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

omissions *made by the township assessor* in omitting any property, moneys, and credits, which he was bound to return."

If this $1,500.00 was improperly omitted, that was not an error or omission of the assessor, of property *he was bound to return,* for he could only return the property, moneys and credits set forth in the sworn statement.

Very respectfully yours, HENRY STANBERY,

The County Treasurer of Lake County, Painesville, Ohio.

SUBORNATION OF PERJURY; FALSE OATH MUST FOLLOW.

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

SIR:—In answer to yours of the 11th instant, I have to say that I am of opinion that the mere act of using persuasion to induce another to commit perjury not followed by a false oath, is not indictable in this State.

The language of the tenth section of the crimes act is "persuale, procure or suborn." I think these terms are used in the same sense, and mean nothing more than what was understood by subornation of perjury at common law, which, as you know, implies the actual committing of perjury by the person suborned. There was a common law offence of a milder grade, a mere misdemeanor for an *attempt to suborn.* If the word persuade were used in a separate section, and the punishment were milder than for *subornation,* there would be ground for the conclusion that it was intended to embrace even an attempt at subornation, for the word persuade may include as well the means used to accomplish a purpose, as its actual accomplishment.

Section eleventh strengthens the conclusion that the legislature intended to embrace those cases only in which perjury had been committed, in giving the substance of the indictment, which among other things is to set out before

what court or authority the oath was taken. It is true the eleventh section only refers to indictments for perjury and subornation of perjury, but as it follows the tenth section, I think it was intended to cover the crime therein defined, and is in a measure declaratory, that subornation includes procurement or persuasion.

Yours respectfully,

HENRY STANBERY,

N. A. Guille, Esq., Prosecuting Attorney Muskingum County, Zanesville, Ohio.

TAX LAW OF 1846; MANUFACTURER DEFINED.

Attorney General's Office,
Columbus, January 13, 1847.

SIR:—It appears by the statement of facts submitted by S. Brush, Esq., as attorney for Mr. Geo. W. Jackson, that Mr. Jackson being a citizen of Pennsylvania, was engaged in the fall of the year 1845 at Columbus, Ohio, in the purchase of hogs and the converting of the same into barrelled pork and bacon with the purpose of transporting the pork and bacon so made out of the State for sale. That he had moved all the pork and bacon so made out of the State in the month of February, 1846, except about $1,000 worth of hams and shoulders, and $3,610 worth of barrel pork. The hams and shoulders ere removed out of the State prior to the time the township assessor made out his list, but the $3,610 of barrelled pork was yet in store in Columbus and remained there until November, 1846.

It further appears that the assessor has assessed upon Mr. Jackson a tax upon $5,000 of capital as a manufacturer being the average of $60,000 for 12 months.

The questions submitted for my opinion I understand to be:

1. Whether Mr. Jackson is to be considered a manufacturer?

2. Whether he can be assessed with a tax in 1846 for the business done in 1845?

1st. Is he a manufacturer?

The eighteenth section of the act of March 2, 1846, provides that "every person who shall purchase, receive or hold personal property of any description, for the purpose of adding to the value thereof, by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making a gain or profit by so doing shall be held to be a manufacturer."

This language is very comprehensive, and yet I am by no means satisfied that the cutting up and salting of pork, curing bacon and rendering the lard, can be held to mean a process of manufacturing when performed by the owner of the hogs.

If it were carried on as a business and the pork of others was so cut up and cured for the purpose "of making a gain by so doing" the person so carrying on the business might be held to be a manufacturer just as a miller who is engaged in the business of making wheat into flour, is a manufacturer.

Although I cannot say that Mr. Jackson is taxable as a manufacturer under the eighteenth section, yet I am quite clear that he is to be taxed as a merchant under the seventeenth section.

It provides that "every person that shall own, or have in his possession, or subject to his control any personal property within this State, without authority to sell the same, which shall have been purchased either in or out of this State with a view of being sold at an advance price or profit, or which shall have been consigned to him from any place out of this State, for the purpose of being sold at any place within the State, shall be held to be a merchant. At the time of the assessment of the tax upon Mr. Jackson, he owned within the State personal property which had been purchased by him with a view of being sold at an advanced price or profit so that he comes exactly within the terms and very

language of the law. There are cases which may come within the letter of this section and yet not be within the meaning. For instance, the purchase of a horse by a farmer with a view of a resale at a profit would not make him a merchant. This sort of dealing must constitute a business and be made the subject of independent operations, and not be carried on ancillary to the business of farming.

2d. Can he be taxed for the business done in 1845 and before the recent tax law was enacted?

Certainly not; nor does this law contemplate such retrospective taxation. Reference is properly made to past business only for the purpose of fixing an average value of the property embarked in the business. As has been already stated a part of the property was in this State at the time of the assessment of the tax. But the law does not allow the value of property on hand at the assessment to be made the standard for taxation, but fixes the following rule:

> "In estimating the value thereof he (the owner, etc.) shall take as the criterion the average value of all such articles of personal property which he shall have had from time to time in his possession, or under his control, during the year next previous to the time of making such statement, if so long he shall have been engaged in business, and if not, then during such time as he shall have been so engaged, and the average shall be made up by taking the amount in value on hand, as nearly as may be in each month of the next preceding year in which the person making such statement shall have been engaged in business, adding together such amounts and dividing the aggregate amount thereof by the number of months that the person may have been in business during the preceding year.

There can be no question of the perfect fairness of this mode of ascertaining the value of the property.

Although Mr. Jackson was called a manufacturer and

Associate Judge; Time of Taking Oath; Person Holding Two Offices.

not a merchant by the assessor, yet that misdescription does not vitiate the assessment, for the tax is levied in the same manner, that is, by taxing the average value of the property in both cases. HENRY STANBERY,

Attorney General.

John Woods, Esq., Auditor of State.

ASSOCIATE JUDGE; TIME OF TAKING OATH; PERSON HOLDING TWO OFFICES.

Attorney General's Office,
Columbus, January 21, 1847.

SIR:—The facts submitted in yours of the 18th instant in which you request my opinion are as follows:

That on the 6th instant you was elected an associate judge for Marion County for the term of seven years from and after the 28th of February next, and that you have received your commission as such. That you are now a justice of the peace and your term of office will not expire until after the 28th of February.

You ask me in the first place whether you should take the oath of office within twenty days after the receipt of your commission as associate judge, or whether you will be in time if you take it within twenty days after your term of office commences.

Looking to the very explicit provisions of the first and second sections of the act declaring offices vacant in certain cases (Swan's Stat. 611), I am of opinion that you should take the oath and transmit the certificate thereof to the clerk of your common pleas, within twenty days after the day you received your commission.

Next, whether you can continue to act as justice of the peace after you so take the official oath, until the 28th of February, when your term of office as associate judge begins.

The offices of justice of the peace and associate judge

are incompatible and no person can hold both. Ordinarily the acceptance of an office constitutes the person who accepts the incumbent of the office, and he is said to hold the office. And where two offices are incompatible, the acceptance of the office to which the person is last appointed or elected vacates the first office. Milward v. Thatcher, 2 Term Rep. 81.

Now, the taking of the oath of office, is in the case of an associate judge, proper evidence of acceptance, but as your term of office will not commence until the 28th of February next you do not by accepting the office at an earlier day become an incumbent, nor can you be said to hold the office until that day. Until that day comes your predecessor is the associate judge, and to say that you are also an associate judge, would be to say that there may be four associate judges at the same time in one county, or that four men hold at the same time that office in the same county.

This cannot be, for the constitution prohibits more than three associate judges to a county. (See State v. McCollister, 11 Ohio 46.)

I am, therefore, of opinion that there is no objection to your acting as justice of the peace until the 28th of February next. Yours respectfully,

HENRY STANBERY,

Joseph I. Williams, Esq., Marion, Ohio.

SURRENDER OF FUGITIVE FROM JUSTICE.

Attorney General's Office,
Columbus, March 20, 1847.

SIR:—I have examined the requisition from the governor of New York for the surrender of George V. Farnum, with the accompanying documents. It appears from the papers that Farnum was indicted in the Court of General Sessions for the city and county of New York for the offence of obtaining goods in the city of New York by false

pretences. A copy of this indictment is exhibited, certified by the clerk, under the seal of the court in the usual form, and further certified by the governor of New York as being duly authenticated in accordance with the laws of New York. The requisition states that it has been represented to the governor of New York that Farnum had fled from justice of New York, and that he may have taken refuge in Ohio.

These papers are in due form and fully comply with the provisions of the act of Congress as to fugitives. The only question which arises is, as to the character of the offence charged in the indictment, and whether it belongs to the class specified in the constitution of the United States and the act of Congress in relation to fugitives from justice.

The offence so charged, is, as has been stated, for obtaining goods by false pretences, and these pretences, as set out in the indictment, consist of representations by Farnum of the state of his business, the value of his property, and the extent of his means and liabilities.

The constitution gives the right of reclamation against persons "charged in any State with treason, felony or other gress uses the same language. Whether the offence charged in this indictment is to be considered a crime within the meaning of that term as used in the constitution is the question.

crime, who shall flee from justice, etc." and the act of Con-

I was at first inclined to think that this offence could not properly be considered a crime, at least not of the magnitude provided for in the constitution, but further examination has changed this opinion.

The offence of obtaining money or personal property by any false token or writing, or any other false pretence, is by the laws of New York made punishable by imprisonment in a State prison not exceeding three years, or in county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both imprisonment and fine. Revised Stat. N. York, Vol. 2, part 4, Title 3, Article 4, Sec. 53.

In Ohio the same offence is punishable by fine not exceeding $500,, or imprisonment in the dungeon of the county jail, on bread and water only, not exceeding ten days, or both, at the discretion of the court. (Swan's Stat. 242, Sec. 59.)

In respect to fugitives, the rule seems to be, that the character or grade of the offence, is to be determined accord- Kaye, 4 Taunt, 34, cited by Ch. Kent in the matter of Wash- ing to the *lex loci* where it has been committed. Mure v. burn, 4 Johns. Ch. Rep. 111.

The case of Washburn before Ch. Kent was of a person who, having committed a larceny in Montreal, was arrested in New York. The point having been made that the offence charged did not come within the class of crimes which, by the comity of nations, authorized the surrender of the fugitive, the chancellor says:

> "It has been suggested that theft is not a felony of such an atrocious and mischievious nature, as to fall within the usage of nations on this point. But the crimes which belong to the cognizance of the law of nations are not specially defined, and those which strike deeply at the rights of property, and are inconsistent with the safety and harmony of commercial intercourse, come within the mischief to be prevented and within the necessity as well as the equity of the remedy." Page 113.

In the matter of Clark vs. Windell, 312. This was the case of a requisition from the governor of Rhode Island for the surrender of Clark upon a charge of having been guilty of frauds in abstracting money and notes from a bank in Rhode Island of which Clark was president, the punishment for which was simply by fine not exceeding $5,000.00.

C. J. Savage, in delivering the opinion of the court, says:

> "It was also objected that a crime of greater atrocity was intended by the constitution than

> is here charged. It seems that when the proceedings are instituted by the comity of nations, they apply only to crimes of great atrocity, or deeply affecting the public safety. 1 Kent. Com. 36. With the comity of nations we have at present nothing to do, unless perhaps to infer from it that the framers of one constitution and laws intended to provide a more perfect remedy, one which would reach every offence criminally cognizable by the laws of any of the states. The language is, treason, felony or other crime; the word crime is synonymous with misdemeanor, 4 Black. Com., and includes every offence below felony punished by indictment as an offence against the public." p. 221.

I would also refer your excellency to an opinion delivered by Governor Fairfield upon a requisition from the governor of Massachusetts, for the delivery of certain fugitives charged with a conspiracy to cheat and obtaining goods in Boston by false pretences (Amer. Jurist, Vol. 24, p. 226). In relation to the point in question the governor says, p. 229:

> "The next position assumed by counsel is, that this provision of the constitution was intended to apply not to every crime, but only to those of a high, and aggravated nature. This, I think, would be a limitation of the terms of the constitution, altogether unwarrantable. The phraseology used is treason, felony or other crime—not other crimes of a high and aggravated nature, but crimes in their absolute and unqualified sense. A recurrence to the circumstances under which this provision was adopted will be found strongly corroborative of this view. In the old articles of confederation, the provision corresponding to the one under consideration, the following terms were used 'treason, felony or other high misdemeanor.' The committee who drafted and reported the constitution to the convention adopted the same phraseology, omitting the word 'other.' In the

> convention the words 'high misdemeanor' were stricken out and 'other crimes' substituted. Now, why this change? Is it not clear that the term was deemed too limited; that it was seen a large class of cases would be unprovided for, and that the maintenance of law in the states, and the punishment of offenders, could only be affected by enlarging the term and making no distinction whatever between 'crimes.'"

Ihave found nothing to overcome the force of these authorities, and considering that the offence charged is made punishable, as well by the laws of Ohio, as those of New York, and in the latter State by imprisonment in the State prison, and that it deeply affected the security of commerce, I am constrained to the opinion that it comes within the class of cases embraced in the constitution.

I am aware of a practice in New York to use these requisitions for individual purposes, and to coerce the payment of debts by extending them to persons who have never been within the territorial jurisdiction of New York by a fiction of constructive presence and constructive flight from justice. In such cases it is the duty, as I conceive it, of the executive upon whom the requisition is made, to refuse to surrender the citizen.

There must be an *actual* flight from justice to bring the case within the constitution, and to authorize the surrender.

Very respectfully, HENRY STANBERY,

His Excellency William Bebb, Governor of Ohio.

PUBLICATION OF COMMISSIONERS' REPORT; SELECTION MADE BY COMMISSIONERS.

Attorney General's Office,
Columbus, March 22, 1847.

SIR:—In consequence of absence, I have not before replied to yours of the 15th instant.

I am of the opinion that the county commissioners, if

they choose to do so, may properly designate the newspaper in which the exhibit of receipts and expenditures shall be published, and the auditor is bound to follow the direction so given.

Where no paper is specified by the county commissioners, of course the auditor may select the paper. On consultation with the auditor of state he concurs with me.

Yours respectfully,
HENRY STANBERY.

William Munger, Esq., Auditor of Hancock County, Findlay, Ohio.

LIQUOR LAW; DOUBLE PUNISHMENT; REPEALING CLAUSE.

Attorney General's Office,
Columbus, March 22, 1847.

SIR:—An earlier reply to yours of the 3d instant has been prevented by my absence.

The fourth section of the act to prevent intemperance in the counties of Medina, Huron and Erie, punishes the sale of spiritous liquors in *any* quantity. So far then as respects a sale by the quart or larger measure, it provides for a *new* offence, and it also covers the offences of a sale by less quantity than a quart, or if any quantity to be drank at the place where sold provided for in the act granting licenses, etc., passed March 3, 1831. I incline to think it must be taken to repeal so much of the act of 1831 as punishes the last named offences for the counties named in the act, otherwise there would be a double punishment for the same offence. I am further of opinion as the repealing clause in the local law is limited only as to cases of inconsistency, that it does not affect cases pending at the time of its passage, under the act of 1831.

Yours respectfully,
HENRY STANBERY.

Jno. R. Osborn, Esq., Prosecuting Attorney Huron County, Norwalk, Ohio.

Mode of Prosecution; Law Silent; Fees of County Commisioners in Laying Out State Road.

MODE OF PROSECUTION; LAW SILENT.

Attorney General's Office,
Columbus, March 22, 1847.

SIR:—Yours of the 11th instant has been received and has remained unanswered in consequence of my absence.

The prosecution under the act of February 28, 1846, "to secure the inviolability of places of human sepulture," must be by indictment. It is true the act is silent as to the mode of prosecution, but the tenth section of the eighth article of the constitution of Ohio provides that no person shall be put to answer any criminal charges, but by presentment, indictment or impeachment. I take the rule to be that where the law defining an offence is silent as to the mode of prosecution, the proper mode is the usual one, by indictment. Yours respectfully,

HENRY STANBERY.

Th. West, Esq., Prosecuting Attorney, Woodsfield, Ohio.

FEES OF COUNTY COMMISSIONERS IN LAYING OUT STATE ROAD.

Attorney General's Office,
Columbus, March 23, 1847.

SIR:—In answer to the inquiries in your letter of the 20th instant I am of opinion that the fees of the commissioners, etc., employed in laying out a State road are to be paid out of the county treasury, whether the road is established or not. The failure of persons interested in the road to give bond, etc., can make no difference. The fees are due upon the return made by the commissioners of the survey and plat of the road and the certificate of time employed in the service.

If the county commissioners refuse to make payment the parties interested will take the usual course of appeal

to the common pleas. I know of no law to make mere petitioners for a State road liable for such fees.

Yours respectfully,
HENRY STANBERY.

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

OFFICIAL SURVEYS; OATH OF SURVEYOR.

Attorney General's Office,
Columbus, March 23, 1847.

SIR:—In reply to your letter of the 3d instant I have to say:

That I am of opinion that the survey of roads and surveys made in partition at the request of the commissioners do not fall within the official duties of a county surveyor.

Official surveys are such as are made of lands sold for taxes or by consent of the parties in interest or by order of court pending a litigation concerning the land.

When engaged in any other survey the county surveyor does not act in his official capacity, and consequently whenever, as in the case of survey of roads, an oath is required of the surveyor for the faithful performance of the particular duty, he must take such oath and only charge the fees provided for such service.

Yours respectfully,
HENRY STANBERY.

B. F. Raleigh, Esq., County Surveyor of Butler County, Hamilton, Ohio.

POWER TO ISSUE BONDS.

Attorney General's Office,
Columbus, March 24, 1847.

GENTLEMEN:—In reply to your letter of the 19th instant inquiring whether under the act to authorize your sub-

scription to the stock of the Mad River and Lake Erie Railroad, you are at liberty to issue county bonds for a less sum than $1,000, I have to say that the proviso of the first section of the act referred to, Vol. 43 Local Laws, p. 109, expressly forbids you to issue bonds for a less sum than that amount. I do not see how you can avoid the force of that provision, notwithstanding it may be a matter of convenience to the contractors that you should do so. If you could issue bonds for any less sum you might make them of the smaller denomination, say for $1, and thereby issue a sort of currency, to avoid which was perhaps the object of the restriction.

I would therefore advise you to conform strictly to the law. Yours respectfully,

HENRY STANBERY.

The County Commissioners of Hancock County, Findlay, Ohio.

TAX LAW OF 1846; LIQUIDATED CREDITS; LEASES.

Attorney General's Office,
Columbus, March 24, 1847.

SIR:—In answer to the questions made in yours of the 18th instant I am of the opinion:

1. That the term "liquidated credits" used in the sixth section of the act to amend the act for levying taxes, etc. (Gen. Laws, Vol. 44, p. 61), does not include ordinary matters of book account or unsettled claims for property sold or services performed, "credits" as defined in the section second of the act of March 2, 1846 (Gen'l Laws, Vol. 43, p. 85), include every claim for moneys, labor, or other valuable thing, due or to become due, excepting among other things, claims 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. The sixth section of the amendatory act was undoubtedly intended

to embrace, in part, the subjects so excepted, but not the whole of them. The qualifying terms "liquidated" shows that every credit was not to be made taxable. I cannot think that a mere unsettled claim for property or labor performed, or an open book account, is to be considered as a liquidated credit, within the meaning of the law. But where a note has been given, or there has been any formal settlement or acknowledgment of the amount or balance due, then the credit or demand is to be considered as liquidated, and becomes taxable, if such credit or credits exceed in the aggregate $200, without reference to the credit given.

2. I do not think it is the duty of the owner of the lease made taxable by the twenty-sixth section of the amendatory act, to include the same in the statement of his personal property to be furnished to the assessor.

Although the principal sum so taxed, is declared to be personal property, yet unlike other personalty it is to be listed in the township where the land is situate, out of which the rents arise, and it is made the special duty of the township assessor to ascertain the amounts of the rents, and to assess them to the person entitled to receive the same, and when the same are not payable in money to ascertain their value in money. These provisions are inconsistent with the provisions of the original law, as to the statement of the person and the ascertaining the value by his own affidavit.

3. A lease, or rather the rents reserved therein, where the term exceeds fourteen years, and the terms of the lease do not provide for a continuance or renewal beyond the term specified in the lease, would not be taxable. The provisions of the twenty-sixth section of the amendatory act is very explicit in requiring that the lease, if for a term of years, must be for a term exceeding fourteen years, and contain some clause of renewal or continuance, beyond such number of years, that is, as I understand, a renewal or continuance beyond the term specified in the lease, or beyond the number of years, exceeding fourteen specified in the lease, whatever that longer term may be.

I have felt some doubt whether this construction meets the true meaning of the legislature, and this doubt arises from the word "continuance." A lease for a term of twenty years is a lease, which by its terms provides *for a continuance* beyond fourteen years. But if it were the purpose of the legislature to make all leases for a longer term than fourteen years taxable, then there was no necessity for the provision as to a continuance or renewal beyond that term of years. I am strongly inclined to think it was the purpose of the legislature to make all leases for a period of more than fourteen years taxable, whether that period be fixed by the original or by any clause for a renewal and continuance for that period, superadded to an original term for a less number of years, but yet the plain language used, perhaps, forbids us to place that construction on the law.

Very respectfully,

HENRY STANBERY.

John Woods, Auditor of State, Columbus.

HOMICIDE; VENUE.

Attorney General's Office,
Columbus, March 24, 1847.

SIR:—In consequence of absence at the Supreme Court in Washington City, I have not sooner replied to yours of the 19th instant and suppose as your court sat on the 2d instant that the trial of Bickel has been had.

The only suggestions I would have made to you, would have been the addition of two counts, in all respects like your first count, except that in one of them the venue of the death should be laid in Preble County and in the other the venue of the death should be laid "at the county of Montgomery in said State of Ohio, to-wit: at the county of Preble aforesaid."

The last count would have conformed to the common law rule that the venue of every traversable fact should be laid within the body of the county where the trial is had.

Public Documents; Admissibility; Sworn Copies.

I incline, however, to the opinion that the venue as laid in your first count is sufficient under the thirty-seventh section of the crimes act. Yours respectfully,

HENRY STANBERY.

Geo. W. Thompson, Esq., Prosecuting Attorney Preble County, Eaton, Ohio.

PUBLIC DOCUMENTS; ADMISSIBILITY; SWORN COPIES.

Attorney General's Office,
Columbus, April 12, 1847.

SIR:—I have examined the question submitted in the letter of Mr. Perkins as to whether certified copies of office papers in the office of the canal fund commissioners, are admissible in evidence.

After a careful examination of our statutes, I am not able to find any act similar to that passed last winter in relation to copies from the books and records of the board of public works, as to the board of fund commissioners. In the absence of such statutory provision, I am of opinion that sworn copies of records or papers in the office of fund commissioners are admissible in evidence, at common law, and this on the well-established doctrine that whenever the original document is of a public nature, an exemplification of it, if it be a record, or if not, a sworn copy, is admissible in evidence, for the reason that such public document cannot be removed from their proper place of deposit without inconvenience and danger of loss, and might be required in two places at the same time. 1 Stark Ev. 181. Peck vs. Farrington, 9 Wind. R. 44.

The copies that are made out are simply certified to be correct by the secretary of the board with the seal of the board attached. An affidavit in the following form should be added to each document, to be made before a notary public, whose seal will not require further authentication by the clerk of the Common Pleas:

The State of Ohio,
Franklin County, SS.

Before the subscriber, a notary public for the county aforesaid, duly commissioned and qualified as such, personally came C. S. Sill, and being duly sworn, deposes and says, that he is secretary of the board of canal fund commissioners of Ohio, that he has carefully compared the foregoing copy with the original now on file in the office of said board at Columbus, Ohio, and that the same is a true copy of said original.

Sworn to and subscribed before me this — day of April, A. D. 1847. } In testimony whereof I have hereto set my hand and affixed my notarial seal.

The opinion that such sworn copies are admissible is given upon the supposition that the parties whose names are signed to the bonds have not, by affidavit, denied the execution of the bonds. If such affidavits have been made, it may be necessary to send the original.

Very respectfully,
HENRY STANBERY.

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

MISAPPROPRIATION OF FUNDS BY OFFICER WHO IS ALSO AGENT.

Attorney General's Office,
Columbus, April 14, 1847.

SIR:—Yours of the 6th instant has been received, and the questions submitted for my opinion have been carefully considered.

It appears from your statement of facts that Mr. Leland was duly appointed a fund commissioner of the surplus revenue fund for the county of Williams in June, 1842, and gave bond as such, and continued to act in that capacity until the 1st of June, 1844. That during the continuance

of his office, he was appointed by the board its agent, the books and papers were placed in his possession, and authority given to him to receive money arising from the payment of interest and principal on the loans, and being also an attorney at law he was further employed by the board in that capacity to sue for and collect such moneys.

That whilst he so continued in office as fund commissioner, and whilst so acting as agent and attorney he collected and received moneys due to the fund, the receipt for which he signed as agent or attorney, which moneys he has failed to account for.

The first question submitted for my opinion is whether he is to be considered as having such moneys in his hands as fund commissioner so as to charge the securities on his official bond. You do not say that he gave any bond as agent, and I shall take it for granted that he did not.

I think the whole question turns upon the inquiry whether one of the board of fund commissioners can receive money due to the fund, so that it can be said that the money is in his hands by virtue of his office.

Each fund commissioner is to give a separate bond (Act of March 28, 1837, Sec. 5, Swan's Stat. 884). Whenever the principal sum, or any loan is paid to the commissioners, or collected by them, the same shall be re-loaned or invested as before provided for (9th clause of Sec. 10).

The fund commissioners shall meet for the performance of their duties at the county auditor's office or at such other places at the county seat as they may appoint at such times as may be necessary for the transaction of business, and a majority shall be competent to transact business (Sec. 14) and may appoint one of their body, or any other competent person, an agent to transact all necessary business during the recess of the board.

By the amendatory act of March 10, 1945 (Vol. 43 Ohio Law, p. 69), it is provided that if any county fund commissioner or agent of the fund commissioners shall fail to pay over according to law, all moneys that may come into

his hands, by virtue of either of said offices, and by him not legally invested, it shall be the duty of the prosecuting attorney, etc., to cause suit to be instituted against such delinquent county fund commissioner or agent and his securities, etc.

Now in this case where the money is received by a person who is at the same time a fund commissioner and the agent and attorney of the board, he is well authorized to receive the money in each capacity. He signs the receipt as agent or attorney, but it is to be accounted for or paid over to the fund commissioners or any one of them. The same hand which is topay over is to receive, and wherever this is the case, the law intends that the money is so paid over, and that the person holds it in the ultimate capacity of payee. The case of an administrator who in his capacity of attorney at law collects money due to the estate is an example of the operation of this rule. The presumption of the payment of the debt in the case of a debtor administrator, is also in point. It is well established that where a debtor of an intestate becomes an administrator, he is presumed to have received payment of the debt in his capacity of administrator, and the sureties on his bond as administrator are liable for the amount of the debt as assets received, and this although there may not have been any payment in fact, nor even any ability to pay. (Winship vs. Bass, et al, 12 Mass. 199 marginal paging. Execr. of O. Bigelow vs. Administrator of E. Bigelow, 4 Ohio 147.)

As to the other question of the right to recover the penalty under the act of March 10, 1845 (Vol. 43, p. 69), I think it quite clear in favor of such recovery. The right to recover *the penalty* does not depend upon the special employment of the attorney who may conduct the suit, but is a necessary incident of the judgment. It may be well to have an order made by the court recognizing your authority to act as attorney for the plaintiff, and in that way to conform to the *directory* provisions of this act, but I do not con-

Board of Equalization for Cincinnati; Special Board for Hamilton County.

sider this as necessary or that the absence of such appointment or recognition, could in any way avail the defendants.

Very respectfully,

HENRY STANBERY.

Chas. Case, Esq., Bryan, Williams County, Ohio.

BOARD OF EQUALIZATION FOR CINCINNATI; SPECIAL BOARD FOR HAMILTON COUNTY.

Attorney General's Office,
Columbus, April 14, 1847.

SIR:—I think the special board of equalization for Cincinnati is to be considered entirely distinct from and independent of, the special board of equalization for the county of Hamilton and that there is no objection to its sitting and to the performance of its duties, after the final adjournment of the county board.

The special board of equalization for a county has a double duty to perform, 1st, to equalize the real property of the county, by raising or lowering the valuation of separate parcels, so as to conform to the average valuation of the county; 2d, to equalize the valuation of any town, township or district by raising or lowering its aggregate such per cent. as will make such town, district or township, conform to the valuation of other real property in such county.

As it respects the county of Hamilton, the special board appointed for the city of Cincinnati, is only authorized to equalize the real estate within the city. In this matter it takes the place of the special board of equalization for Hamilton County and discharges a duty which otherwise would belong to that board, leaving to the county board the duty, so far as the city of Cincinnati is concerned, of equalizing its value in reference to the other real estate of the county by addition or deduction of a fixed per cent.

I do not see that either of these boards of equalization for Hamilton County need have any reference to or depen-

dence on the operation of the other. The county board have nothing to do with the equalization of the parcels of real estate in the city of Cincinnati. All that the county board need look to is whether in the aggregate (which aggregate cannot be diminished by the acts of the city board) the relative value with the other real estate of the county is right.

Yours respectfully,

HENRY STANBERY,

Jno. Woods, Esq., Auditor of State.

STATE PRINTING; CUSTODY AND CONTROL OF PAPER; POWER OF SENATE TO MAKE CONTRACT.

Attorney General's Office,
Columbus, April 16, 1847.

SIR:—I have received your letter of the 18th instant in relation to the public printing.

On the 23d December last my opinion was requested by the secretary of state upon the resolution passed by the senate on the 22d December, 1846, requiring the secretary of state to deliver to the clerk of the senate whatever paper might be called for by the clerk for the printing of the senate. I advised the secretary that he was not at liberty to comply with that resolution inasmuch as this paper was, by the express terms of the act to provide for the State printing, passed on the 12th of March, 1845, specially appropriated to the use of the contractors under that law, and could only be delivered by the secretary to such contractors. The question under that resolution simply touched the lawful custody of and control over the paper, and in view of the conflicting provisions of the act of March, 1845, passed by both houses appropriating the paper to the use of the contractors under that law, and of the resolution of one of the houses appropriating it to a different use, I did not hesitate to advise the secretary that he was bound to conform to the provisions of the act.

State Printing.

The question now presented is of a very different character. The facts as they appear in your statement are these:

That in June, 1846, contracts were entered into between the State and Messrs. Scott and Philips for executing the public printing under the provisions of the act of March 12, 1843. That these contractors made all the necessary provisions for the performance of their contracts, and were ready to execute the printing for the General Asssembly which convened on the first Monday of December, 1846, according to the terms of their contracts; that on the 16th of December, the senate passed the following resolution:

> "Resolved that Samuel Medary be and he is hereby appointed printer for the senate during the present session, and the clerk of the senate is hereby authorized to enter into the necessary arrangements with the said Medary for the execution of the printing of the senate at a price not greater than is now paid by the State for similar kinds of work, provided that the work shall be done in the same manner and that the prices shall be estimated by the same rules that now govern the contractors for the state printing."

That Mr. Medary has executed the printing of the senate in accordance with this resolution. That the contractors, Messrs. Scott and Philips, claim that they were legally entitled to perform this printing, and that they ought to be compensated in damages for a breach of the contract on the part of the State. That a general appropriation was made by the legislature for the State printing without designating in any way the person to whom such payment should be made.

In this state of facts, you require my opinion upon the question, whether the account of Mr. Medary for printing done under the resolution of the senate can be audited and allowed whenever it may be presented.

After the most careful consideration of this question,

State Printing.

I am of the opinion that the account should be paid. Mr. Medary has been employed by the senate to execute the printing of that body and under that employment he has performed the work, and undoubtedly should be paid for it unless the senate has exceeded its constitutional power in so employing him.

I am not able to see any such excess of power. In respect of its printing or the appointment of a person to execute it, each house of the General Assembly is independent of the other. It has been supposed by some that this independent power, so far as the matter of printing is concerned, only extends to the printing by each house of the journal of its own proceedings, as provided for in the ninth section of the first article of the constitution. I apprehend that section was not intended to limit the power of each house of causing to be printed any matter or document it might see proper to print, but to make it an absolute duty, not merely a thing discretionary, that the journal of its proceedings should be printed.

The eleventh section of the same article of the constitution gives to each house all powers "necessary for a branch of the legislature of a free and independent state." The right of each branch to print and publish its reports, resolutions and other proceedings, independent of any control of the other branch would seem to be a most necessary power.

It has been supposed by some that the existing contract, entered into with Messrs. Scott and Philips under the provisions of law, divested the senate of this constitutional right and that the resolution of the senate, the necessary effect of which was to take part of the public printing from those contractors, was void, on the ground that it impaired the obligation of their contracts.

If we admit that each branch has an independent right to print and publish its own proceedings, resolutions, reports and memorials, I do not see upon what ground the exercise of this right can be denied to the senate of December, 1846. That senate possessed all the powers that any senate has

possessed since the foramtion of the constitution. Its legitimate powers could not be abrogated by any law which had been passed by a prior legislature. This is too clear for argument.

Then as to the idea that the resolution is void because it impairs the obligation of a contract. The constitutional prohibition is that no State shall pass a law impairing the obligation of contracts.

It would be difficult to maintain, that this resolution passed by one branch of the law-making authorities of the State, can be considered a law within the meaning of the constitution. But, besides that, there is nothing in the resolution, even if it had all the characteristics of a law of the State, that violates the obligation of any contract, in the sense in which those terms are used in the constitution. The resolution does not refer to any contract, but simply appoints a person to execute the printing of the senate. The effect of this undoubtedly was to take so much of the printing from the regular contractors and to prevent those contractors from performing that part of their contract. This undoubtedly was a breach of their contract, but not at all a violation of its obligation. That contract, so far as its obligation is concerned, remains unimpaired by any legislation. The contractors suffer no loss or should suffer none in consequence of being prevented in this way from performing a part of their contract. This act of the senate in withdrawing this part of the public printing from them, furnished a valid excuse for the non-performance of the work and a valid claim for full indemnity for any damages they may have sustained, extending perhaps to the reasonable profits they would have made upon performing the work. The obligation of the contract in this particular, is, to be paid for the work they may perform, and, in case the other contracting party chooses to stop this work or give it to another, to be paid a full indemnity, and this obligation is in no way impaired by the resolution of the senate. The question would have been the same if both branches of the legislature had

passed the resolution, giving the printing to Mr. Medary instead of the regular contractors.

Such a resolution would not have been unconstitutional. It would have been nothing more than the exercise of an acknowledged right on the part of the employer to put an end to the performance of a contract for services.

I am, therefore, of opinion that the account of Mr. Medary must be paid notwithstanding the loss which the State may suffer, in providing a just indemnity for the regular contractors, and by departing from the economical and wise policy of giving the public printing to the lowest responsible bidder rather than to a favored individual.

Yours respectfully,

HENRY STANBERY.

John Woods, Esq., Auditor of State.

TAX LAW OF 1846; THEOLOGICAL SEMINARY; LISTING OF LANDS.

Attorney General's Office,
Columbus, May 3, 1847.

SIR:—In answer to your inquiries as to the listing of the lands belonging to the Theological Seminary of the Protestant Episcopal Church for the diocese of Ohio, I have to say:

1st. As to such of the lands as are held under lease from the society. These are to be listed as the property of the lessee or lessees, and are to be valued at such price as the assessor believes could be obtained at private sale for such leasehold estate, excluding the value of crops growing thereon. The meaning of this is understood to be, that the value of such leasehold, for the purpose of taxation, is so much as could be obtained, by the lessee for the residue of the term over and above the rents to be paid. If, therefore, the rent is equal to, or greater than the value of the lease, there is nothing for taxation.

2d. As to the rents payable to the Seminary, if they are appropriated solely to sustaining the institution, and do

not exceed in amount the limit of income prescribed in the charter, they are not taxable.

3d. As to the other lands belonging to the society. The Theological Seminary is a literary society of a public character. By the third clause of the third section of the tax law of March 2, 1846, the buildings belonging to such a society "together with the land actually occupied" by the society, not leased or otherwise used with a view to a profit, are not subject to taxation. You do not state the facts in regard to the quantity and occupantion of the lands, fully enough, to enable me to say whether they come within the exemption.

If, however, the unimproved lands should be included in the lease or leases of the improved lands, then they will be listed by the lessee according to the rule for valuation above stated.

Respectfully yours,
HENRY STANBERY.

M. A. C. Wing, Esq., Theological Seminary, Gambier, Ohio.

NEWLY PLATTED LOTS; ASSESSOR RELISTING.

Attorney General's Office,
Columbus, May 6, 1847.

SIR:—It appears from the statement contained in your letter of the 5th instant, that a tract or lot of ten acres of land adjoining the city of Columbus, has been subdivided into 56 inlots since the assessment and listing made by the district assessor for the year 1846, and that the plat has been duly acknowledged and recorded. The question submitted for my opinion is whether the township assessor is authorized or required to relist and revalue these 56 lots as separate parcels.

I am of opinion that he is required to do so. The ninth section of the act of March 14, 1836 (Swan's Collated Stat. 909), requires the assessor annually between the 1st of March and the 25th of May to take a list of all inlots and outlots in any town or village, which may have been laid out

agreeably to law, subsequent to taking the former lists in the county. The assessor referred to in this law was the county assessor, but by the act of March 20, 1841, creating the office of township assessor, that officer was required to perform the duties required by law of county assessor.

I do not think that this part of the duty of township assessors, that is, the duty to take a list of inlots laid out since the last assessment, is changed or repealed by the tax laws of 1846 and 1847. The township assessor in whose district this ten acres is situate, will therefore provide himself with the plat of these lots, and return a list and valuation of each lot, in the name or names of the persons in whose name the ten acres now stand on the duplicate, and in making this valuation he is to be governed by the same rules that are prescribed for the valuation of real estate, without reference to the existing valuation of the ten acres.

Yours respectfully,

HENRY STANBERY.

The County Auditor of Franklin County, Columbus, Ohio.

LESSEES FROM STATE AND THEIR ASSIGNEES.

Attorney General's Office,
Columbus, May 19, 1847.

DEAR SIR:—Yours of the 18th instant is received. As to the question you proposed, whether assignees of lessees from the State are liable for rent accrued prior to the assignment, I am of the opinion that they are not, but that their liability in this respect is only for such rent as may accrue after the assignment.

Yours respectfully,

HENRY STANBERY.

Jno. W. Smith, Esq., Hebron, Ohio.

TAX LAW OF 1846; CERTIFICATES OF CANAL STOCK.

Attorney General's Office,
Columbus, May 24, 1847.

Chas. C. Convers, Esq:

MY DEAR SIR:—In consequence of absence from the city, I did not receive yours of the 20th instant until this morning.

I have given as careful a consideration as the time would allow, to the question submitted by you, and have arrived at the conclusion that your certificates of canal stock are taxable.

The key to our tax law of March 2, 1846, is found in the chapter of "definitions." All *credits* of persons residing in this State are made taxable and this term is so defined as to include among other things every claim for money and all money invested in property of any kind which is secured by deed, mortgage or otherwise.

You hold a claim or investment secured in the first place by a pledge on the part of Indiana of certain canal lands, and the tolls and revenues of the Wabash and Erie Canal from the Ohio state line to Evansville. I take this to come within the definition of a credit as used in our tax law. The condition attached to this pledge of raising a fund for the completion of the canal does not seem to me to change the question. It is in the nature of repairs made by the mortgagee and is to be reimbursed from the pledge. So that even if you have no other security but the pledge of the canal and the canal lands, for your certificate, the claim or credit would be taxable. I have endeavored to find the acts of the Indiana legislature which you refer to, but have only found the act of January 10, 1846, entitled, "An act to provide for the funded debt of the Wabash and Erie Canal to Evansville." The act is a very long one and contains many intricate and perplexed provisions, but according to my understanding of it, Mr. Sturges is mistaken in supposing that the State of Indiana "is in no way liable for the payment of any part of said canal stock either of the principal or interest."

It appears to me from a hasty perusal of this act that

the state is to continue liable for the payment of the *principal* of the bonds surrendered, and is only relieved from the payment of half the interest on those bonds. It may be that the act of last winter, which is referred to by Mr. Sturges, contains a provision releasing the State from half the princopal of thes urrenderd bonds, but as I do not think it necessary that the State is to continue liable for the payment of the *principal* of the State, in order to make it taxable, it is not material to ascertain how the fact is.

In fixing the value of this stock for taxation, the safe standard to adopt is its market value if any has been established; if not, then you are to list such portion of it, as you believe will be received, or in other words, you are to list according to your own opinion of its value.

Very truly yours,

HENRY STANBERY.

ASSESSOR'S CENSUS RETURN; DUTY OF CLERK WHEN SAME DELAYED.

Attorney General's Office,
Columbus, June 5, 1847.

SIR:—Yours of the 26th ult. is received.

I am of opinion that the assessor's return of the census of white male inhabitants above the age of 21 years, although made after the 25th of May, ought to be received by the clerk of the Common Pleas, and that the clerk is bound to receive it, though made after that day, and act upon it in the apportionment of jurors and to make return of it to the speaker of the senate.

The provisions of the statute (Sec. 10 of the act of March 20, 1841, Swan's Stat. 1016) fixing the 25th of May as the day by which the assessor is to make his return to the clerk are directory to the assessor and not essential to the validity of the return.

If the delay in making the return by the 25th of May

has arisen from any neglect on the part of the assessor, it is made your duty to sue him for the penalty prvided in the third section of the act of January 7, 10, 1827. See Swan's Collated Stat. 201, and Vol. 42 Gen'l Laws, page 3, sec. 4.

Very respectfully,

HENRY STANBERY.

Abel F. Parker, Esq., Prosecuting Attorney Hancock County, Findlay, Ohio.

MORRIS LEELY CANAL.

Attorney General's Office,
Columbus, July 16, 1847.

GENTLEMEN:—I have considered the questions of a legal nature, which arise under the act of the last General Assembly entitled, "An act to authorize the board of public works to abate a nuisance in the city of Dayton."

By the provisions of this act, the board of public works and the attorney general are required to investigate various matters touching a canal passing through a part of the city of Dayton, usually known as the Morris Leely Canal.

So much of the investigation as leads into questions involving matters of law, arises upon the first, second, fourth and eighth clauses of the first section of the act. Slightly changing the order in which these clauses are stated in the act, I shall consider:

1st. What title the State has to this work and the land upon which it is made.

A statemnt of the facts in relation to the construction of this canal is contained in the case of Morris Leely vs. The State, reported in 11 Ohio Reports, 501, and in the 12 Ohio Rep. 496.

It appears from that case that in January, 1829, Leely made a proposition to the board of canal commissioners to sell the State a site in the town of Dayton, for the use of the water power passing from the feeder into he canal below, or

to lease the use of the water from the State at a stated rent.

The board on the 15th of January, 1839, in answer to this proposition agreed to purchase of Leely one or two acres of ground to be selected by the acting commissioner, at the rate of $500 per acre, provided Leely and others interested with him "shall make a cut from the canal and upon the same level, up to a convenient point for the use of the water on Leely's ground, for the free flow of the tail race water into the canal."

In accordance with this proposition and its acceptance, two acres of ground situated on the feeder, were conveyed to the State by W. Lodwick, on the 26th of May, 1829, for the consideration of $1,000.

Leely proceeded to construct the cut, which was nearly completed, when an injunction was obtained by Cooper's heirs to prevent the agents of the State from abstracting water from the feeder and further excavations of the proposed cut were abandoned.

Under a special act of the General Assembly Leely filed his bill in chancery against the State claiming compensation for all damages sustained by him in the construction of this work in addition to the sum of $5,000 which had been granted to him by the General Assembly at the session of 1833-34. The court were of opinion that Leely had an equitable right to compensation and allowed him the further sum of $15,215.40. In this allowance is included $4,488.80, the estimated value of the land covered by the canal or cut so made by Leely, and the towing path, in the year 1829, and interest upon such estimated value from that date.

It appears from the foregoing statement that the State has paid Mr. Leely the sum of $20,215.40 on account of this work, which, besides the value of all the land covered by it, includes the total cost of its construction, and an allowance to Mr. Leely for his services in superintending the work.

Not withstanding all this, I am not able to find that the State has acquired title to any part of the land or to the cut or channel.

From other sources of information than the case above referred to, and principally from the records in the recorder's office at Dayton, it appears that the title to the land occupied by this work was not vested in Mr. Leely, so as to pass to the State in virtue of the payment of the $4,488.80 which was made to Leely, but that it is either owned by other persons or has been by those other owners dedicated to public uses.

2d. Whether the State is legally or equitably bound to abate the nuisance, if it be a nuisance.

Although the State has been made to pay for its construction, I am not able to see any ground upon which the State can be called upon to abate it. This work was altogether a matter of private enterprise, entered upon by the owners of the lots through which it was to be cut, for purposes of speculation. The State was no further connected with it, than it was made a condition in the purchase of the two acres of Leely that he and his associates should cut the canal, that it might be used as a race for the discharge of water. There was no appropriation of the ground covered by the canal, by the agents of the State, nor any grant or authority by the State for its construction. The owners of the land dug the canal in such form and dimensions as suited their own views, in expectation of a large supply of water from the feeder, but without any contract on the part of the State to furnish the water. This expectation has been disappointed, not by a refusal of the State agents to furnish the water, but from the interference of third persons. Nothing has been done or omitted by the State or its agents to make the State in any way responsible for this work.

3d. Whether there be any contract with Ebenezer Thresher or the Cooper estate, relative to the water power, or growing out of the rent of water power, or of the lands for the use of such power.

The only contract in which the State is concerned is in the form of a lease dated October 10,1837, in which the State by T. Bates, its acting commissioner, has leased to

Enos B. Potter, the two acres of land conveyed to the State by Lodwick, for the term of 30 years from the 1st of October, 1837, at the rent of $90 per year. It is said that the interest of Potter in this lease is now vested in Ebenezer Thresher. A saw mill is erected on the two acres, which is operated by water taken from the feeder, under a lease of the water from Letitia C. Cooper to said Potter. This water passes from the saw mill into the canal excavated by Leely and his associates.

4th. Whether, if the State shut the water out of the work, there is any contract violated, by which the State may be equitably liable for damages.

The only contract made by the State is, as has been stated, a lease of *the land* to Potter. The only thing demised is the land, but in making the lease the acting commissioner used one of the printed forms drafted for the leasing of water power and has carelessly omited to strike out certain provisions which have reference to the use of water, such as the usual covenants of the lessee to keep the head and tail race in repair so as to secure the regular flow of water from the upper to the lower levels, and the usual provisions for a deduction of rent, if the lessee should be deprived of the use of the water "hereby leased" for more than one month in any one year. Looking to the express terms of the demise, which are confined to the land alone, and to the fact that the lessee had leased the use of the water from another lessor, it is quite apparent that all the provisions as to the races and the use of the water, were left in the printed lease by accident. If, however, the State by its agents should shut out this water, so as to deprive the lessee of its use, a very serious question would arise upon a claim by the lessee for deduction of rent. I am of opinion that a court of equity would, on a bill filed by the State, reform the lease in the particular of the provisions as to the use of water, so as to make it, what it not doubt was intended to be, simply a lease of the land.

But aside from the questions arising upon the terms of the lease, it is highly probable that the two acres were

leased, with the view of occupying them as a site for the use of the water to be leased of Mrs. Cooper, and that the rent of $90 per year was fixed in reference to such contemplated use, taking it for granted that the State is not bound by any express covenants to maintain the lessee in the enjoyment of this water, it would seem to be a harsh proceeding on the part of the State to deprive him of the use of the water, and of the use of the land in the mode which was in contemplation when the rent was fixed.

Very respectfully,

HENRY STANBERY.

The Board of Public Works, Columbus, Ohio.

TAX LAW OF 1846; MANUFACTURERS; MACHINERY.

Attorney General's Office,
Columbus, July 14, 1847.

SIR:—I have considered the question submitted on the application of Messrs. Orth and Wallace and others.

It appears that the applicants were in the year 1840 manufacturers of woolen goods, cotton yarn and paper in the county of Jefferson, and they complain that the personal property and machinery employed by them in their several manufacturing establishments have been improperly assessed with taxes for the years 1841-42-43-44.

Accompanying the affidavit are various affidavits amongst others of the appraisers for the township of Steubenville in the year 1840, who state that in appraising the woolen manufactories of Messrs. Orth and Wallace and C. C. Wolcott, the machinery in the manufactories, amounting in value to several thousand dollars was included in the appraisement. Other affidavits show that in the manufactory of Orth and Wallace at the time of the appraisement there were five sets of carding machines, valued at about $1,800 per set.

There is nothing in the application or in the affidavits

accompanying it, to show what other machinery besides the carding machines, was valued by the appraisers, or in what manner the machinery was placed in or attached to the buildings or the freehold.

If this were strictly a question of fixtures it would be essential to have a more satisfactory and full statement, showing exactly the nature and mode of the attachment of the machinery. I do not think the question of the lawfulness of this assessment depends upon the fact whether the machinery is technically a part of the realty or not.

So far as the carding machines are concerned, they are made taxable as such whether affixed to the freehold or not.

(See the 4th clause of the fifth section of the act of March 13, 1840, Swan's Stat. 905.)

As to the other machinery in those manufactories, if it were a mere question of fixtures, the rule is that such machines as are in any way attached to the freehold so as not to be detached without injuring the building or the other part of the freehold to which they are fastened, are to be considered as part of the realty.

This general rule is subject to many exceptions and is greatly modified in its application between vendor and vendee, heir and executor, landlord and tenant.

The question under consideration is in reference to liability to taxation. The building and machinery in it belong to the same owner, and no question arises between a claimant of the realty and a claimant of the personalty.

The law establishing the tax, declares, among other descriptions of manufactories of cloth and cotton yarns, shall be valued for taxation, at the true value thereof in money, taking into consideration their advantages of site, location *and actual amount of capital invested* and employed.

Obviously, something more than the land and the mere building is to be taken into the estimate, and I am very clear that the object of the law would be entirely disappointed by excluding from the valuation the entire machinery in which more capital may be invested than in the build-

ing itself, and which is the very thing which gives the name and character to the manufactory.

I am, therefore, of opinion that the carding machines and other machinery in the manufactories of these applicants were properly included in the assessment.

Very respectfully,

HENRY STANBERY.

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

BANK LAW OF 1845; APPLICATIONS; PREFERENCE.

Attorney General's Office,
Columbus, July 28, 1847.

GENTLEMEN:—In relation to the question submitted for my opinion on the application for independent banking companies at Tiffin, Seneca County, I understand the facts to be:

That three of the banks to which the fourth district embracing Seneca County is entitled have already been established, leaving only one to be established for that district. That two applications are before you from Tiffin, showing regular certificates for the formation of independent banking companies.

One to be called the Seneca County bank of Tiffin is an association formed on the 12th of July, 1847. The certificate of association was acknowledged on the same day, recorded in the recorder's office of Seneca County on the 15th of July, 1847, and by an indorsement thereon appears to have been filed on the same day. The capital of this company is $50,000 and all the shareholders except one appear to be residents of Seneca County.

The other association to be called the Bank of Tiffin was formed on the 20th of July, 1847, and the certificate of association appears to have been acknowledged and recorded on the same day. Its capital is $100,000 and all the shareholders appear to be residents of Seneca County.

I am further advised that you have appointed an agent

to examine the condition of the first named association and that the report of the agent has been received, but no further action has been had, and that no agent has as yet been appointed to examine the second named association.

In this state of facts, my opinion is required upon the question, whether a legal preference exists in favor of the association making the first application.

After a careful examination of the bank law February 24, 1845, and the amendments thereto, I find nothing which secures a preference in consequence of priority in time of association or application.

The eleventh section of the act referred to provides certain rules for determining a preference in cases where there are more applications than can be granted. Mere priority in time of application and association, is not one of the rules so established.

The appointment of the agent, and his report, do not in my opinion, secure any preference. No action of your board has as yet been had upon that report, nor any certificate been given to the governor. Indeed, the report of the agent is only a means to enable you to make a decision.

By the letter of the eleventh section, all applications are in time if made before the commencement of the business of banking in any district or county, but it would seem, so far as your board is concerned, that any application would be too late after you had certified to the governor.

Applying to these two associations the rules established for determining a preference, it would seem, all other things being equal, that the application for the association *last* formed is the one to be adopted as its capital is the largest and all its stock taken by citizens of Seneca County.

Very respectfully, etc.,

HENRY STANBERY.

The Auditor, Treasurer and Secretary of State, Commissioners of Banks, Columbus, Ohio.

Tax Law; False Swearing; Perjury—Fugitives from Justice; Selling Land Without Title.

TAX LAW; FALSE SWEARING; PERJURY.

Attorney General's Office,
Columbus, July 30, 1847.

Yours of the 29th instant is received.

I am of opinion that a person swearing falsely before the assessor under the eighth and thirty-first sections of the tax law of 1846, may be prosecuted for perjury. The terms of the ninth section of the crimes act embrace the offence of taking a false oath before any person "having authority by the laws of this State to administer an oath." The expression "having authority" must be understood as of the time when the oath is administered and ought not to be confined to such offences and persons as had authority at the date of the passage of the crimes act. The authority to administer an oath is given to the assessors in the clearest language.

Very respectfully,
HENRY STANBERY.

I. Durbin Ward, Presecuting Attorney, Lebanon, Ohio.

FUGITIVES FROM JUSTICE; SELLING LAND WITHOUT TITLE.

Attorney General's Office,
Columbus, July 31, 1847.

SIR:—I have examined the indictment found by the grand jury of Meigs County, Ohio, against David Jacques, upon which the appliaction is made to you for a requisition on the governor of Virginia for the arrest of Jacques as a fugitive from justice.

The indictment does not, in my opinion, charge Jacques with the commission of any crime known to the laws of

Ohio. The substance of the charge is that he conveyed to one Holt a tract of land in Virginia, by a deed which he executed as attorney for one Claiboume without any title to the land or any authority from Claiboume to act as his attorney. I suppose this indictment was founded on the thirty-third section of the crimes act which punishes the person who sells or conveys land without having title to the same either in law or equity by descent, devise or evidence.

As the case is charged in the indictment, Jacques does not stand as the vendor of the land, or as assuming to sell or convey it as owner or as pretending to any title in himself. He has simply assumed to be agent for the owner, and to sell and convey such title as the owner or his principal might have. This false assumption of agency and the sale of land in that character is a very different thing from a sale in the character of owner. The one is a false assumption of agency, the other a false assumption of ownership.

I am, therefore, of opinion that the case does not authorize a demand or requisition upon the executive of Virginia. Very respectfully yours,

HENRY STANBERY.

His Excellency, Wm. Bebb, Columbus.

FUGITIVES FROM JUSTICE; FALSE PRETENSES.

Attorney General's Office,
Columbus, August 4, 1847.

SIR:—I do not think a proper case is made for a requisition upon the governor of Michigan for the surrender of Cyrus and Walter Stone as fugitives from justice.

The indictment which appears to have been found at the June term, 1847, of Lucas County Common Pleas, charges them with having on the 6th of January, 1842, ob-

tained a pair of horses in exchange for a note of hand signed by one Gilbert for the sum of $150 dated July 5, 1839, and payable January 1, 1841, by representing that the note was good and worth its face and that Gilbert was able to pay it, which representations were false.

According to the day alleged for the offence, it was barred by the statute several years before the indictment was found. And, although the day or time stated for an offence is not in general material and need not be proved as laid, yet it is not so when a prosecution is limited, for there a day should be named which is within the time and not barred by the statute of limitations.

Although as a general rule, the sufficiency of the indictment may not be a proper subject for the consideration of the executive upon an application like this, yet it ought to appear that the indictment is for a subsisting crime or offence.

There is also another ground on which I think your excellency should refuse a requisition. What is claimed or alleged as a false pretence appears to be nothing more than a false affirmation of the goodness or value of the note. The note itself is not alleged to be false. Every false representation in a contract is not a false pretence which would make the party liable criminally and I incline to think that no offence is charged in the indictment.

Very respectfully,

HENRY STANBERY.

His Excellency Wm. Bebb, Columbus, Ohio.

Forfeited Recognizance for Forgery Belongs to the County; County Commissioners May Remit Same.

FORFEITED RECOGNIZANCE FOR FORGERY BELONGS TO THE COUNTY; COUNTY COMMISSIONERS MAY REMIT SAME.

Attorney General's Office,
Columbus, August 11, 1847.

SIR:—I have found considerable difficulty in making up an opinion upon the question submitted in your letter of the 7th of June, and have delayed an answer to the auditor of state.

After a careful examination of our statute, I have not been able to find any provision in relation to the money due, or arising upon, the forfeiture of a recognizance in a penitentiary offence. There are as you are aware many statutory provisions as to the disposition to be made of money arising on fines, forfeitures, etc., but none as to such recognizances. It is impossible to say from our statutes whether the money is to go to the county or the State. The uniform practice has been to consider it as belonging to the county and this practice has been acquiesced in by the officers of the State here.

Besides it would seem that the money ought to go to the county, inasmuch as all costs in criminal prosecutions, except in cases of conviction for penitentiary offences, are paid by the county.

Taking it then that the money due on this recognizance is a debt due to the county, I think it quite clear that the county commissioners have a right to remit in whole or in part, to control the execution in the hands of the sheriff. See the 41st Vol. Stat. p. 85.

Yours respectfully,
HENRY STANBERY.

A. F. Parker, Esq., Prosecuting Attorney Hancock County.

MILITIA.

Attorney General's Office,
Columbus, August 18, 1847.

SIR:—In answer to yours of the 31st ult., I am of the opinion that under the existing laws regulating the militia, the commissioned officers of the volunteer militia are alone authorized to vote for a brigadier general. In so far as organization is concerned, the militia law of March, 1844, quite takes the place of the law of March, 1837, and substitutes the volunteer system for the old militia system.

The militia at large no longer exists as an organized body, or in the form of companies. It is true that by the thirty-seventh section of the act of 1844 the commissioned officers of the militia at large are permitted to hold their commissions for five years thereafter, and may at their option attend the brigade master. This privilege is merely with a view to exemption from military duty in time of peace, and from the payment of commutation money and was not intended to secure any other right such as that of voting for the brigadier general. But what makes it quite clear that such officers are not so entitled to vote is the latter clause of the tenth section of the act of 1844 which provides that the generals of brigades shall be elected by the commissioned officers of the volunteer troops thereof, upon the order of the proper general of division.

2d. Whether staff officers of volunteer corps not yet commissioned, yet holding by certificate, have the right to vote for brigadier general.

The tenth section of the act of March 4, 1837, provides in reference to staff officers, that the certificate of appointment an oath of office, shall authorize them to perform all the duties of their office until a commission is procured. The attendance upon elections may be considered in one sense a matter of official duty, but yet I cannot think that such officers are entitled to vote.

The provisions of the act of 1837 and 1844 are, the election shall be by the *commissioned officers,* and what is yet more stringent is the same provision in the constitution.

Yours respectfully,

HENRY STANBERY.

Brigadier General Benjamin Neff, Lower Sandusky, Ohio.

SHERIFF; UNEXPIRED TERM; CORONER.

Attorney General's Office,
Columbus, August 19, 1847.

SIR:—Yours of the 17th is received. It appears from the statement of facts that the sheriff of Pickaway elected in the fall of 1846 has since deceased, and that the coroner is now discharging the duties of sheriff, and my opinion is requested upon the question, whether the coroner is to act as sheriff until the fall of 1848, or whether another sheriff should be elected this fall, at the general election.

Upon a careful examination of the constitution, and the various statutory provisions in relation to elections, and the office of sheriff, I am of opinion that the coroner must hold the office for the unexpired term of the deceased sheriff, and that consequently no other sheriff can in the meantime be elected unless upon the order of the associate judges.

With regard to most other county officers, such as the auditor, treasurer and recorder, in case of a vacancy, a person is appointed to discharge the duties until the next annual election, and so too, upon a vacancy in the office of sheriff and coroner, the Common Pleas of a county appoints a person to act as sheriff until the next annual election.

There is no such provision in reference to the next annual election when the office of sheriff devolves on the coroner. The coroner holds the office in a different capacity from the persons appointed to fill vacancies in the other county offices. He holds in virtue of his office by succes-

sion, not by appointment. The law designates him as the person to fill the office and he is, for the unexpired term, to all intents and purposes the sheriff, just as fully as the vice president of the United States becomes the president in case of the death of the president.

Very respectfully,
HENRY STANBERY.

Jas. Green, Esq., Prosecuting Attorney, Circleville, Ohio.

PROSECUTION; LIMITATION STATUTE; REQUISITION OF GOVERNOR.

Attorney General's Office,
Columbus, August 27, 1847.

SIR:—Your several letters of August 20th and 21st are received.

On reference to your letter of the 24th of May last, I do not find that you notify me that the Stickney cases would stand for judgment at the then next term. I am not aware, however, that we could have made any defense.

As to the indictment against C. & W. Stone. Having reviewed the opinion you referred to and considered your suggestions, I see no ground to change that opinion.

What you say as to the statute of limitations is all very true when applied to a civil case, but not to a criminal prosecution. In a criminal case the statute need not be specially pleaded, nor is there any exception or saving for or against persons absent from the State. The indictment alleges the offence to have been committed on the 6th of January, 1842. The act of March 8, 1831, for the punishment, etc., provides that no one shall be indicted or prosecuted for any offences against the provisions of that act (except for larceny) unless such indictment be found, or such prosecutions commenced within one year from the time such offence was committed. (See Swan's Collated Stat. 250, Sec. 43 (100.)

The indictment in this case was found in your June term, 1847, more than four years after the offence was

barred. As the case appears, there is no subsisting crime or offence, and I therefore thought it very proper that the governor should refuse a requisition. You will see by reference to 1 Chit. Crim. law, 222, that the day stated in the indictment for the commission of an offence, where the time for the prosecution is limited, should be within the limit. I take it from your leter that the day stated is the true day. If that be so the case is hopeless, for if, upon a new indictment, the day should be laid (contrary to the fact) within one year from the time of finding the indictment you would inevitably fail at the trial, upon proof as to the true day.

Yours very respectfully,

HENRY STANBERY.

Thos. Dunlap, Esq., Prosecuting Attorney, Lucas County, Ohio.

MILITIA.

Attorney General's Office,
Columbus, August 30, 1847.

SIR:—I have taken the first opportunity since the receipt of yours of the 25th instant to examine the questions submitted for my opinion.

The act of last winter relating to the militia places the system upon the same footing, so far as the State is concerned in time of war as in time of peace. All exemptions from training and commutation, which are recognized by the act of 1844, and therein limited to a time of peace, are by force of the act of 1847 to obtain in a time of war.

Yours respectfully,

HENRY STANBERY.

N. A. Guille, Esq., Prosecuting Attorney, Zanesville, Ohio.

MILITIA.

Attorney General's Office,
Columbus, September 6, 1847.

Wm. Kendall, Esq., Township Assessor, etc., Portsmouth, Ohio:

DEAR SIR:—Yours of the 31st of August has been received, and in answer I have to say that by the existing law it is your duty to collect the 50 cents to be paid as a commutation for military duty.

Yours respectfully,
HENRY STANBERY.

MILITIA.

Attorney General's Office,
Columbus, September 7, 1847.

H. A. Stedger, Esq., Carrollton, Ohio:

SIR:—Yours of the 4th instant is received. In reply I have to say that in so far as organiaztion and active duty are concerned, the militia law of March, 1844, supersedes the law of March, 1837. Some difficulty was felt prior to the law of last winter in consequence of the limitation to a time of peace, contained in the law of March, 1844, but that has been removed by the amendatory act of last session striking out that limitation. At the present time all militia training is dispensed with, except that of volunteer militia.

Very respectfully yours, etc.,
HENRY STANBERY.

HABEAS CORPUS; FEES.

Attorney General's Office,
Columbus, September 8, 1847.

GENTLEMEN:—I am of opinion that upon habeas corpus in *a civil case* the fees of the officers may be required in

advance, even where the applicant for the writ is a resident of the county.

The eleventh section of the act in relation to the writ of habeas corpus passed February 8, 1847, Ohio Stat., Vol. 45, pages 47-48, clearly contemplates such payment in advance, in all case except where the applicant is confined under color of proceedings in a criminal case. I do not think that the provisions of the third section of the act to regulate the practice of the judicial courts (Swan's Collated Stat., 651), and which secures to a person residing in the county a right to have a writ as a matter of course, without prepayment of, or security for, costs, apply to the writ of habeas corpus. Very respectfully yours,

HENRY STANBERY.

I. M. Dana and William Golden, Athens, Ohio.

CAPITAL CASES; JURISDICTION OF SUPREME COURT.

Attorney General's Office,
Columbus, September 9, 1847.

SIR:—I am clearly of opinion that the fifth section of the act directing the mode of trial in criminal cases, which secures to a person indicted for a capital offence the right to a trial in the Supreme Court, is not repealed by the ninth section of the act to regulate the judicial courts passed March 12, 1846.

The last mentioned act expressly repeals the 2d section of the act to organize the judicial courts passed February 7, 1821, which section declares that the Supreme Court shall have original jurisdiction of all capital offences. If such jurisdiction depended solely on that section, there might be some question, but as it is given by the constitution, it of course, is in no way affected by the repealing act of March 12, 1846.

The fifth section of the act above referred to, securing

the right of trial in the Supreme Court, is not expressly repealed nor is it repealed by implication as inconsistent &with any provisions of tlfe repealing act. The object of the repealing act, so far as the jurisdiction of the Supreme Court is concerned, is limited altogether to civil jurisdiction. There is not a word in the entire act that has any reference to criminal jurisdiction, consequently no other act on that subject can be said to be inconsistent with its provisions.

Very respectfully yours,
HENRY STANBERY.

L. B. Otis, Esq., Prosecuting Attorney, Lower Sandusky, Ohio.

MILITIA; COMMUTATION.

Attorney General's Office,
Columbus, September 9, 1847.

SIR:—Yours of the 7th instant has been received. Under the existing laws regualting the militia, all training, except of the volunteer militia, is dispensed with, and the commutation of 50 cents or one day's labor on the roads, is payable, and ought to be enforced by your township assessor.

Yours respectfully,
HENRY STANBERY.

Brigadier General Wm. J. Elliott, Hamilton, Ohio.

QUALIFICATIONS FOR REPRESENTATIVE.

Attorney General's Office,
Columbus, September 9, 1847.

SIR:—Yours of the 6th instant has been received. I am of opinion that a person who, at the time of the election, is under 25, but attains that age before the sitting of the legislature, is eligible to a seat in the house of representatives of Ohio.

The language of our constitution is that no person shall be a representative who has not attained the age of 25 years, etc. I think that this language is equivalent to the provision in the English law, that no person shall sit or vote in parliament, who is not 21 years of age. If the person elected has attained the age of qualification for the office at the time he is to discharge its duties, he is, I think, well entitled to his seat.

There is a marked distinction between this phraseology and that which is used in other sections of the constitution. Take as an example the twenty-sixth section of the first article of the constitution, which declares that no judge, secretary of state, etc., shall be eligible as a candidate for, or have a seat in the General Assembly. Here the disqualification attaches as well to the eligibility as to the exercise of the office, and for obvious reasons, among which may be mentioned the apprehension that official influence might be brought to bear upon the electors.

The twenty-eighth section of the same article furnishes another example of the distinction between a disability which goes to the eligibility of the person, and one which only attaches to the exercise of the office. It provides that no public defaulter shall have a seat in either house of the General Assembly until he shall have paid into the treasury all sums for which he may be liable. It cannot be denied that a public defaulter may be elected to the office of representative, and that if between the date of his election and

Tax Law; Merchants; School Sec. 16 Taxable.

the taking of his seat, he pays off his defalaction, he is well entitled to hold the office.

It seems to me that the reason of the thing as well as the phraseology of the section favors this construction. The age of 25 is fixed as an age for qualification, but of qualification for what? Certainly not for being a candidate, but for being a representative, not for canvassing for the office, but for performing its duties. If that age is attained before the duties are to be performed, I can see no ground of objection.

Very respectfully yours,

HENRY STANBERY.

Hasnson S. Perin, Esq., Georgetown, Ohio.

TAX LAW; MERCHANTS; SCHOOL SEC. 16 TAXABLE.

Attorney General's Office,
Columbus, September 14, 1847.

SIR:—Yours of the 6th instant was duly received. I have delayed an answer until I could have an opportunity, for consultation with the auditor of state, on the question submitted by you, and find that we concur in opinion.

1st. As to the storeboat, you state that it is to be permanently located at the shore or bank of the Ohio River, and to be used for the sale of merchandise. We think that the proprietor may well be considered a merchant and that his stock is taxable as such. The question of low water mark or jurisdiction ought not to enter into the matter. His business is carried on with the people of Ohio, and for purposes of taxation at least, he is subject to our laws.

2d. We are of opinion that leases of school section No. 16 are now subject to taxation. There is no exemption in

the contract of lease, and the various laws under which they have hitherto been exempted are repealed.

Yours respectfully,
HENRY STANBERY.

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

SURPLUS DIVIDENDS OF BANKS.

Attorney General's Office,
Columbus, September 15, 1847.

SIR:—You are aware that of the banks chartered in 1816 and which ceased on the 1st of January, 1843, several have finally wound up and divided their assets among their stockholders, in some instances dividing to stockholders a surplus beyond the par of the stock. I am not advised that the State has been paid anything on account of such surplus. If not, I think it highly proper that such payment should be required. After a careful examination of the various statutes relating to the State's portion of dividends in the banking companies chartered in 1816, I am of opinion that the State is entitled to 5 per cent. in all dividends beyond the par of the stock.

Very respectfully yours,
HENRY STANBERY.

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

COUNTY TREASURER; COLLECTION OF TAXES; MILEAGE.

Attorney General's Office,
Columbus, September 23, 1847.

SIR:—I am of opinion that no mileage can be charged by the county treasurer or his deputies in the collection of taxes due after the 20th of December unless an actual dis-

tress (or levy) upon the goods of the delinquent has been made.

Very respectfully yours,
HENRY STANBERY.

Adam Peters, Esq, Treasurer Muskingum County, Zanesville, Ohio.

MILITIA LAW.

Attorney General's Office,
Columbus, November 5, 1847.

SIR:—Yours of the 3d instant is received. Under the existing laws regulating the militia, all training except of the volunteer militia, is dispensed with, and the commutation of 50 cents or one day's labor on the road is payable and should be enforced by the township assessors.

Yours respectfully,
HENRY STANBERY.

I. F. Chenoweth, Esq., Township Assessor, Piketon, Ohio.

COUNTY TREASURERS; COMPENSATION.

Attorney General's Office,
Columbus, November 10, 1847.

SIR:—I have considered the question submitted for my opinion in your letter of the 9th instant.

1. I do not think county treasurers are entitled to obtain for their own use any fees or compensation beyond the aggregate sum of $600 per annum, for the performance of any duties prescribed by laws on or before the 27th of January, 1844.

The act passed on that day entitled "an act to reduce the compensation of members of the General Assembly and certain other State and county officers" (Statutes Vol. 42, page 21) provides that the annual salary of a county treas-

urer shall not exceed six hundred dollars exclusive of the expenses of going to and returning from the seat of government to settle with the treasurer of state. And if upon settlement with the county commissioners, it shall be found that the compensation or percentage then allowed to him by law, amounts to more than his annual salary, the excess shall be retained by him in the county treasury and passed to the credit of the county.

Looking to the whole scope of that act as well as to the language of the section as to the county treasurer, it seems to me that the legisalture having in view all the duties then required by law of those officers, fixed the annual salary of $1,600 as the entire compensation for all their services.

2. Subsequent to the passage of the act of the 27th of January, 1844, the legislature has devolved additional duties upon county treasurers in relation to surplus revenue. By the act of February 27, 1846, the board of county fund commissioners which before had the management of this surplus revenue fund, is abolished, and the duties therefore required of that board are to be performed by the county auditor and county treasurer.

The fourth section of this act declares that these county officers shall each be entitled to one-fourth of one per cent. on all this fund collected and paid over to the State treasury, to be retained out of the county's proportion of the interest received, and they are to be allowed no other fees in relation to the fund.

By the act of February 8, 1847, this allowance is increased to one per cent.

Considering that this is a new duty, imposed since the passage of the act limiting the annual compensation to $600, and looking to the very explicit language in which the compensation for this additional service is given, I am of opinion

that it may be retained by county treasurers in all cases, and in addition to the annual salary of $600.

Very respectfully,
HENRY STANBERY.

John Woods, Esq., Auditor of State.

PROSECUTING ATTORNEYS; COMPENSATION.

Attorney General's Office,
Columbus, December 7, 1847.

SIR:—I have received yours of the 2d instant requesting my opinion on the question whether prosecuting attorneys are entitled to 5 per cent. on all fines due and costs collected by him for the State or county, or to any other fee for such services in addition to his annual compensation.

I think it quite clear that no such per centum or other compensation can be retained or charged, in any case, except perhaps upon the collection of costs from persons convicted of crimes punished by imprisonment in the penitentiary.

The 2d section of the act to provide for the election of prosecuting attorneys to prosecute on behalf of the State all complaints, suits and controversies, in which the State may be a party, within the county both in the Supreme Court and the Court of Common Pleas.

The third section provides that the compensation *for the services* of the prosecuting attorney shall be annually fixed by the Court of Common Pleas.

This compensation should be sufficient to cover all his services, and the performance of all the duties prescribed by the preceding section.

I find no provision for special compensation beyond the annual allowance, except in the act in relation to the collection of costs in certain cases (Swan's Stat. 730).

The third section of that act allows the prosecuting attorney to retain 5 per cent. on the amount of costs col-

lected or received by him from persons convicted of penitentiary offences. By the subsequent act of March 4, 1844 (42 Vol. Gen Laws, 30), the duty of collecting such costs devolves upon the clerk of the court, without the intervention of the prosecuting attorney. It impliedly repeals so much of the act of March 7, 1835, as relates to the duty and commission of the prosecuting attorney in relation to costs.

It seems therefore that there is no case in which anything beyond the annual compenastion can be charged or retained by a prosecuting attorney.

Very respectfully yours,

HENRY STANBERY.

W. H. Lockwood, Esq., Prosecuting Attorney, Elyria, Ohio.

QUALIFICATION FOR REPRESENTATIVE.

Attorney General's Office,
Columbus, December 8, 1847.

SIR:—The question submitted by you for my opinion I understand to be, whether a person not twenty-five years of age at the time of his election, but who attains that age before the meeting of the General Assembly, is entitled to a seat as a representative.

The question is not free from difficulty, but on a careful consideration of it, I have heretofore come to the conclusion that a person so elected is entitled to his seat, and on a review of the matter, see no ground to change that opinion.

The language of the constitution is that no person shall be a representative, who shall not have attained the age of twenty-five years.

There is a marked distinction between this phraseology and that which is used in other sections of the constitution. Take, as an example, the twenty-sixth section of the first article, which declares that no judge, secretary of

state, etc., "shall be eligible as a candidate for, or have a seat in, the General Assembly." Here the disqualification attaches as well to eligibility, as to the exercise of the office, and at the same time establishes a distinction between the performance of the duties of office and the mere election to the office.

The twenty-eighth section of the same article furnishes another example of the same distinction. It provides "that no holder of public moneys shall have a seat in either house of the General Assembly until such person shall have accounted for, and paid into the treasury all sums for which he may be accountable or liable." It cannot be denied that a public defaulter may be elected a representative, though not then qualified to take his seat, and that if he pay off his defalcation he becomes qualified.

It seems to me that the reason of the thing strongly favors the construction given to the section, and shows that the difference in language was not accidental.

The age of twenty-five is fixed as an age for *qualification,* but of qualification for what? Certainly not for being a candidate, but for being a representative, not for canvassing for the office, but for performing its duties. If that age is attained before the duties are to be performed, I see no ground for objection.

We are not to forget that in a case of doubt the decision should be in favor of the person elected, or more properly speaking, in favor of his constituents, whose choice has been expressed in his favor. What is said in the case of Barker vs. The People, 3 Cowen's Rep. 703, on the subject of eligibility to office, strongly fortifies this view. The chancellor, giving the opinion of the court in that case, says: "The constitution giving the right of election and the right of appointment, these rights consisting essentially, in the freedom of choice, and the constitution also declaring that certain persons are not eligible to office, it follows from these powers and provisions, that all persons are eligible. Eligibility to office is not declared as a right or principle by any express

terms of the constitution, but it results as a just deduction from the express powers and provisions of the system. The basis of the system is the absolute liberty of the electors and the appointing authorities to choose and to appoint, any person, who is not made ineligible by the constitution."

Very respectfully yours,

HENRY STANBERY.

The Hon. The Chairman of the Committee on Privileges and Elections, House of Representatives.

COLUMBUS AND SANDUSKY TURNPIKE COMPANY; RELIEF FROM STATE.

Attorney General's Office,
Columbus, December 8, 1847.

To the General Assembly of the State of Ohio:

In conformity with the resolution of the General Assembly, passed February 5, 1847, requiring the attorney general to examine into the facts upon which the stockholders of the Columbus and Sandusky Turnpike Company claim relief from the State, and to report his opinion thereupon, and the reasons for that opinion, I beg leave to submit the following report:

First, as to the facts.

On the 21st of January, 1826 (Vol. 24 Local Laws 66), this company was incorporated with a capital of $100,000, with the privilege of enlarging the same to $200,000, with authority to make a road from Columbus, through the town of Delaware, to Sandusky city.

The seventh section provides that the width of the road shall not exceed one hundred feet "at least eighteen of which shall be made an artificial road, composed of stone, gravel, wood, or other suitable materials well compacted together, in such manner as to secure a firm, substantial and even road, rising in the middle with a gradual arch" to be kept in good repair, and that the extreme grade shall not exceed five degrees.

The eighth section provides that as soon as the road shall be completed, or any part thereof, not less than ten miles in length, the same is to be examined by an agent, to be appointed by the legislature or the governor, and upon his report to the president of the company, that the road or any ten miles thereof is completed agreeably to the act, the company may erect gates, and take the tolls allowed by the act.

The ninth section establishes a rate of tolls, with a proviso that the legislature may, after the expiration of ten years from the completion of the road, alter the rate.

The eleventh section provides that if the company fail to keep the road in good repair for ten days in succession, upon complaint of a justice of the peace, an inquest of three freeholders is to be summoned, who, upon oath, are to examine the road, and if they certify to the justice, it is out of repair, no toll is to be taken for the part out of repair under the penalty of five dollars for every offence, to be recovered for the use of the persons aggrieved.

The fifteenth section requires the company to keep an account of the expense of making and repairing and of all incidental expenses, and an account of the tolls received, and secures to the State, or the counties traversed by the road the right to purchase it, on paying the company a sum equal, with the toll received, to the expenditures, with interest at the rate of 12 per cent. per annum.

The sixteenth section provides that if the company shall not within two years from the passage of the act proceed with the work, or within four years thereafter complete the road according to the meaning of the act, it shall, in either case be lawful for the legislature to resume all the rights, liberties and privileges granted by the act.

The records of the company show that the company was organized and reorganized, the act of incorporation, by articles of association, bearing date on the same day the act was passed, and that prior to the 12th of April, 1827, five hundred and two shares of the stock had been subscribed,

and the company was fully organized by the election of directors.

On the 3d of March, 1827, the United States appropriated to the State of Ohio "for the purpose of aiding the Columbus and Sandusky Turnpike Company in making a road from Columbus to Sandusky City, a quantity of the unsold public land along the line of the road, with a proviso for exemption from toll of the mail stages, or the troops proper of the United States."

By an explanatory act passed April 17, 1828, it is declared that the quantity so granted, shall consist of forty-nine sections. (U. S. Statutes at large, Vol. 4, 242, 263.)

On the 12th of April, 1827, the company passed a resolution accepting this grant of land with the conditions attached to the grant.

It appears from the records of the compnay that the original petition to Congress for the grant of land was at the instance of the stockholders of the company, and that the explanatory act of congress was passed in consequence of a memorial by the company.

On the 12th of February, 1828, the General Assembly passed an act on the subject of this grant (26 Vol. Gen'l Law 74).

The first section declares that the land so granted by Congress shall be for the use and benefit of this company and for the purpose specified in the act of Congress and for no other purpose.

The second section authorizes the company to sell the land for money or labor, to be expended on the road, the amount of the sales to constitute stock to be denominated "land stock" and to be so entered on the books of the company.

The third section provides that the tolls or profits of the road shall be annually divided by dividends to the land stock and the stock of the corporation in just proportions, and as to the tolls upon the travel or transportation of mail stages, troops and property of the United States, an account

shall be kept thereof, the amount shall be divided to the land and company stock in like proportion, and the company shall have the right to take from such tolls divided so much as will pay the company's part of said tolls, and the residue of all the tolls and profits assigned to the land stock shall annually be applied to the improvement of the road.

The fourth section requires an annual report to the legislature from the company of their proceedings and an account of all moneys expended in the construction and repair of the road, and of all tolls received under the provisions of that act.

The sixth section declares that any future legislature may make further provisions to secure the application of the proceeds of said land to the construction of the road and may regulate the rate of tolls prescribed in the charter, whenever the next proceeds of tolls shall equal the individual stock actually paid in, together with six per cent. per annum thereon.

During the year 1827 surveys of the route of the road were made, and in September of that year the northern section from Bucyrus to Sandusky City was, in part, put under contract, and the work was commenced immediately.

On the 12th of February, 1829, a supplementary act was passed by the General Assembly authorizing the company to raise money for the construction of the road by mortgaging not more than 15,000 acres of the land granted by Congress at not less than 60 cents per acre. (Gen. Laws, Vol. 27, 60.)

It does not appear that the company availed itself of this privilege.

On the 10th of May, 1833, Nathan Merriman was appointed by the governor on the application of the company to examine the road, agreeably to the eighth section of the charter.

This agent made two reports to the president of the company. The first bears date October 1, 1833, and certifies that the agent had carefully examined seventy miles of

the road from the Sandusky bay south, and that, in his opinion, the same was completed agreeably to the provisions of the charter. The second report bears date November 25, 1834, and contains a similar certificate as to an additional portion of the road, thirty-six miles south of the foregoing, both reports covering the entire road, 106 miles in length.

On the 3d of March, 1834, an act was passed by the General Assembly for the prevention of injuries to the Columbus and Sandusky turnpike road, and for other purposes. (Gen. Laws, Vol. 32, 45.) This act imposes penalties for injuries to the milestones, toll boards, gates, culverts and bridges of the company, and the sixth section extends the time for finishing the road, then in a course of construction until the 1ts of October, 1835.

O the 12th of January, 1835, a resolution was passed by the General Assembly, which, after reciting that it appeared that the company had already made most of the road, and that a large portion of the lands donated by Congress had been bartered for work on the road at the rate of from 15 to 25 per cent. more than the cash value of the work, and that such success ought to be charged to the land stock, it is resolved that the said lands, sold and unsold, shall be computed at $1.40 per acre, and credited to the State on the books of the company as so much land stock free from all charges to the State. (Local Laws, Vol. 33, 440.)

On the 7th of March, 1842, a resolution was passed directing the prosecuting attorney of Franklin County to file on or before the 1st of May the next, in the Supreme Court of said county, an information in the nature of a *quo warranto* against this company alleging—

1. A forfeiture of the charter for the non-construction of a turnpike road of the materials required by charter.

2. For a deficiency in the width or grade as required by the charter.

3. For not having kept the road in repair.

4. For keeping up the gates and taking tolls after the

road had been found by inquest to be out of repair without putting the same in repair.

That in the meantime from the filing to the hearing of the information the company should open their gates for the free passage of travelers, or upon the neglect so to do, that the prosecuting attorney should file an injunction bill against the company, praying the court to stay all collection of tolls until the decision of the information, which injunction the court is required to allow. (Local Laws, Vol. 41, 104.)

At the same session on the 13th of March, 1843, commissioners were appointed to lay out and establish a State road, having the same *termini* and intermediate points with the road of this company. (Local Law, Vol. 41, 227.)

On the 12th of March, 1845, an act was passed declaring that the road from Columbus to Sandusky City known as the Columbus and Sandusky turnpike road, shall be a public highway, authorizing the county commissioners of each county through which the same passes, to cause the same to be repaired in a reasonable manner.

The second section provides "that whenever any company then, or thereafter to be incorporated for the purpose of constructing a plank, macadamized or other permanent road from Columbus to Sandusky City, should actually proceed to carry their improvements into operation, that then the provisions of this act should be void, so far as it respects that portion of the road which the company aforesaid may take possession of, in pursuance of the provisions of their charter." (Local Laws, Vol. 43, 388.)

I find in the journals of both branches of the General Assembly annual reports by the company as to the sales of the land, the progress made in the construction of the road, the tolls received, etc.

It appears from these reports, and the records of the company, that the entire quantity of the land donated by Congress, amounted to 31,340⅞ acres, which lands were all sold prior to December 31, 1835, and constituted "land stock" at the price of $1.40 per acre, amounting to the sum

of $43,877.22½. The land appears to have sold at a greater average rate than $1.40 per acre, and to have realized the sum of $5,965.51½ beyond the amount carried to land stock. This surplus was carried to the account of "stock in common" and subsequently apportioned as stock to each stockholder ratably.

It further appears from the books of the company that the total expended in the construction of the road, including contingent expenses, was $74,376.52¾. That the amount of cash paid on stock subscribed was $23,000.00. The residue of the cost of construction was paid by proceeds of the land donated by congress, other donations, interest received, and relinquished and forfeited stock.

The whole amount of the tolls set apart to the land stock has been annually expended in repairs and beyond that amount the sum of $2,126.80 has been expended for repairs out of the tolls set apart for the individual stock.

Dividends have been declared, and paid to the stockholders annually, from 1836 to 1843 inclusive, the total of which is $19,427.19.

Upon examining the files and records of the Supreme Court in Franklin County to ascertain what proceedings have been had against the company under the resolution of March 7, 1842, I find the following:

On the 29th of April, 1842, the prosecuting attorney of Franklin County filed in said court an information in the nature of a *quo warranto* against the company alleging therein the four causes of forfeiture or violation of charter enumerated in the resolution. The company answered this information by way of plea, protesting that they had in all the particulars alleged complied with their charter, and setting up the acceptance of the road as made by the agent appointed by the governor.

A bill in chancery was also filed by the prosecuting attorney, praying that until the hearing of the information, the company might be enjoined from taking tolls, and setting out the allowance of the injunction. On this bill is

endorsed a refusal by Judge Lane to allow the writ until after the hearing.

The company, meantime, had filed a bill and obtained the allowance of an injunction from an associate judge of Franklin County Common Pleas to enjoin the prosecuting attorney from taking any steps to open the gates on the road, or from any interference with the company, except upon the *quo warranto* proceeding. This last bill was filed in the Common Pleas, but was taken by appeal to the Supreme Court.

At the December term, 1843, of the Supreme Court in Franklin County, the three cases were disposed of as follows:

The injunction in the case of the company against the prosecuting attorney, was made perpetual.

The bill praying for an injunction filed by the prosecuting attorney against the company, was by consent of parties dismissed.

The information in the nature of a *quo warranto* stood without replication to the answer or plea of the company, and was, with the assent of the prosecuting attorney, dismissed.

The foregoing comprise all the facts relating to this company, and upon which it claims relief, which, upon careful investigation of legislation, the books of the company and the judicial proceedings, I have been able to collect.

The resolution further requires an opinion upon these facts, and the reasons for the opinion.

The claim is for relief to the company in consequence of an alleged violation of its rights by the legislature. This violation is understood to be the repeal of the charter, and the appropriation of the road to the public use.

After the most careful consideration of the act of February 28, 1843, repealing the charter and the act of March 12, 1845, declaring the road a public highway without any provision for compenastion to the company, I can entertain

no other opinion than that both the acts are in violation of the rights of this company.

No reason is assigned in the repealing act for the repeal, but it is to be inferred that the legislature proceeded upon the grounds assigned in the resolution of March 7, 1842, directing the *quo warranto.*

These were the alleged failure to construct the road of the materials, or of the dimensions required by the charter, the failure to keep it in repair, and the keeping up the gates, and demanding tolls upon parts of the road condemned as out of repair, by the inquest required by the charter.

All these were questions of fact to be established in the course of judicial proceedings according to the settled rules of evidence, and unquestionably were proper for examination upon *quo warranto.*

There is only one of the grounds which in reference to the charter can be assumed as a ground for repeal, and that is the alleged failure to construct the road of the proper materials.

The seventh section of the charter provides that at least eighteen feet of the road "shall be made an artificial road, composed of stone, gravel, wood or other suitable materials well compacted together, in such manner as to secure a firm, substantial and even road rising in the middle with a gradual arch."

The sixteenth section provides that if the company shall not within four years thereafter complete the road according to the true intent and meaning of the act it shall be lawful for the legislature to resume all the rights, liabilities and privileges granted by this act."

I find in the records of the company that as early as July 3, 1827, it was determined that the material of the road should be clay and that the vegetable road should be removed. The commissioners appointed to locate the road and make the estimate, report as follows: "Owing to the difficulty of procuring the stone or gravel to base the road

on the whole route and wood being deemed an improper material for that purpose, both as respects cost and durability, and that article also being scarce in many parts, it is believed the road can only be made of clay, with the means at the disposal of the company. The act of incorporation, admits of any material being used in the construction, which will make a compact road, and it is supposed that clay can be so compacted as to answer the purpose."

Whether this was a correct construction of the meaning of that clause of the charter admits of some question, though it is difficult to say, after the enumeration of stone, gravel and wood what is meant by *other* suitable materials to make a firm substantial road, if clay is to be excluded.

But, however that may be, it is quite clear the road was made of clay, and *as made* was accepted by the agent appointed by the governor as a road completed according to the provisions of the charter, and for ten years the company was in the recipt of tolls, making annual reports to the legislature. All this would well amount to a waiver of any supposed non-compliance with the charter, in respect of the materials with which the road was made.

Even if it were granted that the reservation of the sixteenth section of the charter, implies a right of repeal for the non-completion of the road as required, and that the road was in fact not so completed, yet in view of these subsequent matters the supposed right of repeal must be considered as abandoned.

As to the failure to keep the road in repair, a remedy for that is provided in the charter, and there is no reservation for future legislative action in that particular.

I am, therefore, of opinion that a wrong has been done to this company by the summary repeal of this charter, and the appropriation of their property to the public use.

What measure of relief or reparation should be adopted, will, of course, rest with the legislature.

It does not appear that the company has taken any steps to test the constitutionality of the repeal. That is a meas-

ure of relief in the power of the company, in order to which it would be necessary to re-establish their gates, and make the question with some individual upon their right to demand toll.

I do not see from the memorial of the company what distinct relief is asked from the legislature; whether it is to proceed on the footing of mere indemnity for actual loss of capital invested or the restoration of their charter and corporate property with incidental compensation for the temporary loss.

If relief is sought in the way of indemity for actual loss, it would seem, from the books of the company, that the account would stand as follows:

The capital actually paid in was.....		$23,000 00
Interest on that sum from the first of January, 1830, average payment as to time....		24,840 00
		$47,840 00
Tolls received and divided.....	$19,427	
Interest from January 1, 1840, which may be assumed averaging the dividends as to time	9,320	28,747 00
Actual loss in capital invested.....		$19,093 00

If the payment by the State of this balance should meet the approbation of the legislature and the company, it should be made to operate as an extinguishment of the charter, and a surrender of the road to the State, in the way of purchase.

The fifteenth section of the charter reserves to the State, or to the counties traversed by the road, the right of purchase, on paying the company a sum equal, with the tolls received, to the expenditures, with interest at 12 per cent. so that a purchase according to the charter would be made more against the State, than upon the footing of mere indemnity.

It is also proper to say, in view of a restoration of the

charter, and the repeal of the acts interfering with it, that the time has arrived at which the legislature may exercise a control over this company in the matter of the tolls.

Respectfully submitted,
HENRY STANBERY,
Attorney General.

TAX LAW; LEASES.

Attorney General's Office,
Columbus, December 11, 1847.

SIR:—I have considered the questions arising upon the application of D. Loring and Joseph Talbert to be released from the payment of taxes, and am of opinion that no sufficient reason appears for granting either of the applications.

1. As to D. Loring. It appears that one Sam'l Dick on the 17th of September, 1829, leased to Loring lot No. 127 in Cincinnati for the term of 99 years renewable forever at the annual rent of $900.00; that the said Loring on the 1st of March, 1845, leased a part of the lot to Robert Merrill for the term of 99 years renewable forever at the annual rent of $300. Upon this lease to Merrill, Loring is assessed in the sum of $5,000, being a principal sum the interest of which is equal to the annual rent payable to Loring on the lease to Merrill. All this is in conformity to the amendatory tax law of February 8, 1847. (Gen. Laws, Vol. 45, p. 65.)

It further appears by the certificate of the auditor of Hamilton County that the part of the lot so leased by Loring to Merrill—20 feet n. e. corner—is charged as *land* or in specie to Merrill at its appraised value of $5,450.00, and that the original lessor Dick is appraised on the same part of the lot at the principal sum $6,666.00. The legality of the two last assessments is not now in question directly, but they are presented under the idea that a case is made of a treble

tax on the same property. It seems to me that idea is a fallacy.

First the lot itself, as so much real property. The legality of that assessment cannot be questioned. Next, the value of the rent payable on the lease of Dick to Loring, lastly the value of the rent payable on the lease of Loring to Merrill.

These three items are not the same thing, nor the same property, although they all arise out of the same parcel of ground. We might as well say that the property is twice taxed where land is assessed to the purchaser and the purchase money due upon it is assessed to the vendor as a part of his credits, or in the case of a horse purchased upon credit, the horse being specifically assessed to the purchaser and the money due on the purchase to the former owner.

2d. As to Joseph Talbert's application.

Talbert leased to Boyd a parcel of ground in Cincinnati for the term of 99 years renewable at the annual rent of $500 until the year 1840, and after that at the rent of $600, Boyd covenanting to pay all taxes assessed on the lot. Boyd is assessed with the value of the lot and Talbert with the value of the lease. I think the assessment lawful for the reasons given in Loring's case.

Very respectfully yours,
HENRY STANBERY.

John Woods, Esq., Auditor of State.

CHARITABLE BEQUEST; POWER TO DIVERT.

Attorney General's Office,
Columbus, December 27, 1847.

SIR:—In answer to yours of this date requesting my opinion on the application of the directors of school district No. 3, York Township, Athens County, I have to say:

That it appears that Dan'l Nelson, deceased, granted to

the town of Nelsonville a lot in said town for the purpose of erecting therein "a free church and school house."

The question submitted I understand to be, whether the legislature can give to the authorities of the town the power to transfer this lot to the school directors for the purpose of erecting a common school house thereon.

The grant so made by Mr. Nelson is in the nature of a charitable bequest to a specific trustee, that is, the town of Nelsonville, which is an incorporated town, for a definite object, that is, the erection on a lot of *a free church and school house.* As this grant was entirely lawful and sufficiently epecific, it requires no interposition either of the legislature or a court of equity to carry out the intention of the donor.

What is proposed on the part of the school directors is that this property is to be diverted from the trustee to whom it was committed by Mr. Nelson, and from the specific purpose intended by the grant.

I do not think this can be done even with the aid of the legislature.

Very respectfully yours,
HENRY STANBERY.

Hon. R. G. McLean, House of Representatives.

TAX LAW; ANNUITIES.

Attorney General's Office,
Columbus, January 11, 1848.

SIR:—Yours of the 28th ult. has remained unanswered for some days in consequence of other engagements.

It appears that Mrs. Cable is entitled to an annuity of $42.00 which she receives from Pennsylvania, and that she has been assessed on account of this yearly payment at the