
Requisites of an Indictment for "Removing a Body from Its Grave."

of 13th instant, which you have submitted to me, and upon the facts therein set forth, I am of the opinion:

1. That the treasurer appointed in August last by the commissioners of Shelby County in August last to fill the vacancy happening by the death of a regularly elected incumbent, whose term would have expired on the first Monday of June, 1858, was entitled to the office only until the then next annual election (which occurred in October last) and for such time beyond the day of that election as might intervene before the treasurer then elected should "qualify" by giving the requisite bond and taking the prescribed oath of office.

2. That the treasurer elect, having given the bond and taken the oath required by law, is now the rightful treasurer of the county, and should at once enter upon the discharge of the duties of that office.

The seeming urgency of the case requires an immediate reply, but I am so pressed with business that I cannot find time to state fully the reasoning which has led me to the above conclusions. The subject, however, is so important, that I will take an early occasion to present my views thereon at length.

Very respectfully,

C. P. WOLCOTT.

To the Auditor of State.

N. B. This opinion has been overruled. See — p. opinion to W. S. Invin, Auditor of Monowles, and 7 Ohio State Rep. 125.

REQUISITES OF AN INDICTMENT FOR "REMOVING A BODY FROM ITS GRAVE"

Attorney General's Office,
Columbus, February 25, 1858.

DEAR SIR:—Your letter of 31st December never came to my notice until last evening, when I discovered it unopened

Requisites of an Indictment for "Removing a Body from Its Grave."

among some papers on my desk. Though perhaps too late to be of any essential service to you, I proceed to answer your interrogatories in the order in which they are made.

1. The first form of an indictment for "removal of a dead body from its grave" given by Warren, though not drawn in the most artistic manner, seems on the whole to contain every substantial requisite of a sufficient indictment for that offence.

2. This inquiry is very broad in its scope, and I can only answer it in the same general way. No instance now occurs to me in which it is necessary to state the names of the "relatives of the deceased," or the degree of relationship, whether such relatives do or do not reside in the county where the offence was committed.

3. The third question involves a point of great perplexity. The general rule undoubtedly is that the State must show affirmatively the existence of every fact constituting an essential ingredient of the offence charged; or, in other words, must establish every material averment of the indictment. This rule, however, is subject to an exception not less firmly settled than the rule itself, that when the subject matter of a negative averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but is to be taken as true unless disproved by the defendant. Wharton's Crim. Law, 284. Archb. Cr. Pl. 105. 1 Greenl. Cv. Sec. 79. The negative averment in the form of indictment under consideration would, at first sight, seem to fall clearly within this exception. It is quite impossible to distinguish it in principle from many of the cases cited in the text books and reports, to which the exception has been applied. But the case of *Cheadle vs. The State*,⁴ Ohio State Rep. 477, covers very considerably the operation of this exception. After a very thorough examination of that case, I find myself wholly unable to reconcile it with the general current of authorities, or to extract from it any certain guide by which to determine

Memorial and Claim of Asabel Chittenden.

what cases fall within the general rule, or what within the exception.

On the whole, however, I incline very strongly to the opinion that the negative averment in question comes within the exception, and consequently that the State is not bound to offer any evidence to support it. If the defendant insist that he had the "consent" required by the act, he must prove it. But while this is my opinion, I think that, in view of the doubt that hangs over this question, it would be the safer and better cause for you, on behalf of the State, to prove that such consent was not given, or, at least, to offer such evidence in that behalf as may be within your power.

Very respectfully,

C. P. WOLCOTT.

Jno. W. McKim, Esq., Prosecuting Attorney, Defiance, Ohio.

MEMORIAL AND CLAIM OF ASABEL CHITTENDEN.

Copy of Opinion given to the House committee on claim in respect to Asabel Chittenden's memorial to the General Assembly, insisting that a lease made by the quartermaster general, on the 18th November, 1855, of his building, for the term of three years, was valid, and asking an appropriation for payment of rent alleged to be due him thereon.

I have examined the within memorial, and lease thereto attached, and am of the opinion that the lease is void. The appropriation act of 1854 (52 Ohio Laws, 147) appropriated \$500 "for rent of building in which to lodge the public arms," and, in my judgment, the quartermaster general had no power to make any agreement for the rent of any building which involved the payment of any sum beyond the amount appropriated for this specific purpose, or which should extend to a longer period than two years from the

Relative to Contracts for "Widening and Deepening Lancaster Side Cut."

date of the appropriation. Neither he, or any other officer, has power to contract debts on behalf of the State, and every consideration of public policy demands the stern enforcement of this rule.

Mr. Chittenden has already been paid in full for the time the State actually occupied the building. Whether he shall be allowed any further sum upon the ground that, supposing the lease to be valid, he made large expenditures to adapt the building to the uses specified in the lease, is a question for the legislature alone to determine. The last General Assembly directed the sum of two hundred and fifty dollars to be paid Mr. Chittenden to compensate him for this expenditure (54 Ohio Laws, 207), but I am advised by the auditor of state that he has declined to accept it.

C. P. WOLCOTT,
Attorney General.

RELATIVE TO CONTRACTS FOR "WIDENING AND
DEEPENING LANCASTER SIDE CUT."

Attorney General's Office,
Columbus, March 4, 1858.

SIRS:—I have examined as carefully and thoroughly as a great press of other business would permit, the papers relating to the "widening and deepening of the Lancaster side cut," transmitted with your communication of the instant, and now beg leave to submit to you the result of that examination, in the form of answers to the inquiries propounded in your letter.

1. The contract with McCarthy & Co. does *not* "cover all the work necessary to be done to put the Lancaster side cut in good navigable order."
2. It does not necessarily "cover all work staked out and exhibited to bidders, as intended to be done at the time

Relative to Contracts for "Widening and Deepening Lancaster Side Cut."

of the bidding." The third article of the "rules and specifications for the widening and deepening of the Lancaster side cut canal," which are in express terms made a part of McCarthy's contract, declares that the "canal shall be increased to such width and depth as the acting commissioner or resident engineer may direct." This provision gave to the commissioner or engineer plenary power to determine the extent and quantity of the work to be done under the contract. They might require more or less than that which had been previously staked out to be done, and, in either case, their requirement would conclude the contractors.

3. Assuming that all the work embraced in the contract has not yet been done, the contract did not expire by its own limitation, if by that it meant that the omission on the part of the contractors to complete the work by the 25th day of August, 1856. From the evidence transmitted to me, it is quite clear that this omission, if not the result of a direct order to that effect given by the resident engineer, was so far acquiesced in by the engineer and the board of public works, that the State cannot now avail itself of that omission as a substantial ground for declaring the contract to be abandoned in respect to any work yet to be done which would otherwise be within its scope.

4. The papers submitted to me do not disclose facts touching "the settlement with the State, and estimates by the engineer," sufficient to warrant the expression of any opinion as to whether that settlement cancelled the contracts or not.

5. The "papers and testimony" do not show any "action of the contractors" which would in law "absolve the State from the obligations of the contract," if it was otherwise binding upon the State.

6. This inquiry is too general in its terms to admit of any definite answer. Whether the agents of the State have or have not the right, in the case supposed, "to compel the contractors to perform the expensive part at the contract price, and lease the unexpensive part unperformed"

Relative to Contracts for "Widening and Deepening Lancaster Side Cut."

depends wholly on the terms of the contract in the particular case. If that contemplates the doing of a precise amount of work, in every and any contingency, then, of course, the contractor has a right to do all the work covered by its terms. But the parties may lawfully agree that the person for whom the work is to be done, shall have the power to increase or diminish the amount thereof as specifically stated in the contract itself, and when such power is given, the party upon whom it is conferred may well exercise it without subjecting himself to any liability other than that provided by the contract itself. When such a power is reserved, the parties are properly presumed to have contracted with reference to it, and to have made such stipulations as would, in their judgment, guard against any loss which it might otherwise occasion.

7. The "terms of the law passed April 3, 1857" (54 Ohio Laws, 86) making the additional appropriation for the "Lancaster side cut," do not affect the validity of the contract with McCarthy & Co. The legislature did not undertake to pass upon the question of the validity, or rather of the existence of that contract, but, in express terms, referred the examination and determination of that question, so far as it might be ordered in the expenditure of the sum then appropriated, to the board of public works.

All of the questions which you have been pleased to submit to me, assume that the acting commissioner had unlimited power to bind the State, by contract, for the expenditure of such sums as in his judgment might be necessary for the widening and deepening of the Lancaster side cut. My answers to these inquiries have necessarily proceeded upon the same assumption. Since, however, my attention has been called to the general subject, it is due to myself as the law officer of the State, and to the committee which has been charged with the duty of inquiring into the claim of McCarthy & Co., growing out of this contract, to say that, in my judgment, the acting commissioner has no such power. Within

Relative to Contracts for "Widening and Deepening Lancaster Side Cut."

the last year I have had frequent occasion to examine this question, and the result of that examination is a clear conviction that no officer of the State has power to make any contract on its behalf, the execution of which will involve the expenditure of any sum beyond that appropriated for the subject matter of the contract, or which shall require for its completion more than two years from the date of the appropriation. This limitation clearly results from the constitutional prohibition against the creation of "any debt by or on behalf of the State" (Art. 8) or the making of any appropriation "for a longer period than two years." Art. 2, Sec. 2. Fidelity to the constitution and the highest considerations of public policy alike demand the stern observance of this salutary limitation. Tested by this rule, the contract with McCarthy & Co., so far, at least, as it involved an expenditure beyond the sum appropriated, was and is void. That appropriation has been exhausted, and the State therefore is not lawfully bound to permit them to finish the work (if there be any such) covered by the terms of that contract, but not yet done, or to respond to them for the loss of any supposed profits which they might have realized from its complete performance. Whether upon general principles of equity and justice the State ought to pay the contractors any sum beyond the stipulated price which they have already received, in consequence of the low rate at which they agreed to do the work, or of the unforeseen difficulties encountered by them in its prosecution, is a question purely of legislative will and discretion.

C. P. WOLCOTT,
Attorney General.

To the House Committee on Public Works.

*Relative to the Office of Probate Judge of Perry County—
Relative to the Act in Regard to the State House,
Passed April 12, 1858.*

RELATIVE TO THE OFFICE OF PROBATE JUDGE
OF PERRY COUNTY.

Attorney General's Office,
Columbus, April 3, 1858.

SIR:—I have considered the questions stated in your note of the 1st instant, respecting the office of probate judge of Perry County, but am so much pressed with business that I have at the moment only time to say that, in my opinion, William M. Brown is now entitled to a commission as probate judge of Perry County. A court of competent (perhaps exclusive) jurisdiction over the subject matter, with the parties properly before it, has determined that Mr. Brown was duly elected to that office. Until reversed, that judgment absolutely concludes the rights of the parties to it, and until superseded, the successful party may lawfully demand its instant enforcement in the prescribed legal mode.

At an early day I will communicate to you the reasons which have led me to this conclusion.

Very respectfully,

C. P. WOLCOTT.

To the Governor.

RELATIVE TO THE ACT IN REGARD TO THE
STATE HOUSE, PASSED APRIL 12, 1858.

Attorney General's Office,
Columbus, April 15, 1858.

DEAR SIR:—Very careful consideration of the questions submitted to me by your note of yesterday in reference to the "act to provide for the more expeditious completion of

Relative to the Case of Joseph Loeffner.

the new state house," prescribing the order in which it shall be done, passed April 12, 1858, has led me to the following conclusions:

1. That act, in all of its distinguishing features, is incompatible with the constitution, and therefore void.

2. It does not operate to abolish created by the "act to provide for the prosecution of the work on the new state house, prescribing the order in which it shall be done, and making appropriations therefor," passed April 8, 1856, nor does it have the effect to make any considerable (if, indeed, it makes any) change on the powers and duties of those offices as prescribed by that act. It is not, however, necessary to express immediately any decided opinion as to whether it makes any such change, and I, therefore, reserve that question for further consideration.

3. The "new state house commissioners" last appointed under the above named act of 1856, are therefore still in office, and entitled to exercise all the powers, and bound to discharge all the duties which pertain thereto.

The urgency of the public interests depending on a decision of these questions is so great, and the demand of other official duties is so pressing, that no time is now allowed me to state the reasons on which these conclusions are founded. I will, however, communicate them to you at length as soon as other more imperative duties will permit.

Very respectfully yours,

C. P. WOLCOTT.

W. A. Platt, Esq., Acting Commissioner, etc., Columbus, Ohio.

RELATIVE TO THE CASE OF JOSEPH LOEFNER.

Attorney General's Office,

Columbus, April 12, 1858.

SIR:—At the December term, 1857, of the Court of Common Pleas of Hamilton County, Joseph Loeffner was

Relative to the Case of Joseph Loefner.

tried on an indictment charging him with the murder in the first degree of Nichols I. Horton. Though upon his arraignment at a previous time the plea of not guilty had been interposed, which plea remained unchanged, it was admitted by the counsel charged with the defence, that in fact Loefner did slay Horton, but it was nevertheless insisted that the slaying was not murder, for the alleged reason that the act was the mere outbreak of an insanity which overwhelmed the reason and judgment of Loefner, so that he was not an accountable agent. The whole question of the guilt or innocence of Loefner was thus narrowed to the single inquiry, was he sane or insane? Most of the evidence adduced on the trial was directed to this one point, and as uniformly and perhaps necessarily happens in all questions of capacity, it was quite contradictory. Under the instructions of the court, the jury found him "guilty of murder in the first degree as charged in the indictment." After verdict, motion for a new trial was made by his counsel, upon the ground, among others, that the verdict was against the weight of the evidence. This motion was overruled, and Loefner was thereupon sentenced to death. All of the evidence adduced on the trial was set forth in a bill of exceptions which, duly signed and sealed, was made a part of the record, and a writ of error was afterwards prosecuted out of the Supreme Court to reverse the judgment below.

It became my duty to take charge of the case, on behalf of the State, at the hearing thereof in the Supreme Court, and in the discharge of that duty I gave to the case the most careful and patient consideration.

Though various errors were assigned upon the record, three alone were mainly relied on by the counsel for Loefner, and chief of these was the refusal of the court below to set aside the verdict because it was against the weight of the evidence. Upon this point it was my duty to insist (for such is now the unquestioned rule) that in the present state of the law, the Supreme Court had no power to review the evidence adduced on the trial, and could not, therefore, reverse the

Relative to the Case of Joseph Loefner.

judgment of the inferior court for refusing on that ground to grant a new trial, however erroneous the refusal might seem to be, at the same time I signified to the court that if it should nevertheless hold that it had that power, I did not conceive it to be my duty to urge that the verdict was warranted by the evidence. The court, however, held that it could not re-examine the evidence, and having ruled against the other points assigned for error (though as to one of them, by a bare majority only) it affirmed the judgment of the court below, and appointed the thirtieth day of the present month for the execution of the sentence.

Whether the result would have been different if the court had held itself at liberty to consider the testimony, is, of course, mere matter of conjecture. Speaking for myself, however, I may say that a very thorough and anxious consideration of the evidence has forced me to the conclusion that Loefner ought not to be executed. In arriving at this conclusion, I have not failed to remember that the testimony upon the question of Loefner's sanity is quite contradictory, though it is to be noted that this contradiction extends only to the opinions of the experts called on either side during the trial. As to the particular facts or circumstances which were claimed to evince his insanity, there was no substantial conflict of the evidence, and even the contrariety in the opinions of the witnesses was no greater than is ordinarily encountered in the trial of this class of questions. Nor have I at all disguised from myself how difficult it is to gather, from even the most faithful narrations, the force which the evidence, as detailed by the mouths of witnesses, justly carries with it to the court and jury. Still less have I forgotten how much confidence may well be claimed for the deliberate finding of a judicial tribunal, ascertained and pronounced in the prescribed legal mode.

But after making due allowance for all these considerations, the testimony still leaves upon my mind something more than a pregnant and terrible doubt as to the criminal and moral accountability of this condemned man. The pre-

Relative to the Case of Joseph Loefner.

ponderance of the evidence (and that is the rule declared by the Supreme Court in this very case for the determination of the question) is, in my judgment, clearly and decisively upon the side of insanity. And I can easily see how the something more than doubt, growing out of this preponderance, which I entertain, may hereafter resolve itself into a "torturing certainty;" and then it would always be a matter of just self-reproach if I had failed at the proper time to give it most emphatic utterance. You have, as I understand, already been furnished with a copy of the record containing the evidence, and to that I invoke your most serious attention.

While, however, I am of the opinion that the capital sentence ought not to be executed upon Loefner, I do not by any means suppose he should be unconditionally pardoned. The same interests of society and humanity which in this state of the question as to his responsibility exact a remission of the extreme penalty of the law, also require that he shall be placed under such safe conditions of restraint as will effectually prevent any injury consequent on the recurrence of a like outbreak hereafter, whether it be the blind impulse of insanity, or the promptings of "a depraved mind fatally bent on mischief." This can be thoroughly accomplished by confining him in the penitentiary, and this course will at the same time give ample opportunity of properly treating his supposed (and, as I believe, actual) mental alienation:

Influenced by these considerations, I respectfully but earnestly recommend that the capital sentence against Loefner be commuted to imprisonment in the penitentiary during his life.

C. P. WOLCOTT,
Attorney General.

To the Governor.

Relative to Power of Commissioner of Public Works—Relative to the Office of Comptroller.

RELATIVE TO POWER OF COMMISSIONER OF
PUBLIC WORKS.

Attorney General's Office,
Columbus, June 14, 1858.

DEAR SIR:—I have considered the questions stated in your letter of the 28th ult., and answering them in the order in which they are asked, I beg leave to say:

1. That under the circumstances stated by you, I do not think it is your duty to appoint inspectors at the place named, unless in your judgment the public interests require such appointments to be made.

2. That you have no power to enter into any contract for the rebuilding of the locks mentioned in your letter, there being, as you state, no appropriation made for that purpose. No executive officer can make an agreement which looks to the expenditure of any sum beyond that specifically appropriated for the subject matter in relation to which the agreement is made. You must, therefore, wait until an appropriation for that end is duly made, before taking any step whatever, involving the expenditure of money, for the rebuilding of these locks.

Very respectfully,

C. P. WOLCOTT.

John Waddle, Esq., Member of Board of Public Works,
Columbus, Ohio.

RELATIVE TO THE OFFICE OF COMPTROLLER.

Attorney General's Office,
Columbus, June 26, 1858.

SIR:—I have the honor to acknowledge the receipt of your note bearing date the 21st instant, and handed to me on

Relative to the Office of Comptroller.

the afternoon of that day, requesting my opinion "as to the constitutional power of the General Assembly to create the office of comptroller, and annex thereto the powers and duties specified in the various acts of last session relating to the independent treasury, the collection of taxes, disbursement of revenue, and the banking department, especially with reference to the duty imposed on the governor in the appointment of that officer," and adding that "a reply within the present week" will gratify you.

Imperative duties imposed upon me as one of the commissioners of the sinking fund, require me to leave for New York City on Monday next, so that the time at my control for the present examination of this matter has necessarily the same limit which your desire for a reply this week would otherwise assign to it.

In compliance with your request, I have considered, as thoroughly as this limited interval would permit, the questions indicated in your note, and now respectfully submit to you the following, as the result of that consideration:

1. That the authority to establish an efficient system for the due collection, proper disbursement and safe keeping of the public revenue, and for the thorough accountability of all officers charged with the execution of fiscal duties, is one of the most unquestioned of all the attributes, and its exercise one of the most urgent of all the duties which pertain to the "legislative power" delegated by the constitution of the State to the General Assembly.

2. That in accomplishing these purposes, not less indispensable than legitimate, the General Assembly may establish such offices, not prohibited by the organic law, as it shall deem expedient, and assign thereto such powers and duties of an administrative character, not vested elsewhere by the constitution, as in its judgment shall seem best adapted to secure these purposes. The choice of all possible means (save those clearly forbidden by the constitution) necessary or proper to attain a rightful end of legislation, is committed to the absolute discretion of the legislative body.

Relative to the Office of Comptroller.

3. That the creation of an office under the name of comptroller of the treasury is not prohibited by the letter, spirit, or policy of the constitution, and the General Assembly may, therefore, establish, as part of a revenue system for the State, an office to be designated by that title, and subject to the limitations stated, may devolve upon it such administrative functions in that behalf as, in the legislative opinion, will best enable it to answer the end of its creation.

4. That the various powers and duties which the acts indicated in your letter annex to the office of comptroller of the treasury, are legitimate instrumentalities, not interdicted by the constitution, which may be employed at the discretion of the legislature, and assigned by it to some office or offices, in order to give efficiency to the revenue system constituted by these and other enactments; and as the constitution does not vest these powers and duties in either of the branches of the executive department, or prescribe that, when called into action, they shall be exercised through any other office established by itself, the General Assembly may well ascribe them to an office created by its own act. It must, however, be understood that in thus speaking of the functions cast upon the office of "comptroller of the treasury," they have been regarded in their general bearing, and with reference to the scheme of which they form a part. Quite possibly it may be found upon further examination that some of these functions can be assigned only to one of the heads of the executive department, though no such instance has yet occurred to me.

5. That the constitution has not prescribed the manner in which this officer shall be elected or appointed, and since the office is one of legislative creation, and does not, in the general scope of the functions imposed on it, usurp powers vested by that instrument in either of the branches of the executive department, or in any other office, the General Assembly may, at its discretion, provide that the incumbent of this office shall be appointed by the governor or elected by the people, or, adapting the later alternative as the general mode,

Relative to Punishment for Violation of Gaming Act.

may confer upon the governor power to appoint the officer until one shall be elected.

The brief interval within which your wishes and other duties, not to be postponed, alike constrain an answer to your inquiry, has been so entirely occupied with the examination of the large questions involved, that no time is left for stating the considerations which have guided me to the above results.

Very respectfully,

C. P. WOLCOTT.

To the Governor.

RELATIVE TO PUNISHMENT FOR VIOLATION OF
GAMING ACT.

Attorney General's Office,
Columbus, October 22, 1858.

DEAR SIR:—Your letter of the 30th ult. was duly received, but I have not before found time to reply.

Answering your question, I have to say that, in my opinion, the body may be taken in execution for the payment of a fine adjudged by the Court of Common Pleas against a party duly convicted of an offence under the gaming act.

You do not suggest the ground of a different opinion, which you state is entertained by some members of the profession, and for myself I can discover nothing upon which to hang a plausible doubt that, upon the failure of the defendant to pay the fine adjudged against him, execution may issue, as, of course, against his property and body.

Very respectfully,

C. P. WOLCOTT.

I. C. Lee, Esq., Prosecuting Attorney, Toledo, Ohio.

County Auditor's Fees; Proceedings to Recover Excess.

COUNTY AUDITOR'S FEES; PROCEEDINGS TO
RECOVER EXCESS.

Attorney General's Office,
Columbus, October 22, 1858.

DEAR SIR:—I have carefully considered the questions stated in your letter, and now submit the following answers thereto:

1. The auditor of a county is in no case entitled to a percentage upon a sum realized for selling escheated lands. His compensation is made up of specific fees for each item of labor performed, and he can receive payment in no other way, and to no further extent. In my opinion, the only fees he can exact from the State or county for selling escheated lands are,

First. For attending and keeping record of the sale, three dollars per diem for the time actually employed.

Second. For crier of sale, three dollars per diem. All the other fees allowed by law, such as giving certificates of sale, and executing deed, are to be paid by the purchaser. Of course, the auditor will be allowed all reasonable expenses actually and necessarily incurred in making the sale, such as the fees of the appraiser, printer, clerk of court, and of counsel. The fees which you represent to have been charged by the auditor, in the case mentioned in your letter, are in plain and most flagrant violation of law, and stringent measures should at once be taken against the auditor and his sureties to recover the amount which he unlawfully retains in his hands.

2. The commissioners of the county are the "proper parties" to cause suit to be instituted against the auditor and his sureties, in this instance.

Whether an action can be maintained against him and them, in the absence of any direction to sue by the county commissioners, is a question not now necessary to be determined. If the facts be as stated by you, the dereliction of

*Relative to the Issuing a Commission De Novo to the Sheriff
of Vinton County.*

the auditor is so gross and palpable that the commissioners, upon a proper representation and proof of the facts, can hardly fail to direct the institution of the necessary proceedings. If, however, they shall omit a duty so plain and manifest, then I advise you to apply to the District Court of your county, or to the Supreme Court of the State, for a *mandamus* compelling them to make the necessary order. If you resort to the latter tribunal, you shall have the aid of my service. The foregoing advice is given on the ground inferred from your letter that Mr. Cutchen's term of office has expired. If it has not, I am by no means certain that, without the intervention of the commissioners, proceedings in mandamus may not be directly instituted against him, ordering him to pay the excess over his lawful fees to the county treasurer. Please advise me how the fact is, and of the action of your county commissioners in the premises, and I will then communicate with you further in this behalf.

3. If the commissioners shall direct an action to be instituted against the auditor, such action must be brought in the name of "The State of Ohio," as the party plaintiff.

Very respectfully,

C. P. WOLCOTT.

Geo. Crawford, Prosecuting Attorney, Upper Sandusky.

RELATIVE TO THE ISSUING A COMMISSION *DE
NOVO* TO THE SHERIFF OF VINTON COUNTY.

Attorney General's Office.

Columbus, December 2, 1858.

SIR:—In reply to your letter bearing date this day, and stating for my opinion certain questions in reference to the propriety of issuing a new commission to the sheriff elect of Vinton County, I have to say that upon the facts stated

*Relative to the Issuing a Commission De Novo to the Sheriff
of Vinton County.*

there seems no room to doubt that a commission *de novo* ought now to be issued to the sheriff elect of Vinton County.

The act of 26th February, 1816, which is the only one applicable to the question, provides that "each sheriff" shall be entitled to receive from the governor, a commission to fill such office "upon producing to the secretary of state a legal certificate of his being appointed or elected." This provision obviously contemplates a direct application by the sheriff elect to the governor for the commission, and the direct delivery of that commission to the applicant. Doubtless he may constitute an agent to act in his behalf, both as to the application and delivering of that instrument, by whose authorized action he would be concluded. But neither the governor or secretary of state can constitute such agent for him, or thrust the commission upon him against his will, by sending it to another person for delivery to him. Except as to the judges of the Supreme Court and Courts of Common Pleas, who, by the act of January 5, 1813, stand upon an entirely different footing, every person elected or appointed to any of the offices named in this act, is entitled at least to reasonable time to determine whether he will or will not accept the office, and he cannot be deprived of that right by the issuing of a commission antecedent to his application therefor. In the present instance, without such application on the part of Shades, or any instruction to that effect, a commission properly filled out and intended for him was sent by the secretary of state to the clerk of the Court of Common Pleas of Vinton County. This mode of issuing the commission was irregular, but Shades might waive the irregularity and "receive" the commission so as (if the first section of the act of January 19, 1853, Swan's Stat. 134, be still operative) to bind him to give the requisite bond within ten days thereafter, as an essential condition of his right to the office. But to constitute such a receipt it is clearly necessary that he should have received it with intent to retain and act upon it. Mere manual possession, without that intent, avails nothing. Issued to

*Relative to the Issuing a Commission De Novo to the Sheriff
of Vinton County.*

him in this irregular mode, he might well take it for the purpose of ascertaining whether it had been duly issued, or whether the prosecuting attorney was then ready and willing to prepare the bond which his acceptance of the commission would compel him to give in so short a time thereafter, without in either case being justly held to have "received" it, within the contemplation of this act. Now Shades did take the original commission into his possession for the very purpose of applying to the prosecuting attorney to prepare the proper bond—but with no intent to retain it if he could not procure such bond—and failing to find the prosecuting attorney, he returned the commission to the clerk, by whom it was subsequently mislaid or lost. It seems impossible to hold that the mere taking of the instrument into his possession under the circumstances and for the purposes here stated, is equivalent to an acceptance of it by him for any purpose. After the return of the commission to the clerk, Shades stood in precisely the same position as if it had never been in his possession, and the clerk held it, not as Shades' agent, but simply in virtue of its remittance to him by the secretary of state. Having given no authority to the secretary of state to decline his commission, and none to the clerk to receive it, Shades is not bound to receive from the clerk the one improvidently forwarded to that functionary, even if he could now produce it. No commission has yet been properly issued, or, at least, delivered to him; the one intended for him, even if rightfully issued *ab origine*, having been lost before its delivery, and consequently before it took effect, so that Shades is still "entitled to receive from the governor a commission to fill the office" of sheriff of Vinton County "upon producing to the secretary of state a legal certificate of his having been duly elected or appointed."

The other question stated by you, which is in substance whether the first and fifth sections of the act of January 19, 1853, 55 Ohio Laws, 150, are applicable to a sheriff elected under the act of April 12, 1858, is one upon which I am not

*Relative to the Issuing a Commission De Novo to the Sheriff
of Vinton County.*

prepared to express a definite opinion. My present inclination tends strongly to the conclusion that they do *not* apply to such sheriffs. As, however, I have not had sufficient time to reflect upon the matter, and as it does not necessarily involve in the question of issuing a new commission, upon which alone you have now to act, I must beg leave to reserve it for further consideration.

Very respectfully yours,

C. P. WOLCOTT.

To the Governor.

DEFICIENCY APPROPRIATIONS; HOW DRAWN.

Attorney General's Office,
Columbus, November 28, 1858.

SIR:—By a communication bearing date the 28th ult., John Waddle, Esq., acting commissioner of the second division of the public works, with your concurrence and at your instance, solicits my opinion in respect to certain matters therein stated.

Inferring that you have been furnished with a copy of the communication referred to, I proceed (without undertaking here to state the matter submitted) directly to say, that upon the facts therein set forth, I am of the opinion that the whole sum of ten thousand dollars appropriated by the General Assembly, at its last session, "to pay any deficiency that may occur in the appropriations for the public works," is subject to the drafts, made according to law, of the acting commissioner of the second division. Indeed, I can see no room for plausible doubt or even quibble on this point. The object of the appropriation, expressed in terms upon its face, was to provide a fund of ten thousand dollars, which, "with the concurrence of all the members of the board," should be used "to pay any deficiency that might occur in the appropriations for the public works." In order to make the

Deficiency Appropriations.

fund available, two conditions and two only must exist—a deficiency in the other appropriation for the public works, and the concurring assent of each member of the board in applying it to that deficiency.

The first condition, the existence of a deficiency, will be fulfilled whenever, from any cause, an expenditure beyond or aside from the specific appropriations made therefor shall become necessary to the proper maintenance and effective use of any part of the public works. That a deficiency of this nature did, in fact, exist in respect to the second division of the public works, is directly affirmed by the statement submitted to me, and may for all present purposes be properly assumed. In truth, its existence is necessarily implied from the unanimous action of the board to be hereafter noticed, for the validity of that action depended solely upon the existence of the deficiency. Without that the board would have been guilty of a palpable violation of law, and gross breach of official duty. Here, if ever, the settled rule aptly and strongly applies, that in favor of the acts of a public officer, in the discharge of an official duty, everything is presumed to have been rightfully done, unless the circumstances of the case overturn the presumption.

Assuming, then, that a deficiency within the purview of the act of appropriation had occurred, it now only remains to inquire whether all the members of the board had concurred in applying the appropriation contingent thereon to this deficiency.

The solution of this inquiry depends upon the effect which shall be assigned to the recorded action of the board, in which "all the members concerned," and by which it was "ordered that" the fund in question "be subject to the draft of John Waddle, acting commissioner in charge of district No. 2." This order, though perhaps not framed with the utmost possible precision to effect the end in view, yet speaks an unmistakable purpose. It is, as has been seen, precisely equivalent to an affirmative, formal finding by the

Deficiency Appropriations.

board collectively and individually, that a deficiency had occurred in the appropriations applicable to the named division. When, upon this necessarily implied deficiency as the basis of their action, the board "ordered" that the money appropriated to meet and applicable only to precisely such a contingency, should be held subject to the check of the acting commissioner of that division as to which the deficiency had been so found, the implication is absolutely irresistible that the order was intended to, and, in fact, did, devote the entire appropriation towards making good that deficiency. Under all circumstances, it is in substance and effect plainly nothing less than a deliberate affirmation by the entire board that the second division required for its maintenance and use an expenditure of ten thousand dollars beyond the specific appropriation made for that purpose, and a permission, if not indeed a direction, to the commissioners in charge of that division to apply the appropriation in question to that expenditure. For it cannot be denied that the board in placing, as the orders did in terms place this sum subject to the draft of that commissioner, intended that the fund should be expended under his directions for some purpose, and "concurrent" in its expenditure for that designed purpose. Still less can it be questioned that the subject of the intended expenditure in which the board so concurred was one for which the fund might lawfully be used, since it is not to be presumed for an instant that the board or any member thereof, meant to violate the law. Now, the only object to which this money could be lawfully applied by that commissioner, was to meet a deficiency such as has been described in the appropriation for his division. It may, therefore, be affirmed beyond the possibility of mistake, that all the "members of the board" did "concur" in the expenditure of so much of this money, as after exhausting all other appropriations available to that end, might be found needful to maintain the second division in a proper and efficient condition.

Deficiency Appropriations.

Proceeding on "the concurrence of all members of the board," duly certified to him, the auditor of state placed the entire appropriation to the credit of the second division; and the commissioner in charge of that division, acting on the same concurrence, and on the credit so given, did, after exhausting all other appropriations at his control, necessarily incur liabilities to the extent of ten thousand dollars, in accomplishing the objects contemplated by the order and for the payment thereof issued his checks to that amount upon the fund devoted by the board to that especial object. These checks, to the extent of "about \$6,600," have been paid out of this fund, without objection from any quarter, leaving others still outstanding equal in amount to the unpaid balance of the appropriation. These outstanding checks have been presented to the auditor of state by the holders, in order to obtain his warrant for the payment thereof; but the auditor declines until legally advised to draw his warrant, because long after the liabilities for which they were drawn, were incurred one of the members of the board, upon the refusal of the auditor of state to pay *his* checks, "drawn within a few days, but without the concurrence of his colleagues," upon the contingent appropriation, to the amount of one-third thereof, protests against the application of an equivalent portion of this fund to the payment of the balance yet due on the expenditures thus made by the commissioner of the second division. This protest, if effective, will obviously prevent the payment at all of the checks, for the sum which that protest virtually demands, should be withheld, equals, within a few cents, the unpaid balance of the fund in question, and all other available appropriations have long since been exhausted.

Very obviously, the checks thus drawn by the protesting member were in absolute violation of law. For all the members of the board had not concurred in applying this money, or any part of it, to the subject matter of these checks, but had, on the contrary, unanimously appropriated it to another

Deficiency Appropriations.

purpose, for which it had been practically expended long before the checks of the protesting member were drawn.

The protest interposed by this member is equally vain. It comes too late. Whether before any action had upon it, the order, once validly made, could have been rescinded by the protest of a member, or even by the formal action of a majority of the board, is a question which it is not now necessary to determine. Be that as it may, when it has once been acted on, dissent from it, especially by one who originally concurred in making it, is wholly unavailing. It must be so from the very nature of things, since no power, however absolute, can undo the past. The fact would still remain that such an order had once validly existed, and constituted a lawful foundation for any legitimate action taken thereon during such its valid existence. Upon the faith of this order the commissioner in charge of the second division, as it was his right, and indeed his plain duty to do, procured the necessary repairs to be made. In doing this, he necessarily incurred temporary liabilities to the amount thereof. For, by the act then and now in force regulating the public works, no money can be drawn from the treasury on account of the public works until after the consideration on which it is to be applied "shall have been actually rendered." 55 O. L. 112. Now, if after these temporary liabilities had once been incurred, it was in the power of any other member of the board to invalidate the order by which money had been lawfully set apart to meet these identical liabilities, upon the faith of which they had been thus incurred, and without which they would have been wholly unauthorized, the plain effect would be not only to exonerate the State from all liability to pay for the repairs thus made, but to render the commissioner personally responsible therefor, as having represented himself to be clothed with an authority which it ultimately turned out he did not, in fact, possess. This would be cruel in the ex-

Deficiency Appropriations.

treme, alike to the creditor and the commissioner, and it may be safely said the law tolerates no such flagrant injustice. The consequences of the doctrine on which the protest is founded do not, however, stop here. They are of even broader scope for evil. If so much of the expenditure now under consideration as yet remains unpaid may be invalidated by an after protest, so equally may that part which has, in fact, been paid for out of the appropriation in question, and by necessary consequence the payment so made. The act of expenditure and the act of payment depended alike for their authority and validity upon the order made by the entire board. So long as that order can have an effect to uphold the payment hitherto actually made under its sanction, just so long will it, on precisely the same ground, and to precisely the same extent, uphold payment (to the extent of the fund on hand) of the unsatisfied expenditures made equally under its sanction. If the protest which has been made can impair its validity as a warrant for past expenditures, another one may impair it as a warrant for past payments, and in the latter event it would follow that the acts done respectively by the auditor of state, the comptroller of the treasury and the treasurer of state, in paying for part of the expenditures in question, may be invalidated by a similar subsequent protest. The effect of this would be to enable the protesting member to stamp with all the characteristics of illegality an act lawful when done, and to visit the commissioner, auditor, comptroller and treasurer for a simple discharge of official duty, with all the civil (if not criminal) consequences of a misappropriation of the public moneys.

It cannot, however, be necessary to pursue this matter to greater length. This *ex post facto* protest is clearly fruitless by the law of the land. If there be no other reason for withholding it, the auditor of state cannot too soon direct payment of the outstanding checks; nor can he ever be called

Taxation.

upon to perform an act more thoroughly warranted by law, or more in accordance with equity and good conscience.

C. P. WOLCOTT,
Attorney General.

F. M. Wright, Auditor of State.

RELATIVE TO THE UNCONSTITUTIONALITY OF
TAX LAW.

Attorney General's Office,
Columbus, February 4, 1859.

MY DEAR SIR:—I have from day to day deferred answering your letter of the 18th ult., in the hope that on each succeeding one I might be able to advise you of some definite action taken upon the subject therein mentioned.

Even now, however, I cannot say that any satisfactory conclusion has been reached, but nevertheless I felt impelled to write and at least acquit myself of the seeming discourtesy implied by the long delay in answering your letter.

Since my return from New York engagements in the Supreme Court and official duties which could not be postponed or avoided, have so entirely engrossed my attention, that I have not been able to give the subject that close examination which would justify me in committing myself to any opinion as to the compatibility of the tax in question with the federal constitution.

Such general consideration, however, as I could, at intervals devote to this topic, inclines one very strongly to the conclusion that the tax is unconstitutional, and therefore, while I am not, for the reason stated, prepared to plant myself finally on that ground, I am prepared to say that this State ought, in my judgment, to question by such form of proceeding as is best adapted to that end, the validity of an impost which bears so heavily and directly upon the property of a large class of her citizens.

As well to secure beyond all peradventure the authority