecuting attorney for each county in this State shall annually receive for his services in criminal and civil business, which now are or hereafter may be required of him by law to be performed," etc., the compensation in that section provided.

In my judgment a suit brought on behalf of a board of education against a township treasurer, or upon his bond, would be among the duties denominated official by the section of the school act above cited, and for this duty he is paid in his general compensation provided in the section of the act of 1865 above referred to, and the prosecutor is not legally entitled to charge other fees. I admit the hardships of the case but cannot see otherwise under present legislation.

Very respectfully,
F. B. POND,
Attorney General.

HABEAS CORPUS AND SECOND COMMITMENT.

The State of Ohio,
Office of the Attorney General,
Columbus, September 30, 1870.

W. Allen, Esq., Greenville, Ohio:

SIR:—Yours of 28th inst. is at hand, and in reply I have to say that I have given some attention to the section of the statute, to which you refer, and have come to the following conclusion:

Section 6 of the act of 1811, re-enacted March 27, 1858, O. L. 19, was intended by the General Assembly to secure respect to the writ of habeas corpus.

When the commitment is found defective and the accused discharged, this order of the court (i. e., the commitment) is dead and accused may not be again interfered with under it, and this, this statute is intended to make sure. But it is clear to me that the magistrate may immediately upon such discharge, pending an examination, issue another warrant for the arrest of the accused upon the same affidavit, make out a new mittimus, and this new mittimus will be such "legal order" of a "court having jurisdiction of the cause or offense" as is contemplated by the section, and as will protect the officers from the penalty imposed by the section; or a new affidavit may be filed for the same offense and the whole case proceeded in de novo.

Very respectfully,
F. B. POND,
Attorney General.

JUDGES OF ELECTION; ACT OF 1870 IN RELATION THERETO.

The State of Ohio,
Office of the Attorney General,
Columbus, October 6, 1870.

Hon. R. D. Harrison, Chairman Republican State Executive Committee:

SIR:—In accordance with your request, I have the honor to submit the following, as my judgment of the act of April 12, 1870, entitled "An act to amend an act to regulate the election of State and county officers, passed May 3, 1852."

First—The General Assembly has the power to regulate and fix by law the mode of conducting elections, and to determine who shall be judges of elections.

Second—The above act is now the only law in existence fixing who shall be judges of elections, inasmuch as all laws in existence on the date of the passage of this act are by it repealed.

Third—The first section of said act of April 12, 1870, as amending the sixth section of the act of March 11, 1853, fixes who, of persons to be indicated at elections held thereafter, shall be judges of elections; and the third section of the act provides that "the electors who, according to the returns, would have been selected judges of election, had this act not been in force on the 4th of April, 1870, shall be judges of election, and shall qualify as much, as if the same had been then in force," etc., etc.

In my judgment this act is the law applicable to the election to be held on the 11th inst., and all polls not conducted in accordance with its spirit will be illegally conducted.

Very respectfully,
F. B. POND,
Attorney General.

Separate School District Entitled to Its Proportion of all School Funds.

SEPARATE SCHOOL DISTRICT ENTITLED TO ITS PROPORTION OF ALL SCHOOL FUNDS.

The State of Ohio,
Office of the Attorney General,
Columbus, October 13, 1870.

W. D. Henkle, Commissioner of Common Schools:

SIR:—In reply to your inquiry in regard to the school fund to a proportion of which, a separate school district, organized under the act of April 9, 1867, is entitled, I have to say:

In my judgment the act of May 6, 1869, amending the sixth section of the act of 1867, applies to all school funds in the township treasury at the date of the organization of the separate district, and to all school funds which might after such date come into such treasury as the proceeds of a larger levy made before such date.

The word "contingent" in the act, it appears to me, describes all other funds than the tuition fund. It appears to me that the school law contemplates but two absolutely distinct funds, viz.: a tuition *fund*, and a fund raised "for purchasing school house sites, for erecting, furnishing and repairing school houses, for providing fuel and for any other school purpose other than the payment of teachers." (See S. & C., pages 1353-4, Sec. 22.) This second fund, which may be used for any and all purposes above mentioned as the circumstances may require, is one fund, and it appears to me to be the fund described by the word "contingent" in the act of 1869. If the word does not mean this, it is difficult for me to fix a definite meaning to it; and it appears to me that the act of 1869 contemplates that when the separate district sets up for itself it shall have "its proportionate" share of all school funds which it aided in raising,

and which it might have shared in if it had remained under the control of the old township board.

Very respectfully,

F. B. POND,
Attorney General.

LEGISLATIVE HALLS; WHOSE DUTY IT IS TO PREPARE THEM FOR RECEPTION OF LEGISLATURE.

The State of Ohio,
Office of the Attorney General,
Columbus, October 26, 1870.

General I. R. Sherwood, Secretary of State:

SIR:—Yours of 17th inst. is to hand, inquiring "whose duty it is to prepare the halls of the General Assembly for its reception."

In reply I have to say that I have examined the different statutes relating to this subject, and while I find some difficulty in harmonizing some of their apparently conflicting provisions, I have come to the following conclusion: That it will be the duty of the Superintendent of the State House to prepare the halls for the reception of the General Assembly, so far as the preparation of the halls themselves and the furniture thereof is concerned. And as to all such property as books, stationery and other property that the Secretary of State has charge of and is required to furnish for each session, the Secretary of State, on demand will furnish it to the sergeant-at-arms of the proper house, whose duty it will be immediately before the session to place it in the hall for the use of the members.

Very respectfully,

F. B. POND,
Attorney General.

Reform School; Commitments to—Deeds Made by the Governor Require no Stamps.

REFORM SCHOOL; COMMITMENTS TO.

The State of Ohio,
Office of the Attorney General,
Columbus, October 27, 1870.

Hon. D. W. Whitmore:

SIR:—Yours of 25th inst. came to hand this morning, and in reply I have to say:

I have been unable to find any statute under which the boy you mention can be sent to the Reform Farm by an order of the Probate Court. But I am satisfied that a judge of the Court of Common Pleas in your county may, on application, have the boy brought before him, and in a proper case make an order committing him to the farm, which would be valid under the statute of February 24, 1865. S. & S., 388.

Very respectfully,
F. B. POND,
Attorney General.

DEEDS MADE BY THE GOVERNOR REQUIRE NO STAMPS.

The State of Ohio,
Office of the Attorney General,
Columbus, October 27, 1870.

His Excellency, the Governor:

SIR:—In my judgment a deed made by you as Governor of Ohio, as provided by statute for ministerial lands sold (Sec. 29), is covered by the language "official instruments, documents and papers" in section 154, page 117, of the Internal Revenue Laws of the United States, and does not require a stamp to render it a valid instrument.

Very respectfully,
F. B. POND,
Attorney General.

Mechanic Laboring From Place to Place Can Vote—County Auditor; No Valid Election For, in 1870.

MECHANIC LABORING FROM PLACE TO PLACE CAN VOTE.

The State of Ohio,
Office of the Attorney General,
Columbus, November 2, 1870.

John Gander, Esq.:

SIR:—Yours of 12th October would have been answered sooner but for absence from the city.

In my judgment the laborer of mechanics who labors a while in one place, and then in another, remaining so long in one place only as he can get employment, if he has been in the State and township the time required by law, is a voter within the meaning of the law. Of course a man having a family must vote where his family resides.

Very respectfully,
F. B. POND,
Attorney General.

COUNTY AUDITOR; NO VALID ELECTION FOR IN 1870.

The State of Ohio,
Office of the Attorney General,
Columbus, November 2, 1870.

Hon. I. R. Sherwood:

SIR:—I am informed by the Governor that he will issue a commission, if desired, by the successful candidate this fall for county auditor.

In my judgment the commission, however, can avail nothing if issued as there is no authority of law for holding an election for that office in the fall of 1870.

Very respectfully,
F. B. POND,
Attorney General.

County Commissioners Elected for a Full Term Hold Office for Three Years—County Treasurers; Fees of.

COUNTY COMMISSIONERS ELECTED FOR A FULL TERM HOLD OFFICE FOR THREE YEARS.

The State of Ohio,
Office of the Attorney General,
Columbus, November 2, 1870.

Samuel Kendrick, Esq., Auditor of Ross County:

SIR:—In reply to yours of the 31st ult., I have to say that in my judgment under the law as it now stands, a commissioner elected for a full term is entitled to hold the office for the full term of three years.

Very respectfully,
F. B. POND,
Attorney General.

COUNTY TREASURERS; FEES OF.

The State of Ohio,
Office of the Attorney General,
Columbus, November 2, 1870.

Messrs. Durfee and Stephenson:

GENTLEMEN:—Yours of October 26, 1870, came duly to hand, and in reply I have to say:

As I understand the bonds of the county have been negotiated through a bank, and the money raised on them has never been received or disbursed by the county treasurer. In that case it is clear the county treasurer is not entitled to fees under the act of February, 1859, S. & C., 1234, for receiving and disbursing the proceeds of a funded debt as created as he does not receive or disburse it.

In my judgment he is entitled to fees under the act of April 13, 1865, S. & S., 918, upon the redemption fund as

A Justice of Peace Can be a Township Trustee— County Auditors; Liability of the Bond of, for Extension of Term of Office.

fast as it is collected and is found in his hands upon semi-annual settlement, and no faster.

Very respectfully, etc.,

F. B. POND,
Attorney General.

A JUSTICE OF PEACE CAN BE A TOWNSHIP TRUSTEE.

The State of Ohio,
Office of the Attorney General,
Columbus, November 11, 1870.

John D. Hanks, Esq.:

SIR:—Yours of 4th inst. is received, and would have been answered sooner but for necessary absence from the city.

In reply I have to say that there is no legal objection to one person holding at the same time in Ohio the office of justice of the peace and township trustee.

Very respectfully, etc.,

F. B. POND,
Attorney General.

COUNTY AUDITORS: LIABILITY OF THE BOND OF, FOR EXTENSION OF TERM OF OFFICE.

The State of Ohio,
Office of the Attorney General,
Columbus, November 11, 1870.

G. W. Binckley, Esq., Auditor Perry County, Ohio:

SIR:—Yours of the 5th inst. is to hand and would have

been answered sooner but for necessary absence from the city.

Under the law, in accordance with which you were elected, you were elected to hold the office for two years and until your successor was duly elected and qualified, and you gave bond accordingly. The bond you have already given is good for the additional eight months, and no additional one is needed. If the county commissioners desire it I should give, however, an additional bond, without disturbing the old one. The election held this fall can amount to nothing. The office of auditor is one which is created by statute, and all elections for that office must be held in accordance with some statute. There was no statute in existence authorizing an election for auditor of the county this fall.

Very respectfully,
F. B. POND,
Attorney General.

JUSTICES OF THE PEACE; ELECTION OF.

The State of Ohio,
Office of the Attorney General,
Columbus, November 15, 1870.

J. W. Albaugh, Esq.:

SIR:—Yours of 14th inst. came to hand this morning, and in reply I have to say that in my judgment the act of April 12, 1870, does apply to elections of justices of the peace and does not apply to other township officers.

The act of March 14, 1853, S. & C., 1565, provides the *mode* for the election of township officers other than *justices of the peace.*

The act of March 11, 1853, S. & C., 765, 14 Sec., provides the *mode* for the election of justices of the peace, and says that elections for justices "shall be conducted in

Fees of a Surgeon in Post Mortem Examination to be Fixed by the Court.

the same manner as is required in the election of members of the General Assembly," etc.

The act of April 12, 1870, and the act which it amends provides *the mode* for the election of members of the General Assembly, etc.

Very respectfully, etc.,

F. B. POND,
Attorney General.

FEES OF A SURGEON IN A POST MORTEM EXAMINATION TO GE FIXED BY THE COURT.

The State of Ohio,
Office of the Attorney General,
Columbus, November 17, 1870.

T. G. McCray, Esq.:

SIR:—Yours of 13th inst. came to hand this morning. I suppose the fee you inquire about is for the services of the chemist in a post mortem examination. This chemist, I suppose, to be a physician or surgeon. If so, the act of March 8, 1861, S. & S., page 730, provides for the payment to him by the commissioners of the county, of such sum as the Court of Common Pleas may direct. I know of no statute warranting such payment by the commissioners until the amount shall have been fixed by the court.

Very respectfully,

F. B. POND,
Attorney General.

Village Treasurer's Bond Liable for Safe Keeping of Public Funds; Vacancy in Office—County Auditors; Fees of; Under Forty-first Section of School Law.

VILLAGE TREASURER'S BOND LIABLE FOR SAFE KEEPING OF PUBLIC FUNDS; VACANCY IN OFFICE.

The State of Ohio,
Office of the Attorney General,
Columbus, November 30, 1870.

SIR:—In reply to yours of 28th inst., I have to say:

First—The treasurer of a village is under our statutes liable upon his bond for the safe keeping of the public money no matter what may happen—robbery or anything else; and no power inferior to the General Assembly can relieve him—no matter whether he has used the money himself or has been robbed of it.

Second—When a vacancy occurs sixty days or more before the regular election for such office any elective officer's vacancy must be filled by election, and no appointment would be valid unless it be for a period of less than sixty days immediately preceding such election.

Very respectfully,
F. B. POND,
Attorney General.

COUNTY AUDITORS; FEES OF; UNDER FORTY-FIRST SECTION OF SCHOOL LAW OF 1853.

The State of Ohio,
Office of the Attorney General,
Columbus, November 30, 1870.

N. Thomas, Auditor Madison County:

SIR:—Yours of 26th inst. is to hand.. In my judgment the forty-first section of the act of the General Assembly, called the school law, S. & C., 1360, was superseded by the

Recorders Should Not Use Printed Blanks for Recording Deeds, Etc.

act of February 7, 1861, and impliedly repealed. The last named act is entitled "An act to regulate and limit the compensation of county auditors," 58th Vol. O. S., page 7.

There is considerable conflict of opinion about this, and the matter will soon be brought before the Supreme Court in the case of "The Commissioners of Lorain County vs. Mozart Gallup," when it is to be hoped the matter will be definitely settled by that tribunal.

Very respectfully, etc.,

F. B. POND,
Attorney General.

RECORDERS SHOULD NOT USE PRINTED BLANKS FOR RECORDING DEEDS, ETC.

The State of Ohio,
Office of the Attorney General,
Columbus, December 16, 1870.

A. L. Marshall, Esq., Recorder Shelby County:

SIR:—Yours of 15th inst. came to hand today. In reply I have to say that in my judgment the practice you speak of of issuing records for deeds, mortgages, etc., in which the formal part of such instrument have been printed before the deed or mortgage is presented for record is, to say the least of it, a bad and dangerous practice.

Whether our Courts would hold that such records were illegal, I am not now prepared to say, but I am, for various reasons, inclined to think they would so hold.

The transcript of a record duly certified by the recorder is now of even a higher order of evidence than the original instrument itself in this, that the execution of such instrument is *proved*.

If records are to be made or partially made out beforehand, the greater liability to errors in actually making the

Perjury Where a Party Swears Falsely Before a Commission Appointed to Take Testimony in a Divorce Case by an Indiana Court.

record conform to the original instrument in form—interlineations that must often be made in your printed parts to adapt them to the original leave so much greater room for errors that a record so made ought not to carry with it that character for truth which it now has. In my judgment such records ought not to be used.

Very respectfully, etc.,

F. B. POND,
Attorney General

PERJURY WHERE A PARTY SWEARS FALSELY BEFORE A COMMISSION APPOINTED TO TAKE TESTIMONY IN A DIVORCE CASE BY AN INDIANA COURT.

The State of Ohio,
Office of the Attorney General,
Columbus, January 16, 1871.

W. P. Howland, Esq., Prosecuting Attorney, Etc.:

SIR:—Below please find extracts from Indiana statutes. That speaking of "willful absense" is as follows:

"Abandonment for one year."

As to taking depositions under a commission, section 240 of the Indiana code provides as follows:

> "When a deposition is to be taken out of the State the clerk shall, upon the request of the party taking the deposition to the *officer or commissioner* designated to take the deposition."

Section 241 provides:

> "If the commission do not specify the name of the officer before whom the deposition is to be