COUNTY COMMISSIONERS' LIABILITY TO PROSECUTION.

Attorney General's Office,
Columbus, April 9, 1846.

W. M. Patterson, Esq., Prosecuting Attorney for Hancock Co.:

SIR:—Yours of the 18th ult. was duly received, and would have had earlier attention but that I did not enter on the duties of this office until the 6th instant.

I have considered carefully the facts stated in relation to the proceedings of your county commissioners, and cannot find any authority or warrant for the course they have taken. The special act under which the bridge tax was levied gives them no further control over this money than is given them over other monies levied for bridge purposes.

The 26th section of the act prescribing the duties of supervisors (Swan's Stat. 814) provides that taxes levied for bridge purposes shall be applied under the direction of the county commissioners exclusively, to the erection and repairing of bridges within the county. This confines their power over such monies, simply to its appropriation to the specific purposes for which it was levied. The proper place of deposit for the money until it is needed for its legitimate object is the county treasury. The commissioners have no authority to draw it out of the treasury for their individual use, whether in the way of loan or otherwise, than any other money in the treasury.

I understand, from your statement, that the commissioners, having obtained the money by an order from the auditor, have divided it among themselves, without giving

any note or security for it, and have applied it to their individual use.

As to the proceedings proper to be taken to recover the money, it occurs to me that the commissioners are liable to prosecution and removal from office under the 17th section of the act establishing boards of county comsioners (Swan's Stat. 207).

When removed, their successors can at once institute suit to recover the money.

Yours respectfully,
HENRY STANBERY.

TRANSFER OF SURPLUS FUND; EFFECT ON PENDING SUIT.

Attorney General's Office,
Columbus, April 8, 1846.

GENTLEMEN:—I have received yours of the 4th inst. requesting my opinion in relation to the act of February 27, 1846, for the better regulation of the surplus revenue, and its effect upon the chancery proceedings now pending against your county auditor.

You enquire whether the suit will abate in consequence of this act. I am clearly of the opinion it will not. This suit is, or ought to be, in the name of the State of Ohio. I do not suppose that the transfer of the mere agency of the surplus revenue from the fund commissioners to the county auditor and treasurer, can work the consequences which you apprehend.

The suit in which the auditor is a party defendant, should go forward precisely as if there had been no change, and the attorney who conducts it in behalf of the county

or State ought to take care that it is properly brought to a hearing on the merits.

Yours respectfully,
HENRY STANBERY.

To the Fund Commissioners of Portage County, Ravenna, Ohio.

SCHOOL LAW; POWER TO ALTER SCHOOL DISTRICTS DOES NOT INCLUDE POWER TO FORM NEW ONES.

Attorney General's Office,
Columbus, April 7, 1846.

SIR:—I have considered the question submitted in yours of the 6th inst., and am of the opinion that the proviso in the 72d section of the school laws is not repealed by the 88th section.

The 72d section provides for laying off districts from the territory of *two or more* townships. The repealing section only refers to so much of the law as provides for *an* alteration in any district, which is contained in the 56th section.

As to the general question, whether the power *to alter* districts includes the power to *form new* districts out of the territory not before laid out into a district, I incline to think it does not. This power of alteration was given early as the 7th of March, 1838, and has continually since been in existence.

The power to form, or to lay off districts, is given in a distinct section of the same act, and is limited until the 1st of June, 1838. By subsequent acts this power has been extended to the 1st of January, 1842.

The legislature has carefully distinguished between the powers making the one general and unlimited in duration, and retaining the exercise of the other within a specified time. If the power to *alter* includes the power to *lay off*, there was no necessity for these separate enactments, or

Ohio Railroad Company; Real Estate of; Lien of State on Same.

for the extension of the time within which districts might be laid off. It is undoubtedly true that every *altered* district is, in a sense, a *new* district, and requires a new map. Yet it is only new in form. The same territory had been before laid out and districted. The laying off of a district, out of territory never before districted, is quite another thing, and makes a new district in every sense.

Very respectfully,

HENRY STANBERY.

Sam'l Galloway, Esq., Secretary of State.

OHIO RAILROAD COMPANY; REAL ESTATE OF; LIEN OF STATE ON SAME; RIGHT OF INDIVIDUAL TO QUESTION RIGHT OF CORPORATION TO HOLD LAND.

Attorney General's Office,
Columbus, April 8, 1846.

SIR:—I have considered the question submitted for my opinion in your note of the 6th inst. touching the real estate of the Ohio Railroad Company and the lien of the State on the same.

The 3d section of the act incorporating the company provides that the corporation shall be capable in law of purchasing, selling, leasing and conveying estates not personal and mixed, so far as the same shall be necessary for the purposes thereinafter mentioned, and no further.

The 12th and 13th sections authorize the president and directors to acquire title to the land necessary for the site of the road, not exceeding 100 feet wide, or for any of their works.

The amendatory act of March 23d, 1840, provides that the company shall have power to acquire title, by purchase or voluntary cession to land intended for the site of the road or to lands granted to aid in its construction, or given

Ohio Railroad Company; Real Estate of; Lien of State on Same.

by way of subscription to capital stock, and the same to convey in such manner as the directors may determine.

The State made a loan to this company under the act of March 24, 1837, and thereby became entitled to a lien on the capital stock, estate tolls, and profits, to secure the repayment of the loan.

The first question submitted for my opinion is as to the capacity of this corporation to take title to lands. It is understood that valuable lands were conveyed to the corporation in the way of purchase and subscription of stock, and not for the particular uses specified in the act of March 8, 1836, prior to the amendatory act of March 23, 1840. Doubts have arisen whether a conveyance or grant so made passed title to the company. I am of the opinion the title would pass under such circumstances.

The faculty of acquiring lands is an incident to every corporation, just as much as the incident of perpetual succession. It is not so much a power necessary to be granted as an inherent quality. This being so, it must be shown that the faculty or incident is restrained, or wholly taken away, either by positive legislative restriction or impliedly, from the purposes for which the corporation was created.

Where the power to acquire land is wholly taken away or denied, it may be that a grant to a corporation is simply void; but not so, where the common law power is limited. In the latter case there being a faculty to acquire lands, the title does well pass, not absolutely and indefeasibly, but subject to divestitute, at the instance of the State, and for the benefit of the public.

No individual, whether the grantor or other person, can be heard to question the right of the corporation to hold the land so acquired. The restriction is matter of public policy—not of individual protection or gain. The remedy is not by private reclamation, but by forfeiture to the State.

Without looking to the amendatory act of 1840, which might be argued as confirmatory of the titles theretofore

Ohio Railroad Company; Real Estate of; Lien of State on Same.

acquired, I am of opinion that the corporation is well seized of all land conveyed to it, subject to the liability to forfeiture at the instance of the public authorities.

The next question is as to the right of the State to subject the lands of the company which have been aliened, to the payment of the debt due the State.

If the corporation acquired the lands in violation of its charter restrictions, then the right of the state to reach the lands, in the way of forfeiture, notwithstanding an alienation, is undeniable.

If, however, the lands were well acquired, in conformity with the charter, or if the right to insist on a forfeiture has been or shall be waived by the State, then it appears to me the State may reach the lands in virtue of the lien given by the 4th section of the act of March 24, 1837.

That section expressly declares that the receipt of the scrip by the company shall operate as a *specific pledge* of the capital stock, *estate,* tolls and profits of the company, to the State of Ohio, to secure the repayment of sums advanced by the State, and written evidence of such pledge is required to be made out and delivered to the commissioners of the canal fund. This is nothing less than a mortgage of all the lands of the corporation to the State, and they remain bound to the State in the hands of the grantees of the corporation.

The act of March 23, 1840, does not amount to a waiver of the lien of the State upon the lands acquired or conveyed under the law. It simply enlarges the capacity of the corporation for the acquisition and disposal of lands, without interfering with, or surrendering any lien which might vest in the lands.

Very respectfully,

HENRY STANBERY.

O. Follett, Esq., President of Board of Public Works.

SURPLUS WATER AT LOCK NO. 7 MIAMI CANAL; LEASE OF.

Attorney General's Office,
Columbus, April 10, 1846.

SIR:—Enclosed please find opinion upon the questions propounded in the letter of Mr. Forrer of the 7th inst., touching the surplus water at Lock No. 7, Miami Canal.

Very respectfully,
HENRY STANBERY.

O. Follett, Esq., President of Board of Public Works.

OPINION.

On the 1st of May, 1833, the State of Ohio leased to Richmond & Death for the term of 99 years, renewable, "the use of the surplus water which may rightfully and properly flow around Lock No. 7, Miami Canal below Dayton, being the surplus water over and above the lockage water which may be necessarily required to pass around said lock, in order to supply navigation to the Miami feeder.'

In consideration of the right to use and occupy the "said stream or quantity of water" the lessees agree to pay a rent of $300 per annum.

The lessees further agree to erect, at their own expense, a waste or regulating wear, over which the water is to be drawn from the level of the canal next above said Lock No. 7, which is to be erected under the inspection and according to the plan of the agent of the State, and to be so arranged that the top of the wear, over which the water is to flow, shall not be more than six inches below the level at which it shall be designed to sustain the surface of the water in that part of the canal whence the water is to be taken, and the lessees are so to construct the head and tail race and other works that the water leased, shall at all times return to the

canal after being used by lessees, in the level next below said Lock No. 7.

The lessees are to keep in repair the wear, head and tail race, and other works connected with the use of the water so as to prevent any breach in the bank, the formation of a bar, or other impediment or injury to the canal or the navigation thereof. And in case the lessees fail to make such repairs, in being notified by the proper agent of the State, such agent is authorized to make the repairs at the expense of the lessees.

The right is secured to the State to resume at any time the use of the water thereby leased, when necessary for the purposes of navigation. And in case the lessees are deprived of the use of the water thereby leased, for more than one month in any one year, an equitable deduction is to be made from the rent.

The water so leased is to be used by the lessees in their own ground situate near said Lock No. 7 on the southeast side of the canal. And the State is not "expected to introduce into the canal from Mad River a greater quantity of water than may be required for an ample supply for the wants of navigation."

It is stated that since the lease was made the State has introduced into the canal a large addition to the quantity of water at that point, for the purpose of supplying the Warren County Canal. The water so added is said to be five times as much as is necessary for the navigation of the canal to the Miami feeder.,

In this state of facts, the first question for my consideration is whether the lease secures to Richmond & Death, or their assignees, the right to use this additional water. I am of opinion it does not. The grant is specifically of the *surplus water* above the lockage water, which may be *necessary to supply navigation* to the feeder.

No doubt the annual rent of $300 was carefully adjusted in reference to that surplus. The water so leased was not understood to be any general surplus.

but only such surplus as was necessary for navigation of the canal, to the next source of supply. The State has since introduced an additional supply of water, beyond the surplus necessary for navigation of the canal. This additional supply is not necessary for the navigation, nor introduced for the purposes of navigation of the Miami Canal, to the feeder, but to supply another canal.

It seems quite clear that the lease conveys no right to such additional water, and that the lessees are entitled to nothing more than the surplus required for the navigation to the feeder.

The remaining question is as to the proper mode in which the right of the State to this additional water is to be asserted.

It appears the regulating wear is upon the land of the lessees, and as it remains at the height originally fixed, I should hesitate to advise the agents of the State to enter upon the lands of the lessees in order to fix gauges to restrict them to the supply of water actually leased.

The erection of the regulating wear was lawful, and it remains unchanged. Without any act on the part of the lessees a greater quantity of water passes it than was leased. This being so, it does not assume the character of a nuisance, subject to abatement by the agents of the State. A safer and more advisable course is to notify the lessees to adjust their wear so as not to pass the additional water beyond the surplus for navigation, and if they refuse or delay to do so, then that the agents of the State make the necessary erections at the point where the water is taken from the canal, which shall pass no more than the quantity of water to which the lessees are entitled.

If the lessees interfere with such erection, they may become liable to prosecution, or the State may enjoin them from a repetition of the act of interference.

HENRY STANBERY.

Attorney General's Office, Columbus, April 10, 1846.

Tax Law of March 2, 1846; Exemption of Kitchen Furniture and Bedding; Lawyers and Physicians; Foal-Getters.

TAX LAW OF MARCH 2, 1846; EXEMPTION OF KITCHEN FURNITURE AND BEDDING; LAWYERS AND PHYSICIANS; FOAL-GETTERS.

Attorney General's Office,
Columbus, April 14, 1846.

SIR:—I have considered the questions stated for my opinion in your note of this date, growing out of the recent tax law.

First—It seems clear to me that by the 11th clause of the third section *all* the kitchen furniture, beds and bedding of private families, is exempt from taxation, without reference to its value.

This clause of the law, in respect to kitchen furniture, beds and bedding, makes a distinction between private families and *taverns* and *boarding houses*. Whilst the former are totally exempt from taxation upon that description of property, the public and boarding houses can only claim an exemption of the same property to the value of $200. At the same time all families, private, as well as public, are entitled to an exemption of other household property to the value of $100.

Second—I do not think that the recent act repeals the act to levy a tax on the income of practicing lawyers and physicians.

A tax on professional income or business is a very different thing from a tax on property. The recent law is simply a tax *on property*. It does not touch the various acts imposing a tax on particular professions or pursuits, such as those of law, physics, tavern-keeping, peddling, etc.

Third—For similar reasons I am of the opinion that so much of the act granting licenses in certain cases as relates to the tax or license to be paid for horses used as foal-getters, remains in force.

It is true a stallion is to be listed for taxation and appraised at his true value, and this estimate of value may

Tax Law of March, 1846; Credits Due to Non-residents not Taxable; Credits of Non-residents in Hands of Agent or Attorney for Collection.

chiefly be made up from his value as a foal-getter. So that in effect, the owner may be twice taxed for the same thing, viz: in the actual value put on the horse for his capability as a foal-getter, and again for the exercise of that capability in the way of license. The same thing occurs with regard to the owner of a tavern who is first taxed for the value of the tavern stand and the furniture, and is again taxed for the privilege of keeping the tavern.

Very respectfully, etc.,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

TAX LAW OF MARCH, 1846; CREDITS DUE TO NON-RESIDENTS NOT TAXABLE; CREDITS OF NON-RESIDENTS IN HANDS OF AGENT OR ATTORNEY FOR COLLECTION.

Attorney General's Office,
Columbus, April 27, 1846.

SIR:—I have considered the questions stated in the letter of the auditor of Portage County, viz.:

First—"A. B. died in Massachusetts leaving a will appointing C. D., E. F. and G. H. his executors The will was proven in Massachusetts—the two first named executors reside there—and by the laws of that state are bound to pay taxes on all the property belonging to the estate. G. H., the last named executor, resides in this (Portage) county, and has in his hands sundry notes and other evidences of debt belonging to the estate of A. B. Is he bound to list them here for taxation?"

I am of opinion that the notes and other evidences of debt referred to in the case put, are not subject to taxation.

Tax Law of March, 1846; Credits Due to Non-residents not Taxable; Credits of Non-residents in Hands of Agent or Attorney for Collection.

They come under the description of *credits* as distinguished from *property real* or *personal*.

The law very carefully keeps up this distinction from beginning to end, and very important consequences depend upon it.

The subject matters of taxation are classified under the term real and personal property and monies and credits, and although in a general sense, money and credits come under the description of personal property yet they are not to be so understood as used in this law. The second section defines the term "personal property" to mean "every *tangible* thing" other than money, and capital stock of company, whether incorporated or not, and shares in vessels, etc. A subsequent clause of the same section defines the term *credits* to mean every claim for money, labor or other valuable thing, etc. This word is, therefore, not used in any cumulative sense as another term for personal property, or as including any species or items embraced within that general description, but a description of a distinct subject matter, wholly different from the *tangible* thing, stocks and shares, specified in the former part of the section.

One of the consequences which result from this careful distinction between credits and tangible personal property, is in reference to the place of listing.

Personal property must always be listed in the county where it is situate, credits may be listed in the county where the owner or other person required to list them, happens to reside. The *situs* of the property determines the place of listing in the one case, the *situs* of the owner in the other case.

Keeping this distinction in view, it seems quite clear to me that the first section of the law excludes from taxation a time not exceeding six months.

To subject the credit to taxation there must be either an agreement at its creation for six months' time, or, in the

Tax Law of March, 1846; Credits Due to Non-residents not Taxable; Credits of Non-residents in Hands of Agent or Attorney for Collection.

absence of such original agreement, and after such time has in fact been given, there must be some new agreement or understanding for a continuance of the time.

In the absence of such agreement either at the inception of the debt or subsequently, no length of time voluntarily given would make it taxable. And I think that the agreement for time must be of a character to be legally binding. The terms "credit given" and "agreement or understanding for a continuance of the credit" must be understood as referring to matters of contract between the parties and not merely voluntary or optional delay by the creditor.

The principal difficulty I have felt in the premise, has been in the case put, of a credit in the form of a book account, which has remained for a time over six months, without any agreement, and is then settled by note payable in *less* than six months. In such case it cannot be said that at any time there has been an agreement for six months' credit, and yet, after an actual credit of six months has been given, although voluntarily, there is a valid agreement for its continuance. This is within the letter of the law. It is an agreement "for a *continuance* of the credit beyond six months." And I incline to the opinion, though not without some hesitation, that it is the true meaning of the law.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

Tax Law of March, 1846; Book Accounts and Notes at Less Than Six Months.

TAX LAW OF MARCH 1846; BOOK ACCOUNTS AND NOTES AT LESS THAN SIX MONTHS.

Attorney General's Office,
Columbus, April 28, 1846.

SIR:—I have carefully examined the instructions to county auditor contained in your circular bearing date the 26th inst. and fully concur in all of them except the eighth.

It is in these words: "Notes taken by a merchant for his accounts upon closing up his business are taxable. The taking of a note for an old account may be regarded as an agreement or understanding for the continuance of the credit beyond six months, and such note would be taxable."

If this instruction is to be understood as applying only to cases in which the account is of *more than six months'* standing, and where in the taking of the note a *further* credit is expressly given, then I see nothing in it to dissent from, but if the note be simply taken as evidence of the debt, without giving further day for payment, it seems to me it would not be taxable.

The proviso in the second section upon which the question arises is in these words:

"And provided, also, that claims or demands, for property sold, work done, or services rendered, having no connection with the loaning of money, when the credit given is for a time not exceeding six months and when there shall have been no agreement or understanding for a continuance of the credit beyond six months, shall not be considered credits subject to taxation."

It is obvious that the object of this proviso is to exempt, among other things, book accounts from taxation except items for money lent or advanced. So far as the items are charges for property sold, work done, or services rendered, which in fact cover all proper subjects matter for book account, they are not to be listed, when the original

Tax Law of March, 1846; Book Accounts and Notes at Less Than Six Months.

credit given is for debts due to the estate of a person who resided out of the State of Ohio at the time of his decease, and whose effects are in the course of administration in a foreign domicile.

The language is "that all property whether real or personal within this state, and the monies and credits of persons residing therein, shall be subject to taxation." I do not think that the residence of one of the three executors within this state alters the case. The administration of the estate belongs to Massachusetts.

The remaining questions are whether debts due to a merchant residing out of the state in the hands of an agent within the state for collection, or claims in the hands of an attorney for collection, should be listed by such agent or attorney. I think not in either case. The debt due to the merchant is a *credit,* but not a credit of a person residing in this state, and therefore, not taxable.

As to claims in the hands of an attorney if they belong to persons residing out of the state, they are not taxable, as has been shown; if they belong to citizens of the state they are to be listed by the owners, in the county where such owners may happen to reside.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

ACT OF MARCH 2, 1846; MONEY BROKERS' BANKS; COMPELLED TO REDEEM THEIR OWN NOTES.

Attorney General's Office,
Columbus, April 26, 1846.

SIR:—In answer to your inquiry whether a licensed money broker may lawfully demand from a bank out of the county where his license is granted, redemption of its notes in coin or otherwise, I have to say: That after a careful examination of the act of March 2, 1846, I am of opinion such a transaction is lawful, and does not subject the broker to any penalty.

The first section of the act declares that a person engaged in the business of buying, selling or exchanging money, with a view to profit, shall be deemed a money broker, and shall obtain a license for such business in each county, in which *such business, or any part thereof,* shall be carried on.

The third section imposes a penalty upon any person, who shall, in any county in this state, without having obtained a license in *such county as prescribed in the second section,* either buy, sell or receive in payment or exchange money of any kind, or bills of exchange, for other money or bills of exchange with a view to profit, whether any premium shall have been obtained or not, or whether the money so sold or exchanged shall have been purchased or exchanged for, in such county or not.

The case put is that a licensed broker, who in the regular exercise of his business, within the county covered by the license, receives the paper of a bank whose office is in another county, and demands of that bank redemption of such paper. Must he take out a new license in the county where the bank is situate before he can lawfully make such demand? I am very clear, that he need not. Such a transaction, whether limited to one act, or repeated from time to time, does not constitute a business of buying, selling or exchanging money for profit, within the meaning of the law.

If it were so, every person who is in the habit of demanding of a bank specie in exchange for its notes must take out a license as a money broker.

It is true that any person who receives payment from a bank of gold or silver in exchange for its notes, with a view to gain, comes within the letter of the third section, but when we take the whole law together, it is quite apparent it was never meant that it should have that effect. It is the business of buying, selling and exchanging money for profit, which is prohibited, without a license, a business which is carried on in the way of barter between contracting parties. The demand of payment or redemption from a bank is not in any sense a business of barter or exchange. It is not a dealing between contracting parties, but simply the enforcement of a duty, the payment of a debt.

The purchase of bills of exchange is a part of the business of a money broker, as defined in the law.

Now, if it should happen that the drawer, acceptors, or indorsers reside in some other county than that in which the broker was licensed and where he purchased the bill, would it be lawful for him to take it to that other county and there demand and receive payment for it?

It would be difficult to say that such an act would subject the holder of the bill to a penalty, and yet it would be according to the letter of the third section, a receiving of money for a bill of exchange.

I know of no statute, nor any public policy, which makes it unlawful to require banks to redeem their notes, or protects them from the demands of their lawful creditors.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

RESOLUTION FOR RELIEF OF GEO. D. LICKEY; DESTRUCTION OF WATER POWER IS PART OF DAMAGES.

Attorney General's Office,
Columbus, April 29, 1846.

SIR:—The question submitted for my opinion under the resolution in relation to the claims of George D. Lickey (Local Laws, Vol. 44, p. 304) is whether in estimating his damages, the loss of a water power upon his farm, occasioned by the construction of the feeder, is to be taken into the account.

The resolution directs the commissioners "to estimate the damages sustained by George D. Lickey, of the county of Shelby, by reason of the construction of the Sidney feeder of the Miami extension canal through the farm of said Lickey."

The destruction of the water power is a part of the damages, and may be the larger part, resulting to Mr. Lickey from the construction of the feeder. I am very clear that such damages ought to be allowed.

Even if the language were, *damages to the farm, or the* land, the water power, as incident to the realty, would be included, but it will be seen the terms are much more comprehensive.

The agreement provided for in the second clause of the resolution may be in the following form:

> "Whereas, by a resolution of the General Assembly of the State of Ohio passed on the 11th of February, A. D. 1846, entitled 'Resolution in relation to the claim of George D. Lickey,' reference to which is hereby had, it is amongst other things, provided that before the commissioners therein appointed proceed with the examination therein required, the said Lickey shall file with the Board of Public Works his written agreement to abide by and accept the award of said appraisers in full of

all claims or demands which he may have, on account of damages to his said land or town lot, mentioned in said resolution. Now be it known that I, the said George D. Lickey, in pursuance with said resolution, and with the intent to avail myself of the benefits thereof, and to subject myself to the conditions thereof, do hereby consent and agree to abide by and accept the award to be made by said appraisers or commissioners appointed by said resolution, in full of all claim or demand which I may have on account of damages to the said land and town lot specified in said resolution.

"Witness my hand this.....day of .....A. D. 1846, in the presence of

"[Signed] ....."

Very respectfully,

HENRY STANBERY.

O. Follett, Esq., President of Board of Public Works, Columbus.

TAX LAW OF 1846; LEASE OF WATER POWER FROM STATE; LEASES; PRIVATE SCHOOLS.

Attorney General's Office,
Columbus, May 1, 1846.

SIR:—In respect to the question arising upon the lease of water power from the State by Messrs. Doddridge & Co., I am of opinion that their interest in the use of the water is not taxable.

The fifth clause of the third section exempts all property, whether real or personal belonging exclusively to this state.

Tax Law of 1846; Lease of Water Power from State; Leases; Private Schools.

The State, for an annual rent, has granted the *use* of this power to these lessees for a term of years, together with a tract of land, as a site for using the power.

The water is a part of the realty and can no more be taxed than the land itself. It belongs to the State. If the land cannot be taxed neither can the water which runs over it. There is no provision made in the law for taxing the interest of lessees as distinct from the interests of the owners of land, except in the case of the interest of land belonging to religious, literary, scientific or benevolent societies, and there the land is listed as if it belonged in fee to the lessee, at such price as the leasehold estate would bring at private sale. In all other cases each separate tract of land with all improvements and privileges belonging thereto, is taxed in *solido,* and not in part to the *owner* and in part to the *lessee,* according to their respective interests. And this rule obtains in all cases where a variety of estates or interests exist in the same tract, as in the cases of mortgagor and mortgagee, tenant for life and remainder man, etc., the respective interests are not separately valued and taxed but the whole value of the land and improvements is included in one listing.

It is impossible, therefore, to separate the interests of the State *as owner* in fee, and of the Messrs. Doddridge as lessees for years in this water, and the consequence is, it is exempt.

Second—As to the school of Mr. Charles C. Beatty, of Steubenville, I do not think it comes within the exemption. It appears that it is an individual enterprise carried on by Mr. Beatty for his own profit, and exclusively under his own control.

The exemption is of *public schools,* as contra-distinguished from *private schools.* It is not merely that the business of education is carried on in the school, but it must also be of a public character. Not only are the buildings used exclusively for public schools exempted, but the *money*

Tax Law of 1846; Credits and Personal Property out of State; New Buildings or Structures; Ohio Life and Trust Company; Leases from United States in Other States; Clocks; Shoemakers and Blacksmiths; Stage Company; Deduction for Debts Due.

and credits belonging to such schools (see fourth clause of third section). This provision is a great help to the meaning of the word *public* as used in the law. No money or credits can belong to Mr. Beatty's school as a school or institution. They belong to Mr. Beatty. No one will claim that such monies or credits are exempt from taxation, and yet if the money is not exempt neither is the building. If it be not a public school within the fourth clause, it is not public within the first clause.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State, Columbus.

TAX LAW OF 1846; CREDITS AND PERSONAL PROPERTY OUT OF STATE; NEW BUILDINGS OR STRUCTURES; OHIO LIFE AND TRUST COMPANY; LEASES FROM UNITED STATES IN OTHER STATES; CLOCKS; SHOEMAKERS AND BLACKSMITHS; STAGE COMPANY; DEDUCTION FOR DEBTS DUE.

Attorney General's Office,
Columbus, May 5, 1846.

SIR:—First—Whether money sent out of the state to be invested in cattle, the owner continuing to reside in the state, is taxable.

Answer—If at the time the list is taken the money is not invested, or if the owner has no advice of its being invested, it is taxable, otherwise not. In other words, money is taxable if the owner reside in Ohio, no matter in what

Tax Law of 1846; Credits and Personal Property out of State; New Buildings or Structures; Ohio Life and Trust Company; Leases from United States in Other States; Clocks; Shoemakers and Blacksmiths; Stage Company; Deduction for Debts Due.

other state or country the money may happen to be situate, but such personal property as cattle, goods, etc., is not taxable if it be situate in another state, even if the owner reside in Ohio. A removal of personal property from this state for a temporary purpose, with the intention of returning it to this state, is equivalent to its being situate within the state.

Second—Whether the township assessors, in making the list for 1846 are to include any buildings, except new structures of $100 in value.

Answer—They are not. The thirty-first section expressly requires them to return for the year 1846 the value and description of *all new structures* in the same way as they are required to do annually thereafter. The manner in which this is to be done annually after the year 1846 appears in the fifty-eighth section, and limits the assessment to such new structures as are over $100 in value. The township assessors for 1846 have nothing to do with old buildings, by which are to be understood buildings that were standing at the former assessment. In this respect there is a temporary inequality, but so the law is written.

Third—The agent for the Ohio Life and Trust Company in any county out of Hamilton County, need not return the bonds and evidences of debt belonging to the company.

Fourth—Whether leases of United States lands for mining purposes where the lands are situate out of this state, held by associations within this state are taxable.

Answer—They are not.

Fifth—Clocks and other time-pieces, in any house occupied by a family, are to be taken as part of household furniture.

Sixth—Shoemakers and blacksmiths doing only job work, are still to be considered manufacturers, and should

return the list of all raw material, including coal used in the process of manufacturing.

Seventh—The stock of every description belonging to the stage proprietors called Neil, Moore & Co., is to be listed in the township where the principal office of the company is kept. Supposed to be in the city of Columbus.

Eighth—No deduction is to be made from merchants' or manufacturers' stock for debts due; debts due can only be deducted from monies and credits.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State, Columbus.

TAX LAW OF 1846; CANAL BOATS; LEGAL ADVERTISEMENTS; MONEY DUE FOR WORK DONE.

Attorney General's Office,
Columbus, May 6, 1846.

SIR:—First—All canal boats and shares or interests in them, which boats are used wholly or partially in navigating the canals of this state or which are designed to be so used, are taxable, whether such boats, or the shares in them are owned by persons residing in this state or elsewhere.

Second—Money due to printers for advertisements in legal proceedings, although the same be collected as costs, are not taxable. They are exempt under the clause which relates to money due for *work done*, having no connection with the loaning of money, where there has been no agreement for a six months' credit.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

Money Brokers; Settling Bills or Drafts; Tax Law of 1846; *Administrators; Seventeenth Clause of Third Section; Notes at Less Than Than Six Months Not Taxable.*

MONEY BROKERS; SETTLING BILLS OR DRAFTS; TAX LAW OF 1846; ADMINISTRATORS; SEVENTEENTH CLAUSE OF THIRD SECTION; NOTES AT LESS THAN SIX MONTHS NOT TAXABLE.

Attorney General's Office,
Columbus, May 7, 1846.

SIR:—First—Suppose a person has credits in New York, in bank, can he sell bills of exchange for same without a license?

I am of opinion he may. Such a transaction does not make a person a money broker. There must *be a business* of buying, selling or exchanging money for profit. Not only a continued series of transactions to constitute a business, but the subject matter of traffic must be *money*. The purchase and sale of bills of exchange seems to be contradistinguished from a dealing in money by the first section of the act to tax brokers (Vol. 44; Stat. p. 127). A dealing in money constitutes a broker whether that dealing is carried on in *connection* with the purchase and sale of bills of exchange or not.

I am clearly of opinion that the buying or selling of exchange in the ordinary business of a merchant or other person, such as the sale of drafts for the proceeds of property forwarded and sold, does not come within the meaning of the law.

How far the buying and selling of exchange, by the exchange of money for drafts, or drafts for money, carried on as a business for profit, and not connected with any other dealing or exchanging of money, might come within the law admits of some doubt. That question, however, does not now arise and need not be further considered.

Money Brokers; Settling Bills or Drafts; Tax Law of 1846; Administrators; Seventeenth Clause of Third Section; Notes at Less Than Than Six Months Not Taxable.

Second—An administrator must list the money and credits belonging to the estate in his hands. It is proper to deduct from the monies and credits in his hands as *administrator* the debts due or owing by him *as such*. He cannot take into consideration the debts due by the heirs or distributees to whom the residuum, after paying of debts, is to go. Nor his individual debts, if he be an heir or distributee, as well as administrator.

Third—Under the seventeenth clause of the third section of the tax law of 1846, what is meant by the term *"property?"* Does it include real property or personal property only?

The true meaning with which this term is used in this section is somewhat obscure. It is found among the exceptions of personalty, and I incline to think may have been intended to be confined to personal property, but there is nothing sufficiently definite to authorize that limitation. The term is "other property," which includes realty as well as personalty. That general meaning must prevail, in the absence of some clear intention to restrict it. I am, therefore, constrained to the opinion that the term must be understood to include real as well as personal property.

Fourth—Notes or due bills for money or property, given for labor or services performed, or property sold, having no connection with the loaning of money, when the credit given does not exceed six months, are not taxable. Mere permissive indulgence, beyond six months, is not an agreement for time or credit, which would make them taxable.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State, Columbus.

Tax Law of 1846; *Public Schools; Lessees of Public Schools; Surplus Funds.*

TAX LAW OF 1846; PUBLIC SCHOOLS; LESSEES OF PUBLIC SCHOOLS; SURPLUS FUNDS.

Attorney General's Office,
Columbus, May 8, 1846.

SIR:—First—In relation to the "Grand River Institute," it appears from the letter St. R. Gaylord, assessor, that it is an incorporated academy; it appears that valuable improved farms, mills, etc., have been conveyed to the corporation in fee, in the way of donation for the purposes of education; that part of the lands have been sold, but one not fully paid for, or conveyed away, though in the possession of the purchasers; that the lands not sold are in part occupied by buildings erected for the professors or managed and tilled under the superintendence of the steward of the corporation, or leased for a term of a year or more, in some instances for a money rent, and in others for portion of the crops.

This institute comes within the class of public schools or academies mentioned in the first and fourth clauses of the third section of the tax law. It is entitled to hold exempt from taxation, the buildings used exclusively as the school houses, with the furniture and books therein, used exclusively for the school, with the grounds occupied thereby, not exceeding in any case, twenty acres if the same be not leased or otherwise used with a view to profit. It is also entitled to hold exempt from taxation, money and credits belonging or due to it, and intended solely to sustain the institute, not exceeding in amount the limit of its charter income.

The lands of this institute, *leased* for profit, are to be listed, not by the institute, but by the lessees under the seventh section, and the value to be put on the land so held by the lessee, is to be such price as the assessor believes would be obtained for the leasehold estate at private sale, excluding the value of the growing crops. See the second clause

Tax Law of 1846; Public Schools; Lessees of Public Schools; Surplus Funds.

of the twelfth section, and the State Auditor's instructions to district assessors, pages 4 and 5.

Such of the lands as have been sold, though for or conveyed, are subject to taxation. Whether the purchase money due for such lands, is to be listed, depends upon the fact of its appropriation or intended use. If it is appropriated solely to sustaining the academy and do not exceed the charter limit, it is not taxable.

So too with regard to rents, whether payable in money or in kind, they are taxable or not according to their appropriation or use.

Second—As to the questions submitted by surplus fund commissioners of Putnam County.

It appears a debt is due to the fund in that county secured by mortgage on real estate. That the debtor has absconded, and there is no other security for the debt than the mortgaged premises, the value of which is below the amount of the debt. That there has been a decree for sale of the mortgaged premises, and the only sale that can be made must be a sale on credit, the purchaser to give ample security for the payment of the bid, within a year.

The question submitted is whether by agreeing to such a sale the fund commissioners make themselves personally liable as for money collected.

Clearly they would not. They have general powers to control and manage the fund for the best interests of the county. And according to the case stated, such an arrangement as is proposed might, and ought to be made in the exercise of a sound discretion.

Very respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

Tax Law of 1846; Zanesville Athenaeum; Credits for Services; Costs; Township Assessor; Private Family Exemptions; New Buildings.

TAX LAW OF 1846; ZANESVILLE ATHENAEUM; CREDITS FOR SERVICES; COSTS; TOWNSHIP ASSESSOR; PRIVATE FAMILY EXEMPTIONS; NEW BUILDINGS.

Attorney General's Office,
Columbus, May 12, 1846.

SIR:—First—As to the Zanesville Athenaeum. It appears this is an incorporated literary society of a public character. That the society erected a building in the public square at Zanesville consisting of a basement and two stories. The basement and first floor are leased to lawyers and others by the society and the rents are applied to the purchase of books, etc. The upper story is occupied exclusively by the society.

I am of opinion that no part of the property nor the rents due from the lessees are taxable *to the Athenaeum* as the property or credits of the society, but that such parcel or room held under lease must be listed as the property of the lessee, and to be valued at such price "as the assessor believes could be obtained at private sale for such leasehold estate." I take the meaning of this to be that the value is so much as could be obtained for the residue of the term over and above the rents to be paid.

Second—As to the questions in the letter of the auditor of Monroe County.

County orders held by a county officer in account of his salary and not paid for want of fund in the county treasury, are not taxable. They are credits or demands for services rendered for which no credit over six months has been given.

Items of costs due clerks of courts, sheriffs and justices of the peace, though included in judgments, stand on the same ground, and are not taxable.

Tax Law of 1846; Zanesville Athenaeum; Credits for Services; Costs; Township Assessor; Private Family Exemptions; New Buildings.

A cooking stove owned by a lessee, is not to be valued as realty, but is personalty, and comes under the exemption of kitchen furniture.

Leases of section 16 for any term of years, are taxable. As to the mode of valuation, it is to be of the value of "*the leasehold estate*" not of the land, as indicated in respect of leases from the Zanesville Athenaeum.

Third—As to the question from the auditor of Ashland County, I am of the opinion that where the township assessor has omitted to leave a notice agreeably to the thirtieth section on or before the 10th of May, that he may subsequently supply omission, and it seems that such an omission may be supplied by the county auditor after he has received the return of the assessor. The thirtieth section is merely *directory* to the township assessor, and an omission to comply strictly with its terms, does not operate as an exemption of the property of the person omitted.

Fourth—As to the further question from the auditor of Monroe County in his letter of May 9th.

Beds and bedding and kitchen furniture, if used in a family, although they may happen to belong to one of the inmates, other than the head of the family, I think ought to be exempt. If so used they belong to the family within the meaning of the law. So too of other household furniture, if the total does not exceed $100 in value, used in any family, it is exempt, although it does not exceed all belonging to head of the family.

Surveyors' compasses, chains, etc., are not exempt.

Fifth—As to the question put by Richard McCarty, of Morgan County.

New structures in a process of building, but not finished, or inhabited, are not to be listed although more than $100 worth of work and material may have been put in them.

Saw logs are to be listed. Every description of poultry is exempt.

Very respectfully,
HENRY STANBERY.

John Woods, Esq., Auditor of State, Columbus, Ohio.

MILITIA LAW; "COMMUTATION."

Attorney General's Office.
Columbus, June 8, 1846.

N. A. Quille, Esq., Prosecuting Attorney, Muskingum County:

SIR:—On my return to the city, I have received yours of the 30 ult., requesting my opinion on the question whether, at the present time, the enrolled militia of this state, are liable to pay the sum of 50 cents, or perform labor on the highway, under the act of March 12, 1844.

I am very clearly of opinion that the liability to such payment of money or labor, does not now exist. It is limited to "time of peace" in which the training of the rank and file is dispensed with. And it is expressly put as a "*commutation* for military duty." The country being now in a state of war, and the militia liable to military duty, there can be no *commutation.*

Very respectfully yours,
HENRY STANBERY.

Costs of Sheriff and Clerk in Capital Cases.
County Commissioners' Power to Release Debts.

COSTS OF SHERIFF AND CLERK IN CAPITAL CASES.

Attorney General's Office,
Columbus, June 8, 1846.

S. E. Browne, Esq., Prosecuting Attorney of Van Wert County:

SIR:—Yours of the 21st inst. I have just received on my return form an absence of several weeks.

On a careful examination of our statutes, I can find no provision for the payment of clerks' and sheriffs' fees, in cases of criminals sentenced to death. There is no provision for a judgment against the defendant for costs in such cases, nor for the payment of any other costs therein, except only the sheriff's or jailor's fees for subsisting the prisoner, and the fees for the witnesses.

It is either a *casus omissus* or the legislature must have intended the fees of these officers in capital cases, to be covered by the annual allowance of $60 to clerk and $100 to sheriff.

Very respectfully yours,
HENRY STANBERY.

COUNTY COMMISSIONERS' POWER TO RELEASE DEBTS.

Attorney General's Office,
Columbus, June 8, 1846.

L. B. Otis, Esq., Prosecuting Attorney, Sandusky County:

SIR:—On my return to this city, I have received your favor of the 15th ult.

It appears from your statement in reference to the judgment against Isaac Vandoren, late treasurer of San-

dusky County, that it includes nothing but monies payable to the county, and not to the state.

Under this state of facts, I am of opinion that the penalty follows the defalcation, and is also due to the county. And that consequently it may be compounded for, or released by, the county commissioners, under the twelfth section of the act of March 5, 1831, entitled, "An act establishing boards of county commissioners" and the act of March 13, 1843, Vol. 41, p. 85.

Very respectfully yours,

HENRY STANBERY.

TOWNSHIP ASSESSORS.

Attorney General's Office,
Columbus, June 13, 1846.

SIR:—Yours of the 10th inst. was received this morning. I incline to the opinion that the assessors elected for each ward of a city or town, under the act for levying taxes, etc., section 28, volume 44, page 97, are to be considered *in all respects* as taking the place of the township assessors in their respective wards, under the act of March 20, 1841. There is no *such* officer as *ward assessor* known to the late tax law.

Every assessor is a *township assessor,* although his duties are confined to a particular ward or part of a township. I am therefore of opinion that each assessor elected in the several wards of a city must perform *all the duties* of a

Water Power at Point Harmer; Method of Procuring Control of Ground for the Purpose of Leasing Water Owned by State.

township assessor, within his ward. Among these duties is the registration of electors.

Yours respectfully,

HENRY STANBERY.

The Auditor of Franklin County, Columbus, Ohio.

WATER POWER AT POINT HARMER; METHOD OF PROCURING CONTROL OF GROUND FOR THE PURPOSE OF LEASING WATER BY STATE.

Attorney General's Office,
Columbus, June 24, 1846.

SIR:—In answer to the inquiry contained in the note of Mr. Blickensderfer of the 6th inst., as to "the proper method of procuring the control of the ground at and near the steamboat lock at Harmer (mouth of Muskingum) for the purpose of leasing water owned by the State," I have to say:

That I find the ground so required to be a part of the ministerial section No. 29 and also to be embraced within the corporate limits of the town of Harmer and dedicated as a *common.*

By an act passed by the territorial legislature entitled, "An act authorizing the leasing of lands granted for the support of schools and for religious purposes, in the county of Washington," the charge and control over this section 29, was vested in a corporation styled "The trustees for managing lands granted for religious purposes and for the support of schools in the county of Washington, within the Ohio Company's purchase."

The seventh section of this act recites that the town of Marietta is built, in part on section 29, and that the streets

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and commons thereof have been laid out as public highways by the Court of General Quarter Sessions, and empowers the trustees above created to grant leases for any part of said section, except the streets and commons which are so dedicated as highways.

At that date the corporate limits of Marietta covered the ground now occupied by the town of Harmer, and the ground at and near the steamboat lock was then a part of the commons of Marietta.

I am of opinion that the before recited act of the territorial legislature reserves the streets and commons from the control of the trustees thereby appointed, and consequently, that the ground in question, first as part of the commons of Harmer, stands on the same footing and is subject to the same control and superintendence as the commons of any other town.

The act "to incorporate the town of Harmer in the county of Washington" creates a town council to be composed of the mayor, recorder and two trustees by the name of the "Town of Harmer" and gives authority to this town council among other things "to regulate and keep open, unobstructed and in repair, the river banks, landings and public commons," etc.

In this state of things, the question recurs as to the proper method of securing the ground in question to the use of the State, and the solution of this question is not without difficulty.

Two modes suggest themselves, viz.: by contract and by appropriation.

First—As to acquisition by contract, i. e., by purchase or donation. The town council of Harmer have only a power to regulate and keep open the commons of the town.

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The ground is well dedicated to the public, as a *commons,* and the difficulty is to find authority or power anywhere to change this dedication.

In looking into previous grants made to the State, I find that in one instance the State holds certain ground on the Ohio Canal, at Newark, formerly part of the commons of the town. The mode of acquisition was by an act of the General Assembly entitled "An act concerning water power on the Ohio Canal at Newark" to grant the use of the ground to the State by a committee of the council specially authorized to make such conveyance by a resolution of the council in conformity with the act above referred to. In consequence of the decision of our Supreme Court in Le Clercq et al vs. Town of Gallipolis, it would seem that no title passed to the State by that mode of acquisition. In this case of Le Clercq vs. Gallipolis, it appeared that certain public ground called "La Place in the town of Gallipolis," was diverted from its original dedication and leased to individuals by the corporate authorities of the town, specially authorized thereto, by an act of the legislature.

Upon a bill in chancery filed by Le Clercq and other citiens of the town to enjoin the council from leasing the public ground, or changing its use, the court held that the act of the legislature giving authority to the council was unconstitutional on the ground that the inhabitants of the town, and each of them had a valuable interest or property in this public place, as appurtenant to their respective lots.

In order, therefore, to the requisition of an *unquestionable* title in the way of contract or donation it would be proper not only to have an act of the legislature authorizing the town council of Harmer to make the grant to the State and the consent and conveyance of the town council ac-

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cordingly, but also to obtain the written consent of the various holders of lots in the town, and especially of those whose lots are contiguous to this part of the commons.

Second—Acquisition by appropriation. I mean by this the seizing and condemnation of this ground to the use of the State, without the consent of the owners or persons interested in it.

I am aware that in the cases of Cooper vs. Williams our Supreme Court have held that the agents of the State can only seize and appropriate land or water for the purposes of the canal and not for hydraulic purposes merely. There is no question that as to the Ohio and Miami Canals that doctrine is correct.

The act of March 9, 1836, to improve the Muskingum River by slack water navigation authorizes the canal commissioners "to seize, dedicate, acquire, hold, use and occupy, for the use and benefit of the State, all such private and corporate estate and property as shall be necessary for the convenience of that improvement and for *hydraulic purposes* thereon, as they have heretofore had power to do in the construction and maintenance of the Ohio and Miami Canals; owners of property so seized to have all the indemnity and remedies of compensation provided in relation to the Ohio and Miami Canals, etc."

Here is very specific authority for seizing this ground for *hydraulic purposes,* and yet a doubt arises as to the constitutionality of this part of the law; in other words whether "hydraulic purposes" come within that class of *public uses* for which private property may be taken. I incline to think they do not.

On the whole, I would advise the procuring the title according to the mode first indicated, even if it is found

impracticable to obtain the consent of the lot owners, for I incline to think if any individual owner of a lot in Harmer should apply to chancery to prevent the appropriation of the commons to the use of the State, the court would refuse him relief on the ground of its appropriation to a *quasi-public* use, and to the *apparent* right of the State authorities to have seized it, without the consent of the town council.

HENRY STANBERY.

O. Follett, Esq., President Board Public Works.

NEW COUNTY; TRIAL OF CRIMES COMMITTED IN OLD COUNTY.

Attorney General's Office,
Columbus, July 8, 1846.

SIR:—I have received yours of the 3d inst. It appears from your statement that in the fall of 1844 a robbery was committed in Highland Township, Henry County, which township by the act of March 4, 1845, became a part of the new county of Defiance, and that in the fall of 1845, an indictment was found against the supposed felon in the county of Defiance.

The question submitted for my opinion is in which of the two counties the trial should be had.

The third section of the act to erect the county of Defiance, provides "that all suits, whether of a criminal or civil nature, which shall be pending within those parts of the counties of Williams, Henry and Paulding, so set off and erected into a new county, previous to the first Monday of April, 1845, shall be prosecuted to final judgment and execution within the counties of Williams, Henry and Paulding respectively, in the same manner as though the said county of Defiance had not been erected," etc. (Vol. 43, Local Laws, p. 192.)

New County; Trial of Crimes Committed in Old County.

I understand from your statement, that no prosecution had been commenced until the finding of the indictment. No suit was, therefore, pending against the accused at or previous to the first Monday in April, 1845, and being so, it is quite clear the intention of the legislature was that the new county should have the exclusive jurisdiction. The only doubt arises from the provision of the eleventh section of the eighth article of the constitution of Ohio, which secures to the accused "a speedy public trial, by an impartial jury of *the county or district* in which the offense shall have been committed."

I incline to think that the terms "county or district" as here used are to be understood as implying *locality* rather than mere corporate character. The trial is to be had before a jury of the *place* or *territory* where the offense was committed. This conforms to all our ideas of *venue,* in which it was originally required that the triers should come from the particular *visne* or hundred—the very locality of the offense or transaction. The meaning of the constitution is that the accused shall not be sent to a distance, or out of the *territorial limits* of the county for trial.

I am, therefore, of opinion that the trial should be had in Defiance County.

Very respectfully,

HENRY STANBERY.

The Prosecuting Attorney of Defiance County, Defiance, Ohio.

CANAL LAW; EIGHTY-THIRD SECTION; PENALTY OF TREBLE TOLL.

Attorney General's Office,
Columbus, July 16, 1846.

SIR:—I have examined the question submitted for my opinion as stated in the letter of Mr. D. H. Beardsley, of the second inst., which question is, whether the liability to treble toll in property omitted intentionally in bill of lading, can be charged in such omitted property, before the voyage has begun. The question arises under the eighty-third section of the act to provide for the protection of the canals, etc. (Swan's Stat., page 189), which is in these words:

> "Every person who shall sign or deliver to any collector a false bill of lading, shall pay on all property omitted in such false bill, treble the established rates of toll chargeable thereon to any collector who shall be satisfied of such omission for the whole distance, such property is conveyed on the canal."

It seems to me the penalty is not incurred until the voyage is begun and is then to be adjusted according to the distance the property has been conveyed. Other remedies are given for a false bill of lading in other sections, which are incurred simply by the delivery of the bill, and which cover the case of property intentionally omitted. See the eighty-second, eighty-fourth and ninety-fourth sections. This cumulative penalty of treble toll is expressly limited to the case where *"property is conveyed on the canal."* To say that we are to read this clause as if it were "property is *or is intended to be* conveyed," etc., is going quite beyond the rules of construction for penal laws. Such a construction would not only violate the letter, but I think also the spirit and meaning of this section. I have not omitted to consider the one hundred and fourth section which requires payment in advance of all tolls, that is, the regular and es-

tablished toll. That section does not alter the construction which would be given to the eighty-third section by itself. The two sections provide for two classes of cases. The *regular* toll is to be paid in advance before the conveyance of the property is begun, to the collector who issues the clearance, whilst the penalty of *treble toll* is to be paid to *any collector* who shall become satisfied of the intentional omission of property in the bill of lading, for the distance such property is conveyed.

Very respectfully,

HENRY STANBERY.

O. Follett, Esq., President Board Public Works.

MERCHANTS' AND MANUFACTURERS' STOCK; WHERE LISTED.

Attorney General's Office,
Columbus, July 30, 1846.

SIR:—The question submitted by the letter of the auditor of Butler County, I understand to be in what township is the stock of merchants and manufacturers to be listed, where the stock is in one township and the residence of the owner in another. The fourth section of the tax law is very explicit on this subject and requires all real property and merchants' and manufacturers' stock to be taxed in the township and town in which it is situated. All other personal property is to be listed in the township where the owner resides if it be anywhere within the county of his residence.

In conformity with these plain provisions, I have to say that the merchants' and manufacturers' stock referred to, is to be listed in the township where it is situate, though the owner may happen to reside in another township.

Yours respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

CANAL LAW OF 1840; PENALTIES.

Attorney General's Office,
Columbus, August 13, 1846.

SIR:—Yours of the 20th ult. have been received and the questions submitted for my opinion have been considered. In the view which I take of the eighty-second, eighty-third, one hundred and second and one hundred and ninth sections of the canal law of 1840, the penalties provided in those sections only apply in the cases of fraudulent acts of omissions. The presumption of law, however, would be against persons making out, or delivering, the incorrect bill of lading, list of passengers, or certificate of cargo, that he intended to commit a fraud, and that the *onus* or burden would rest upon him to show that the act was purely innocent. Gross negligence would amount to fraud.

It seems to me that this is the only safe construction, otherwise you would make the master liable where property or a passenger should be surreptitiously put on his boat, without his knowledge, and under such circumstances as not to subject him to the imputation of carelessness.

Very respectfully yours,
HENRY STANBERY.

D. H. Beardsley, Esq., Collector of Tolls, Cleveland, O.

MILITIA LAW OF 1837 AND 1844.

Attorney General's Office,
Columbus, August 17, 1846.

SIR:—I have considered the question submitted for my opinion as to the present condition of our militia system.

Whether at this time the rank and file of the militia are to [be] mustered and trained under the provisions of the law of March, 1837, and if so, whether the training of the volunteer militia under the law of March, 1844, is also to be kept up.

Militia Law.

The first section of the act of March, 1844, directed that thereafter the training of the rank and file shall be dispensed with in time of peace. The act then provides for the enrolling of all able-bodied white male inhabitants resident within the state between the ages of 21 and 45 years, excepting members of volunteer companies, persons absolutely exempt, and idiots and lunatics, which roll is to be made out by the township assessor and is, by transmission through various officers, to be finally returned to the adjutant general of the state.

The fifth section leaves it optional with every person so enrolled, to become a member of a volunteer company or pay annually as a commutation for military duty the sum of 50 cents or perform two days' (reduced to one day by the act of February, 1845) labor on the public highways.

The act then further provides that the acting militia of the state shall consist of volunteer companies raised at large, by order of the commandant of brigade or division to be composed of men between the ages of 18 and 45 years, and to be organized into battalions and regiments and officered as provided [by] law. This volunteer force is first to be ordered into service in case of war. As to the enrolled militia the tenth section of the act provides that whenever they are ordered for actual service, they shall forthwith be organized into companies, battalions and regiments, and officered as now required by law.

The thirty-seventh section provides that the commissioned officers of all companies or regiments exempted from military duty by this act, may hold their commissions for five years from the date of this act, and may at their option, attend the brigade musters and thereafter be exempt from military duty in time of peace and from the commutation pay.

The thirty-eighth section repeals so much of the act of March, 1837, as is inconsistent with this act.

There can be no question that the act of March, 1844, quite takes the place of the act of March, 1837, and insofar

as organization and active duty are concerned, substitutes the volunteer system for the old militia system. The difficulty at the present time arises from the provisions in the first section of the act of 1844, which merely dispenses with the training of the militia at large, in time of peace, and the provision, in such time, for commutation of money or labor for military service. The country being now in an acknowledged state of war, it would seem to have been the intention of the legislature that the militia training should be resumed.

The act of 1837 not being unconditionally repealed by the act of 1844, there would be no difficulty in considering the old law as now in force, insofar as the training of the militia is concerned, but when we carefully examine the various provisions of the two acts, it will be found that the entire organization of the militia is broken up. There are no longer any companies nor any officers below the brigadier general and staff, except such of the officers of companies or regiments as may choose to hold their commissions and attend the brigade musters for five years with a view to exemption. What these officers are to do at the brigade musters except to be present at them, it is impossible to see, as they have no command or duty assigned to them.

It would seem, therefore, that there can be no training of the militia without a reorganization, and the only special provision for a new organization into companies to be found in the law of 1844 has reference altogether to a call into actual service.

As to the volunteer force, it is very certain that their training is to continue, notwithstanding the country is in a state of war. This is not only clear from the want of any provision dispensing with such service at such a juncture, but is yet more evident from the provision in the fourteenth section, that in all cases the volunteer militia shall first be ordered into service in time of war.

There is a further question connected with this subject

Ohio Life Insurance and Trust Company; Tax on Its Dividends.

upon which I have heretofore expressed an opinion, and that is as to the commutation of money or labor on the highway.

Having been called upon to say whether such commutation could be made at the present time, I answered that it could not. The law of 1844 puts the payment of money or labor expressly on the ground of a commutation for military duty. The same law declares that the militia shall be subject to military duty, that is, to actual service, in time of war. To say, therefore, that the militia, in this time of war, are liable to pay the money or labor, and also to perform military service, would seem to contradict the meaning of the legislature, for that would do away with the idea of commutation. If the money or labor were put as a commutation for training merely there would be color for holding that the payment must now be made, but it stands as a commutation for or in lieu of military duty generally. I am, therefore, inclined to adhere to the opinion so given, at the same time being fully sensible of the difficulty of arriving at a satisfactory conclusion as to the meaning of the legislature in this particular of commutation.

Very respectfully, etc.,

HENRY STANBERY.

Adjutant General B. W. Brice, Columbus.

OHIO LIFE INSURANCE AND TRUST COMPANY; TAX ON ITS DIVIDENDS.

Attorney General's Office,
Columbus, August 18, 1846.

SIR:—In answer to your inquiry whether the Ohio Life Insurance and Trust Company is liable to the payment of six per cent. on its profits, I have to say:

Ohio Life Insurance and Trust Company; Tax on Its Dividends.

That by the first section of the act of March 2, 1846, it is provided, that every bank and banking company heretofore organized, and now doing business as a bank in this state, other than banks organized under the act to incorporate the State Bank of Ohio and other banking companies, including the Ohio Life Insurance and Trust Company, shall semi-annually, on the days prescribed for declaring dividends, and whether any such dividend be declared on such day or not, set apart to the State six per centum on the gross profits of such bank for the six months next previous, etc.

The second section provides that the foregoing section shall not extend to any bank whose charter prescribes the amount or rate of tax to be paid by such bank, unless the right shall have been therein reserved to the legislature, to amend its act of incorporation in reference to the amount of tax to be levied, or the right to impose such tax as may be imposed upon other banks of this state.

There is no limitation in the charter of this company of any rate of tax, other than that contained in the twenty-fifth section of the charter, which is, that no higher taxes shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions of the state.

On the 14th of March, 1836 (34th Vol. Stat. 42), an act was passed to prohibit the circulation of small bills. The first section of this act directs the auditor of state in conformity with the act of March 12, 1831, after receiving the statement of dividends made by the banks in this state, to draw on such banks for 20 per cent. on such dividends in favor of the treasurer of state, whose duty it is declared to be to collect such tax. Then follows a provision in these words:

> "Provided, that should any bank in this state prior to the fourth day of July, next, with

> the consent of its stockholders, by an instrument of writing under its corporate seal, addressed to the auditor of state, surrender the right conferred by its charter, to issue or circulate notes or bills of a less denomination than three dollars after the fourth day of July, 1836; and any notes or bills of a less denomination than five dollars after the fourth day of July 1837, then and in that case, the auditor of state shall be authorized to draw on such banks only for the amount of five per cent upon its dividends declared after the surrender aforesaid."

The twenty-third section of the charter of the Trust Company confers upon it the right to issue notes or bills until the year 1843.

It appears that a meeting of the stockholders of the company was regularly held on the 20th of June, 1836, to take into consideration the proposition contained in the act of March 14, 1836, to surrender the right to issue or circulate notes or bills of a less denomination than three dollars after the 4th of July, 1836, and of any notes or bills of a less denomination than five dollars after the 4th of July, 1837, and that the president be authorized by an instrument of writing under the corporate seal of the company addressed to the auditor of state, to make surrender of said right accordingly.

On the 21st of June, 1836, this resolution of the stockholders was confirmed and approved by the directors, and on the next day, June 22d, 1836, a formal written surrender of such right addressed to the auditor of state, under the corporate seal of the company, signed by the president and attested by the secretary, was made out and immediately forwarded to the auditor of state in whose office it yet remains.

It seems to me that all this constitutes a binding contract between the State and this company, by which the

company has forever relinquished the right to issue notes of a less denomination than five dollars, and the State has forever relinquished the right to impose any tax on the company beyond five per cent. on its dividends.

These mutual stipulations are quite as binding as if they were contained in the charter of the company.

The language of our Supreme Court in the case of the State vs. Commercial Bank of Cincinnati (7th Ohio Rep., part 1st, 129), applies with full force. It is as follows:

> "Here is a contract specific in its terms, easy to be understood. Privileges are proffered for a certain and definite consideration to be paid, and those privileges being accepted, the payment of the consideration can be enforced. After a contract, similar to this between individuals, where one undertook to convey any interest to another for a definite consideration, and the conveyance is made and accepted, it will not be pretended that anything more than the definite consideration can be recovered. But a contract between the state and an individual is obligatory as any other contract. Until a state is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfillment by the opposite contracting party. As here was a contract between the state and the corporators of the Commercial Bank in their corporate capacity, that the latter should enjoy certain privileges in consideration of certain payments to be made any law requiring the payment of a greater amount varies this contract and impairs its validity."

Although the Ohio Life Insurance and Trust Company is specially named in the act of March 2, 1846, as one of the banks on which the tax of six per centum is imposed, there is no question, from the cautious reservation of the

rights of banks whose charters prescribed the rate of tax, that the legislature was not aware of the surrender made by the company under the act of 1836.

I am accordingly of opinion that the act of March 2, 1846, insofar as it applies to this company is unconstitutional, and that the tax of six per centum cannot be collected. HENRY STANBERY.

John Woods, Esq., Auditor of State, Columbus.

TAX LAW OF 1846; LEASES FROM STATE NOT TAXABLE.

Attorney General's Office,
Columbus, August 19, 1846.

SIR:—Your letter of the 12th inst., to the auditor of state has been referred to me for an answer. You are correctly informed as to my having an opinion that under the recent tax law structures on lands belonging to the State erected by lessees from the State, are not taxable.

It is true as you state that the first section of the law declares that all property, real or personal, except such as is exempt, shall be subject to taxation. It is also true that there is no express exemption of property belonging to lessees from the State. The difficulty is that there is no mode fixed by the law for bringing such property on the list of taxable property.

The land itself belongs exclusively to the State and cannot be taxed, and the law does not provide for taxing the structures on land as distinct from the land itself or the interest of the lessee (except in the case of lessees of religious, literary or benevolent societies) as distinct from the interest of the lessor or landlord. This is a clear omission in the law, which will be supplied at the next session of the legislature. Yours respectfully,

HENRY STANBERY.

R. I. Peach, Esq., Auditor of Muskingum County.

GREAT MIAMI RIVER; RIPARIAN PROPRIETORS; LAW OF 1845.

Attorney General's Office,
Columbus, August 19, 1846.

SIR:—I have examined the questions submitted for my opinion as to the rights of riparian proprietors on the Great Miami River under the resolutions of the General Assembly "declaratory of the right of riparian proprietors," etc., passed March 12, 1845. (Local Laws, Vol. 43, page 456.)

There can be no question but that the river is one of the navigable waters which are declared to be forever free and common highways by the latter clause of the fourth article of the ordinance for the government of the northwestern territory.

Upon a careful review of our statutes, I find the following laws have been enacted in reference to the river.

The act of January 28, 1811, entitled, an act to regulate the navigation of the Great Miami River and its main branches. This act forbids any person from building a dam (except as specified in the act) across the river, or the southwest branch of the same, or Mad River, or in any way to obstruct the same from the following points—the Great Miami River from its junction with the Ohio to the mouth of Loramie's Creek, the southwest branch of same, called Stillwater, up to the mouth of Greenville Creek, and Mad River up to the forks near Springfield. It next requires any person building a dam across said streams within the aforesaid points to make a slope in the same for the safe passage of rafts and boats, which slope is to be of

certain dimensions specified in the act and to be always kept in repair.

It requires all persons then owning any dam in said streams to make the slope by the first of November, 1812, and punishes by a penalty of $500.00 for every offense, the keeping up or continuing a dam without the required slope.

Next in order is the act of March 20, 1812, entitled an act to amend the foregoing act. It requires all persons who should build any dam across the river from its mouth to the Indian boundary line in Champaign County or should continue to use any dam between said points to build a lock for the safe passage of all rafts; the dimensions of the lock are specified at length. It is also provided that persons who should thereafter build dams in Loramie's Creek up to Fort Loramie's southwest branch so far as Greenville Creek and Mad River up to Keyser's Mill, should build the lock required on the main stream and that each offense should make the party liable to pay a sum not exceeding $5,000 to b appropriated in improving the navigation of the stream.
stream.

On the 27th of February, 1816, another act was passed entitled, "An act in addition to the several acts regulating the navigation of the Great Miami River and its main branches. "This act creates a corporation by the style of "the Miami Navigation Board," and authorized it to establish regulations for improving the navigation of the river and its main branches by removing artificial obstructions therein, saving to owners of mill-dams, who should by the 31st of October, 1816, erect the sort of lock provided for in the act of 1812, the right to maintain their dams, but not otherwise.

On the 22d of December, 1821, an act was passed repealing so much of the act "regulating the navigation of

the Great Miami River and its branches" and all other acts on the subject of the navigation of the same as relates to the southwest branch commonly called Stillwater.

The last act on this subject was passed on the 4th of February, 1830, and is entitled, "An act to repeal in part certain acts therein named regulating the navigation of the Great Miami River and its main branches." This act repeals so much of each of the before mentioned acts as requires a slope or lock in any dam between the mouth of the river and the town of Dayton, or provides the building of any dam between said points, and it provides that no dam shall be erected within one foot of the present height of the state dam.

The resolutions of March 12, 1845, are entitled as "declaratory of the right of riparian proprietors on navigable rivers under the ordinance of 1787," and of the mode of redress for injuries thereto.

The preamble recites that doubts are entertained whether such proprietors are entitled to remuneration from the State for injury to their investments in hydraulic works on such rivers, therefore to settle such doubts, and as a rule, to guide the Board of Public Works and their appraisers, the resolutions are passed.

The first resolution declares that owners of lands on the banks of any such navigable river who have erected dams across such river *and upon which dams for hydraulic purposes* have been authorized in law, and who have sustained damage to capital employed on such lands for hydraulic purposes, by reason of the abstraction of water from such river by authority of law, in the construction or repair of any public works in this State or by back water are entitled to compensation from the State for such damage, so far as such capital is made of less value thereby.

I am of opinion from a careful consideration of the be-

fore mentioned acts and resolutions of our General Assembly that no riparian proprietor on the Great Miami River between the town of Dayton and the Indian boundary line and upon Loramie's Creek up to Fort Loramie and upon Mad River up to Keyser's Mill, who has failed to build and keep up the sort of lock required by the act of March 20, 1812, is entitled to any compensation under the resolutions of March 12, 1845.

As these are navigable waters, it is very certain that no right to obstruct the navigation by dams attached to the ownership of their banks, and it is equally certain that the General Assembly only intended to give compensation where the dams had been erected by authority of law.

If there had been no legislative enactments in regard to these waters, it would have been unlawful to place any sort of dam or obstruction in them. We find, however, that the legislature has positively forbidden all dams, except with locks of a certain description; a dam, therefore, erected across these streams without this lock is not only an erection not "authorized by law" but positively forbidden.

It was unquestionably within the power of the legislature to declare that persons who had unlawfully erected dams across navigable waters should be entitled to compensation from the State for the obstruction of water from their works, but whether the legislature intended to declare such right to such persons is the question.

It seems to me the language used can only bear on interpretation, and that is, that the dam so erected and injured, must have been a *lawful* erection to entitle the owner to compensation; any other construction leaves the sentence, *"and upon which dams for hydraulic purposes have been authorized by law,"* without meaning or application. The doubts referred to in the preamble probably arose out of the question often discussed, how far the State itself could

grant to any person the right to maintain a dam across a navigable stream. In the case of W. I. Hogg vs. Zanesville Canal Company (5th Ohio Rep., 416), our Supreme Court holds the following doctrine:

> "Certain navigable rivers in Ohio are common highways. Of this character is the Muskingum river. Every citizen of the United States has a perfect right to its free navigation, a right derived not from the legislature of Ohio, but from a superior source. With this right the legislature cannot interfere. In other words, they cannot by any law which they may pass, impede or obstruct the naviagtion, they cannot confer this favor on on individual or a corporation."

The doctrine so laid down is somewhat shaken by the case of Hutchins and others vs. Gidings and others (9th Ohio Rep., 52), and between the two cases, it is quite a doubtful question whether the legislature can authorize an obstruction in a navigable river which was exclusively within the limits of the State.

These were the doubts, as I suppose, referred to in the preamble of the resolutions, and I conclude that the legislature intended to declare the owner of every dam, *"authorized by law,"* to be entitled to compensation whether the dam obstructed the navigation or not.

HENRY STANBERY.

O. Follett, Esq., President Board of Public Works.

TAX LAW OF 1846; CINCINNATI COLLEGE.

Attorney General's Office,
Columbus, August 27, 1846.

SIR:—The Cincinnati College is an incorporated literary institution of a public character. Its real property consists of a lot of ground in Cincinnati on which is erected a building for the use of the college, containing halls, recitation rooms, etc., and a lower or first floor which is leased out for stores and shops and the rents appropriated to the use of the college.

In answer to the inquiry how far this property or any part of it, is subject to taxation under the present law, I am of opinion, that no part of the lot or building, or the rents due from the tenants, can be taxed, or listed in the name of the college, as the property or credits of the college. Each parcel or room held under lease, must be listed as the property of the lessee, and must be valued at such price and the assessor believes could be obtained at private sale for such leasehold estate. The meaning of this would seem to be that the value is so much as could be obtained for the residue of the term over and above the rents to be paid.

The above is the substance of the opinion given to you on the 10th of May last in reference to the Zanesville Athenaeum, which stands on the same footing with this college to which opinion I beg to refer you.

It may be proper to state that this opinion is founded on the following sections of the act of March 2, 1846:

The third clause of the third section which exempts from taxation "all buildings belonging to scientific, literary or benevolent societies, and used exclusively for scientific, literary and benevolent purposes, together with the land actually occupied by such institutions not leased or otherwise used with a view to profit," etc.

The fourth clause of the same section, which exempts

"all moneys and credits belonging exclusively to universities, colleges, academies, or public schools of whatsoever name, etc., and appropriated solely to sustain such institutions or societies not exceeding the charter limits.

The seventh section which provides that property held under a lease, and belonging to any religious, literary, scientific or benevolent society or institution, whether incorporated or unincorporated, shall be considered, for all purposes of taxation, as the property of the person so holding the same, and shall be listed as such by such person or his agent.

The twelfth section, second clause, which provides that "each parcel of real property belonging to any religious, literary, scientific or benevolent society or institution, whether incorporated or unincorporated, and school or ministerial lands, and held under lease, shall be valued at such price as the assessor believes could be obtained at private sale for such leasehold estate."

Very respectfully yours,

HENRY STANBERY.

John Woods, Esq., Auditor of State, Columbus.

LUNATIC INQUISITION; LIABILITY OF HUSBAND FOR COSTS.

Attorney General's Office,
Columbus, September 5, 1846.

SIR:—Yours of the 3d inst. is received. Upon the facts stated, I am of opinion that the husband of the insane woman is liable to the county for the costs of the inquisition. The county is first liable to pay the costs to the jurors, etc., and may recover the same by suit against the husband. Yours respectfully,

HENRY STANBERY.

Thos. M. Kirkbride, Esq., County Auditor, Woodsfield, Ohio.

Correction of Tax Duplicate; A. H Pinney's Contract; Right of Renewal.

CORRECTION OF TAX DUPLICATE.

Attorney General's Office,
Columbus, September 14, 1846.

SIR:—Yours of the 10th inst. is received. I do not think your power as county auditor to correct errors in your duplicate would extend to such a case as that of Mr. Smith.

By the tax sale the right of a third person has intervened, and it is too late to make any alteration to his prejudice. Yours respectfully,

HENRY STANBERY.

John M. Kirkbride, Esq., County Auditor Monroe County, Woodsfield, Ohio.

A. H. PINNEY'S CONTRACT; RIGHT OF RENEWAL.

Attorney General's Office,
Columbus, September 14, 1846.

GENTLEMEN:—I have examined the question as to the right of A. H. Pinney to have a renewal of the Case and Jenkins contract. The facts are as follows:

On the 1st of September, 1842, a contract was entered into between R. Stadden as warden of the prison and Case and Jenkins by which the warden agrees to hire to Case and Jenkins for the term of four years from the 1st of October, 1842, the labor of such number of convicts as might be agreed upon, not exceeding 100, to be employed in carpet manufacture and cabinet making, the number to be employed in cabinet making not to exceed or fall short of twenty. It is left optional with Case and Jenkins to carry on the carpet business or not, but if the warden should

at any time notify them to commence the carpet business with a reasonable number of hands, and they should fail to comply with such notice for the term of sixty days thereafter, so much of the contract as provides for that branch of business was to be considered as abandoned and might be let to any other person. The price per day for cabinet hands to be 40 cents, and for carpet hands 32 cents. The contract also contains the following clause:

> "It is further understood and agreed that if the practice of thus disposing of convict labor shall be continued at the expiration of this contract, the said Case and Jenkins shall have the privilege of extending this contract for a further period of five years, on the terms and conditions then equal to the average of like contracts in said prison, notice of such wish to continue being given six months previous to the expiration of this contract."

On the 15th of April, 1843, a contract was entered into between the warden and Mr. Pinney, to continue from that date until the 1st of December, 1846, for the labor of such number of convicts as Pinney might require, not exceeding fifty, to be employed at the coopering business at the rate of 40 cents per day for each hand.

On the same day (April 15, 1843), another contract was made between the same parties, to continue the same time, for the labor of such number of convicts as in the opinion of the warden, will be beneficial to the interests of the prison to be not less than thirty nor more than fifty, and to be employed in the manufacture of wooden bowls and dishes, broom handles, tar buckets, buckets and farming tools generally, except ploughs and chains, at the rate of 25 cents per day for each hand.

On the 16th of October, 1843, the Case and Jenkins contract was with the assent of the warden, assigned to Mr. Pinney, with the condition annexed to the assignment, that

Mr. Pinney should not carry on the cabinet making business under it.

It is stated by General Patterson, then warden of the prison, that no hands had at any time been employed in the carpet business, under the Case and Jenkins contract, and that the twenty hands engaged in the cabinet making, were, upon the assignment to Pinney, transferred by Pinney, with the warden's consent, indiscriminately to Pinney's two contracts of April 15, 1843, and employed upon the branches of business stipulated for in those contracts.

On the 14th of December, 1843, the following order was entered by the directors on the order book of the penitentiary:

> "Ordered that a new contract be entered into with A. H. Pinney, embracing the two contracts which he now has for coopering and making tools, and together with his right under the cabinet contract, which by consent of the directors and warden, he has purchased of Case and Jenkins; the said three contracts to be incorporated into one, and no business to be carried by said Pinney except what is embraced in his coopering and farming tool contracts. The hands which he receives on the cabinet contract to be divided between the other two contracts in such manner as that he shall pay 32 cents for such per day."

Immediately following the above, an order appears in reference to Polkemus and Morrison's application for a carpet contract, which is in these words:

> "The proposition of Polkemus & Morrison is received and ordered to be placed on file and so soon as the warden shall have hands to dispose of, having due regard to present contracts, he shall enter into a contract with said Polkemus & Morrison agreeable to said proposition on file, except as to option proposed in taking more than 35 hands. Any extension be-

yond 35 is to be with the mutual consent of both parties to the contract."

On the 23d of December, 1843, a contract was accordingly made between the warden and Polkemus and Morrison for the hire from that date till the 23d of December, 1848, of thirty-five convicts (increased to 100 August 20, 1844), to be employed in the manufacture of carpeting, coverlets, rugs and in preparing wool for the same, at 50 cents per day for each convict. Then follows a clause reciting that at that time there were not any convicts which could be placed on the contracts, but the warden agrees to place hands on the contract as fast as might be in his power, having due regard to existing contracts, and the warden agrees not to permit the same branches of business to be carried on in the penitentiary, by any other person during the continuance of this contract.

On the 8th of January, 1844, a new contract was entered into with Mr. Pinney, in conformity with the order of December 13, 1843. By the terms of this contract the labor of 120 convicts is hired to Mr. Pinney from that date to the 1st of December, 1846, to be employed in the business of coopering and in the manufacture of wooden bowls and dishes, broom handles, tar buckets, and all kinds of fine cooper ware, scythe snaths, cradles, rakes and farming tools generally, except ploughs and chains, at 32 cents per day for each convict. The contract contains the following clause: It is the understanding of the parties that the hands now in the employment of said party of the second part (Pinney) shall all be received upon this contract and that the balance shall be added as soon as the same shall be practicable without infringing upon the rights of other contractors.

I find among other papers a letter or notice addressed by Mr. Pinney to the directors of the penitentiary bearing date June 3, 1846, at top, and April 1, 1846, at foot, by which he proposes to renew his contract "which calls for

eighty convicts" for the term of five years from December, 1846, the labor to be applied to farming tools, cooper ware of all kinds, machinery, etc.

In addition to what appears in the contract and upon the order book, I have also examined the affidavits of John Patterson, the warden, and of Robert Lee and A. H. Patterson, and the statement of A. McIlvaine, directors of the penitentiary.

The warden states that he entered on the duties of that office in March, 1843, and continued in office until June 1, 1846. That no hands have at any time been employed in the carpet manufacture under the Case and Jenkins contract. That at the time of the assignment to Pinney, the only hands engaged on it, were employed in the cabinet business, to the number of twenty, and it was understood between Case, the assignor, and Pinney, that the twenty hands so employed should be employed in Pinney's two contracts of April 15, 1843, in coopering and farming tool manufacture, and that the cabinet business should be abandoned. That the arrangement was assented to by the warden, the cabinet business being considered objectionable as coming into competition with free labor. Mr. Pinney accordingly transferred the twenty hands indiscriminately to and upon his said other two contracts. That subsequently to the assignment to Pinney, several conversations took place between the warden and Pinney as to his giving security under that contract and of substituting another in place of one of his securities on his other contracts which giving and substitution of securities was agreed to be postponed until the meeting of the directors, as Pinney, at the suggestion of the warden, wished to enter into a new contract, which should take the place of the others, and give security upon such new contract. Accordingly, at the next meeting of the directors the order was made bearing date December 14, 1843, for the consolidation of the three contracts then held by Mr. Pinney. The warden further states that he is satisfied that Mr. Pinney was well aware of the terms of the

order, as it embraces the substance of what Mr. Pinney agreed to in his prior conversations. That after this order was entered, the contract with Polkemus and Morrison for the manufacture of carpeting was made, which contract was a matter of notoriety among the contractors in the prison, and was not on any occasion objected to by Mr. Pinney, within the knowledge of the warden, while he continued to act as warden. That he, the warden, would not have entered into the contract with Polkemus and Morrison if he had not been satisfied that Mr. Pinney had agreed to relinquish all rights under the Case and Jenkins contract. That the new contract with Mr. Pinney, though dated after the contract with Polkemus and Morrison, was drawn up contemporaneously with it, and handed to Mr. Pinney. That this contract in the appropriation of hands, has always been treated as in fact prior to the contract of Polkemus and Morrison.

Upon cross-examination by Mr. Pinney, the warden states that in his conversation with Mr. Pinney, prior to the order of the directors, the carpet part of the Case and Jenkins contract was not mentioned, but that the giving of security was not confined to the two contracts of April 15, 1843; it txtended also to the Case and Jenkins contract.

Upon his direct examination the warden further says that Pinney, in all his conversations prior to the consolidation, made no exception of the carpet part of the Case and Jenkins contract, and in fact, they always referred to that contract under the designation of the cabinet contract, and that nothing occurred during the time the warden continued in office, to induce him to suspect that in making the consolidation of his contracts, Mr. Pinney meant to except the carpet part of the Case and Jenkins contract, from such consolidation, until about the month of April, 1846, when Mr. Pinney made the application to renew.

Robert Lee states that he was a director in 1843 and continued in office for three years. He concurs in the statement made by Mr. Patterson, the warden, so far as the

matter came under his cognizance. He further states that according to his understanding in making the order of December 14, 1843, the directors considered the Case and Jenkins contract as an entire thing, and intended to include the carpet manufacture as well as the cabinet business, and that as one of the board, he would not have consented to give Polkemus and Morrison an exclusive contract for carpet manufacture, if he had not supposed that Pinney had surrendered his right to manufacture carpeting under the Case and Jenkins contract. That Mr. Pinney did not at the time of the consolidation claif that he had any right to any other contract than the three mentioned in the order, nor did he ever complain that his rights were infringed by the directors in giving the contract to Polkemus and Morrison.

On cross-examination by Mr. Pinney, Mr. Lee further says that he was aware the Case and Jenkins contract contained a clause as to carpet manufacture at the time it was assigned to Pinney, but the object in consolidating the contracts was to get rid of the cabinet work. That no notice was ever given to Pinney to carry on the carpet manufacture. That he had no recollection of ever hearing Mr. Pinney say that he would give up his right as to the manufacture of carpeting. That if he (Lee) had not been convinced that the carpet part of the Case and Jenkins contract was at an end, he would not have granted a contract to Polkemus and Morrison, but he cannot state the ground particularly of that belief.

On re-examination Mr. Lee states that the object in entering into the contract with Polkemus and Morrison for carpet manufacture, was to transfer hands to that business upon the expiration of contracts for more objectionable branches of manufacture.

A. H. Patterson states that he was a director of the penitentiary at the time the order for consolidation was made, which order was made at the request of Mr. Pinney. That no intention then existed on the part of the directors

to extend the time of the several contracts so consolidated, but the object of the directors was to do away with obnoxious contracts, which interfered with the mechanical labor of the State, particularly the cabinet ware contract. That he (Patterson) did at first refuse to give a contract to Polkemus and Morrison for carpet manufacture, until he became satisfied that there was little business of that kind carried on in the state.

A. McElvaine, who was also a director at this date of the order of consolidation, states in a letter addressed to the present Board of Directors, that at the time the order was made, it was not intended by the directors to destroy the Case and Jenkins contract beyond the cabinet manufacturing part of it, and that he considers Mr. Pinney entitled to a renewal of the Case and Jenkins contract for the eighty hands to [be]employed in carpet manufacture.

In view of the foregoing contracts, orders and statements, I have arrived at the conclusion that Mr. Pinney is not entitled to a renewal of the Case and Jenkins contract, either as a whole, or of that part of it which relates to the manufacture of carpeting.

I have not found it necessary in coming to this conclusion to consider the question as to the validity of the clause for renewal in the Case and Jenkins contract or of the notice of renewal given by Mr. Pinney. Aside from those questions, it appears to me that the order of consolidation and the new contract of the 8th of January, 1844, no rights or privileges under the Case and Jenkins contract remained. The order of consolidation contains the provision that upon making the new contract no branch of business is to be carried on by Mr. Pinney except what is embraced in his two contracts of April 15, 1843. A. H. Patterson, one of the directors, states that this order was made at the request of Mr. Pinney, and the warden states that it in conformity with what had been agreed upon between mr. Pinney and himself.

P. Hayden's Contract; Contract Extended.

In addition to this and without resorting to the extrinsic evidence of the intention of the parties and the asquiescence of Mr. Pinney in the contract with Polkemus and Morrison it is very clear that the new contract takes the place of so much of the Case and Jenkins contract as relates to the cabinet work. It therefore, essentially changes that contract. The right of renewal or extension as it stands in the original contract is a right to renew or extend the whole contract—the entire thing—not a part, but the whole. When, therefore, that original contract, by the consent of both parties, was essentially changed and a new contract formed out of it, and omitting a right of renewal in the new contract, it is difficult to see upon what grounds any right of renewal can be maintained.

HENRY STANBERY.

The Directors of the Penitentiary, Columbus, Ohio.

P. HAYDEN'S CONTRACT; CONTRACT EXTENDED.

Attorney General's Office,
Columbus, September 15, 1846.

GENTLEMEN:—The question submitted for my opinion as to the contract of Peter Hayden, I understand to be, whether it is to be considered as renewed or extended.

On the 22d of December, 1840, a contract was entered into between W. B. Van Hook, then warden of the penitentiary, and Mr. Hayden for the hire to said Hayden for the term of five years from the 1st of October, 1841, of the labor of not more than 200 convicts to be employed in the business of saddletree and harness making, coach and harness plating and the manufacture of locks and shovels at the rate of 32 cents per day for each convict employed. This contract contains the following clause:

> "And in case the practice of hiring out the labor of the convicts in said penitentiary should be continued, this contract may be extended from time to time, beyond the termination of the first five years at the option of the said Peter Hayden, he giving one year's notice of such intention, but not for a longer period than five years at any one time, and the warden of the said penitentiary being at liberty upon such extension of the contract to raise the price on per diem compensation for the hire of such convicts to such a rate as may be agreed upon by the parties, not to exceed the average price paid for convict labor by other contractors."

On the 1st of October, 1845, one year before the expiration of the five years, Mr. Hayden gave written notice to the directors of the penitentiary of his intention to renew or extend his contract for the term of five years from its expiration, on the 1st of October, 1846.

In December, 1845, the following order was made by the directors and entered on the journal or order book of the penitentiary.

> "Upon application of Peter Hayden for a continuance of his contract, we are of opinion that the business carried on under said contract does not to any considerable extent interfere with free mechanical labor of the State, and that from the reading of said contract, it may be continued at the option of said Hayden, provided he pay the average price of convicts employed on other contracts in the prison, which would be 33 cents per day, and that the warden be authorized to extend said contract, provided said Hayden agrees to pay the average price of convicts now employed on other contracts."

John Patterson makes oath that he was the warden in December, 1845, at which time the order for the extension of Hayden's contract was made. That a short time after the entry of the order and upon his first meeting Mr. Hayden, he exhibited the order to him, and Hayden agreed that

the price of hands as fixed in the order—33 cents—was right. That he, Patterson, then concluded that the contract was thereby extended and obligatory on all the parties. Under that belief, in his subsequent report to the legislature, he stated that the hands hired to Hayden would be under contract on the 1st of December, 1846.

Robert Lee, who was a director in December, 1845, states under oath, that he concurs in the statements of the warden so far as the facts came under his notice. That he considered the contract as in fact extended by the notice of Hayden, and the order of the directors passed in relation to it.

Upon the foregoing state of fact, I am of opinion that the contract is to be considered as extended for the term of five years from the 1st of October, 1846, at the rate of 33 cents per day for each convict.

HENRY STANBERY.

The Directors of the Penitentiary, Columbus, Ohio.

ESCAPE OF CONVICT FROM COUNTY JAIL; DEDUCTION OF TIME FROM TERM OF SENTENCE.

Attorney General's Office,
Columbus, September 16, 1846.

SIR:—It appears that Robert T. Ragan being indicted in the Court of Common Pleas for the county of Summit, and having plead guilty, was sentenced at the September term, 1843, as follows:

> "The said Robert T. Ragan having plead guilty to said indictment, it is considered by the court that he be imprisoned in the penitentiary of this state, and kept at hard labor for the term of three years from and after the thirteenth day of September, 1843; that no part of the time to be imprisoned in the solitary cells of said penitentiary, and that he pay the costs of this prosecution taxed at $13.90¾."

Escape of Convict from County Jail.

After the sentence he escaped from the jail in Summit County, and was at large for some months, and being retaken, was brought to the penitentiary in January, A. D. 1844.

The question submitted to my opinion is whether he will be entitled to his discharge on the 19th of September, 1846, on which the period of three years from the 19th of September, 1843, will have transpired.

I am of the opinion that he will not be entitled to his discharge on that day nor until he shall have remained in the penitentiary for the full term of three years.

The sentence in forgery is required to be, imprisoned in the penitentiary at hard labor, for any space of time not exceeding twenty years, nor less than three years.

Upon conviction of any offence made punishable by imprisonment in the penitentiary, "the court shall declare in their sentence, for what period of time within the respective periods prescribed by law, such convict shall be imprisoned at hard labor, in the penitentiary." (Swan's Statutes 238, Sec. 38.)

By the fourth section of the act of March 27, 1841, (Swan's Stat. 1024), it is provided "that it shall be the duty of the court, when any person shall be convicted of a capital crime or offence the punishment whereof is imprisonment in the penitentiary, to order the person so convicted into the custody of the sheriff to be imprisoned in the jail of the county until legally discharged, and if any person so convicted shall escape, the clerk of the court, on application of the prosecuting attorney, shall issue a capias, reciting such condition, and commanding the sheriff of the county to pursue after such person into any county in the State, and said sheriff shall take such person and commit him to the jail of the county, there to remain until legally discharged."

The first section of the act of February 26th, 1825, (Swan's Stat. 625), provides that the sheriff shall within thirty days after the sentence, transport the convict to the

penitentiary and deliver him with a copy of the sentence to the warden, to be safely kept until the term of his confinement shall have expired, or until he shall be pardoned by proper authority.

The foregoing are all the statutory provisions which apply to the question.

Ragan having been convicted of forgery, the court were to declare for what period of time, not less than three years, nor greater than twenty years, he should be imprisoned at hard labor in the penitentiary.

The sentence is for the lowest term, to which is superadded the limitation that it is to commence from and after the 19th of September, 1843, which day, as it appears by the record was the first day of the term and probably some days prior to the conviction.

However that may be, it was physically impossible to execute the sentence literally, even if the sheriff had started at once for the penitentiary.

If this limitation is an essential part of the sentence, it would be difficult under any circumstances to hold the convict beyond the fixed day, but I look upon it as a mere surplusage, and, in this case, obviously repugnant to that part of the sentence which is material.

The operative and essential part of this sentence is that the convict "be imprisoned *in the penitentiary*" for the term of three years.

It was unnecessary and improper to fix a day for the beginning of this term, for it could be no other day, than that upon which the sheriff should deliver him into the custody of the warden. The law has guarded against unreasonable delay and detention in the county jail to the prejudice of the convict, by requiring the sheriff to transport him to the penitentiary within thirty days after the sentence.

If the sentence in this case had been for imprisonment for the term of three years in the penitentiary, the time during which the convict was at large after his escape

could not be deducted from the term, and I think the same result must follow from this sentence, and that the useless and repugnant clause as to the limitation of time is not to be construed to overcome and frustrate that part which is material. HENRY STANBERY.

The Warden of the Penitentiary, Columbus, Ohio.

SETTING ASIDE JURY; EVIDENCE.

Attorney General's Office,
Columbus, September 17, 1846.

SIR:—I have considered the questions submitted in your letter of the 14th instant.

1. It appears by the journal entries that at the June term, 1846, of the Richland Common Pleas, the sheriff returned the names of fifteen persons as summoned upon the venire facias for grand jurors, of whom eleven appeared and four made default, and that thereupon upon motion of the prosecuting attorney, for good cause shown, viz.: illegality in drawing the same, the whole array, was by the court set aside, a new venire awarded, upon which the sheriff forthwith returned a new panel, who were qualified, etc.

You state that the ground on which the array was set aside was that in consequence of the erection of the county of Ashland, some of the persons whose names were in the box at the time the clerk drew out the ballots, had ceased to be residents of Richland County. As there were a sufficent number of names of persons resident in the county remaining in the box, I do not think that any objection could have been successfully made on that ground. However, that is no part of the record, for it does not appear on what "illegality" the court proceeded. I incline to think that it is now too late to get it on the record, for it would appear that the matter could not be set up by plea in bar. (Turk v. State, 7 Ohio, pt. 2, 240.)

Setting Aside Jury; Evidence.

The court unquestionably had power to set aside the whole panel, and as the cause does not appear on which the order was made the intendment will be that it was upon good ground.

Then as to the mode of making up the new panel. It might have been in conformity with the ninth section of the act relating to juries (Swan's Stat. 64), by a tales, without a new writ.

It was done in a more formal manner by a new venire, and although the statute does not contemplate a new venire, yet it is at least "an order of the court" and would no doubt he held a proper mode of summoning a new panel.

2. As to the indictment, I can see no objection to it.

3. The statements made by the deceased, prior to the homicide, reflecting on the character of the defendant's wife, being no justification or excuse of the act, cannot properly be admitted in evidence. If they are introduced as parts of some conversation of which the State may have given evidence, the court would charge the jury that they could not be relied upon in defense as matters of provocation or otherwise. The State would not be allowed to prove the truth of the statements, even if the defendant should introduce them, for that sort of proof would lead off into matters wholly immaterial.

Yours respectfully,

HENRY STANBERY.

S. I. Kirkwood, Esq., Prosecuting Attorney Richland County, Mansfield, Ohio.

Attorney General's Office,
Columbus, September 30, 1846.

SIR:—In answer to your inquiry whether the truth of the charges can be proved in the event that the defendant relies upon insanity caused by those charges, I am of opinion that such proof cannot be admitted.

Perjury; Affidavit; Growing Crops Part of Realty.

The defense of insanity cannot be rebutted by showing that the cause of insanity was groundless. It quite as often results from an imaginary as from a real cause. If the charges against his wife made the defendant insane, it is all the same whether the charges were true or false.

In one of the early volumes of the Eng. Com. Law Reports, you will find a case upon the subject of intoxication as a mitigation to crimes that depend upon the state of mind.

I suppose you are aware of Pigman v. the State, 14 Ohio Reports 555, on that subject.

Yours respectfully,

HENRY STANBERY,

S. I. Kirkwood, Prosecuting Attorney, Richland County, Mansfield, Ohio.

PERJURY; AFFIDAVIT; GROWING CROPS PART OF REALTY.

Attorney General's Office,
Columbus, October 30, 1846.

SIR:—On my return to this city yesterday from the circuit, I received yours of the 23d instant with enclosures.

I have looked over the indictment against John Vandenburg and see no objection to it.

As to the questions in the case of Robt. Parfray:

1. I am of opinion that it will not be necessary to show that all the articles mentioned in the praecipe were the property of Reynold. The oath was as to the truth of the affidavit, so that if the affidavit was false in any one material particular, the oath was false. However, I would advise another or additional count in which in the assignment of perjury you should limit yourself to such articles as clearly did not belong to Stewick.

2. Growing crops pass by a conveyance of the land unless specially excepted. Whether they pass by a parol sale without writing or change of possession admits of some

question, but the modern doctrine seems to be that they would so pass, and are not to be considered as part of the realty under such circumstances.

Yours respectfully,
HENRY STANBERY.
Prosecuting Attorney Richland County, Mansfield, Ohio.

RETAILING LIQUOR; GRATUITOUS DISPOSAL.

Attorney General's Office,
Columbus, October 31, 1846.

SIR:—Yours of the 29th instant isreceived. [making] inquiry whether any consideration is necessary to constitute the offence of retailing provided for in the fourteenth section of the act granting licenses and regulating taverns (Swan's Stat. 900).

Upon careful consideration of the case of Markle and the town council of Akron, 14 Ohio; 586, I cannot do otherwise than answer in the negative. The ordinance which was before the court in that case is very similar to the fourteenth section, and the word "retail" is there defined to be a disposing of in small quantities, either for or without a consideration.

Nevertheless, I cannot think that every gratuitous disposing of spiritous liquor will constitute the *offence* of retailing. On the contrary, it seems to me it must be connected with or auxilliary to some other business such as keeping a tavern or grocery, or place of public resort. In the case you put of the dealing out of liquors, in small quantities by your tavern keepers without charge, the penalty would be incurred. Yours respectfully,
HENRY STANBERY.
Prosecuting Attorney Warren County, Lebanon, Ohio.

CHECKS OF COMMISSIONERS OF BOARD OF PUBLIC WORKS.

Attorney General's Office,
Columbus, October 31, 1846.

SIRS—Upon consideration of the facts stated in your letter of this date, I am of opinion that you are not authorized to draw a check for the amount of the judgment against Laramore. Admitting that Laramore was the agent of the State, and that the entire judgment was for work done upon the section under his management, and that Laramore is in no way indebted or liable to the State, yet this judgment is not such a debt as you can discharge. It does not come within the class of debts for which an unrestricted check can be given. As to all other debts, it is provided by the sixth section of the act of March 6, 1845 (Vol. 43, General Laws, page 61), that the acting commissioner's check must in all cases be accompanied by the certificate of the superintending engineer, whether the debt arise for work done under contract or by any superintendent or agent. There is no such certificate to show that the judgment is for work, the particular work and the value thereof—all of which is necessary. Looking to the provisions of the seventh section of the same law, it is very clear that the Treasurer of State could not pay your check if you were to make one. I see no way in which Mr. Laramore, or his securities in the appeal, can obtain redress, except upon application to the legislature. Yours respectfully,

HENRY STANBERY,

Samuel Forrer, Esq., Acting Commissioner Board of Public Works.

ELECTION OF JUSTICES.

Attorney General's Office,
Columbus, November 14, 1846.

SIR:—In answer to your inquiry whether clerks of courts should call to their assistance two justices of the peace upon the opening of the poll book of an election of justice of the peace, I have to say that I incline to the opinion that the two justices should be present.

The act to provide for the election of justices of the peace, Sec. 13, p. 501 Swan's Statutes, enacts that all elections of justices shall be conducted *in the same manner* as is required in the election of members of the General Assembly. The twenty-third section of the act which provides for the election of members of the General Assembly (Swan's Stat. 310), requires the clerk to take to his assistance two justices of the peace on opening the returns. I can see no grounds to dispense with the attendance of the two justices upon opening the returns of a justice's election.

Very respectfully,
HENRY STANBERY,

W. L. Henderson, Clerk of Court, Findlay, Ohio.

DEPUTY COUNTY CLERK; MINOR.

Attorney General's Office,
Columbus, December 17, 1846.

SIR:—Yours of the 4th instant requesting my opinion as to whether a clerk can have a legal deputy who is a minor was received on my return after an absence of several days.

In reply I have to say that I can see no objection in a legal point of view, to such a deputy. It is true, such a deputy cannot bind himself by bond to his principal, but as the

bond is only for the protection of the principal, and not of third persons, the principal may waive it.

Yours very respectfully,
HENRY STANBERY,

W. L. Henderson, Esq., Clerk Hancock County, Findlay, Ohio.

PUBLIC PRINTING; PAPER PROVIDED FOR.

Attorney General's Office,
Columbus, December 23, 1846.

SIR:—I have received yours of the 22d instant enclosing a resolution of the Senate of Ohio, passed on the same day, authorizing you to deliver on demand to the clerk of the senate, whatever paper may be required by the clerk for the use of the senate for the purpose of executing the printing which may be required by the senate.

I am further advised by your letter that in conformity with the laws now in force as to the State printing, you have entered into contracts with Jonathan Philips and William B. Thrall for all descriptions of printing including the journal of the senate and house, and all resolutions, reports and such other matters as the two houses, or either of them, may order to be printed which contracts cover the period of three years from the 1st of July last.

You request my opinion upon the question whether in view of the laws regulating the public printing and the contracts so existing, you are at liberty to comply with the resolution of the senate.

The resolution simply refers to the paper on which the printing is to be done, and requires you to deliver it on demand to the clerk of the senate.

By itself it involves no question beyond the lawful custody of, or control over the paper.

I do not find any express provision as to the place where paper belonging to the State and provided for the

public printing, is to be deposited, but it is quite clear from the language of the twenty-seventh section of the act to provide for the State printing passed March 12, 1845, that the Secretary of State, is the proper depository. That section provides "that the paper for the State printing shall be provided by the State, and the Secretary of State shall from time to time, as the same may be needed, deliver over to each contractor suitable paper for the execution of the printing, which he is by his contract required to do, and shall take and preserve a receipt from each contractor of all paper so delivered over."

In virtue of this law, your duties in reference to this public property are well defined. You are to deliver this paper, as it may be needed, to the contractors for the State printing. It is by the force of this new law appropriated to their special use.

The question then arises whether a resolution of one branch of the General Assembly can abrogate the provisions of a law passed by both houses, under all the forms of the constitution. I am clearly of opinion that it cannot, and that between the conflicting provisions of the law and the resolution, you are bound to obey the former.

Very respectfully yours,
HENRY STANBERY,
Samuel Galloway Esq., Secretary of State.

SHERIFFS' COSTS IN ELECTION.

Attorney General's Office,
Columbus, December 23, 1846.

SIR:—I have received your letter of the 9th instant as to the payment by the county of sheriffs' costs in elections. On examining the act to regulate elections the only fees which appear to be allowed to the sheriff for his services, are embraced in sixty-fourth section which fees are to [be] paid out of the State treasury, for other services performed

Tax Law of 1846; *Power of Auditor to Correct Sworn Tax Return.*

by him under that act, for which specific fees are not provided in that section, it must be understood that they are covered by the general allowance of cost more than one hundred dollars per annum, provided for in the third section of the act regulating the fees of sheriffs.

As to the payment of the printer for advertising the sheriff's proclamation of the election, that is to be made out of the county treasury. Regularly the sheriff should pay the printer, and have the money refunded to him under that clause, which provides that he shall be paid for *all* advertisements in a public newspaper twenty-five cents in addition to *the price of printing*. (Swan's Stat. 393.)

Yours respectfully, HENRY STANBERY,

S. Holliday, Esq., Auditor of Meigs County, Pomeroy, Ohio.

TAX LAW OF 1846; POWER OF AUDITOR TO CORRECT SWORN TAX RETURN.

Attorney General's Office,
Columbus, January 2, 1847.

SIR:—Some days ago I received a letter from Wm. S. Tracy, Esq., of Painesville, asking my opinion on the following facts: That he, Mr. S., at the proper time, made out a list of his personal property, moneys and credits for taxation under the existing law, delivered it to the township assessor and verified it by the usual affidavit before the assessor. That subsequently, the assessor, at your request, added to the statement so sworn to the sum of $1,500.00 money at interest.

I have delayed answering the inquiry for some days, not because I entertain any doubt, but that I wish to see the Auditor of State on the subject, but as he is yet absent from the city I have concluded to write at once.

I am very clear that the addition could not be made. The oath of the party is conclusive and if false, that matter must be determined before the proper tribunal. The forty-third section of the law only allows the correction of errors or