
Constitutional Law; Fish and Game Law Unconstitutional.

If a mistake has been made, there is a proper way to correct it; but the treasurer must look in the first instance to the person charged upon his books, who in this case I suppose to be the National Company.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

CONSTITUTIONAL LAW; FISH AND GAME LAW
UNCONSTITUTIONAL.

Attorney General's Office,
Columbus, Ohio, January 8, 1889.

Hon. C. V. Osborn, Dayton, Ohio:

DEAR SIR:—I have examined the question submitted in your recent communication concerning the constitutionality of section 6968, Revised Statutes, as amended by the act of the General Assembly passed April 14, 1888, Ohio Laws, Vol. 85, p. 271.

The act makes it unlawful for any person to "draw, set, place or locate any trap, pound, net, seine or any device for catching fish as this section forbids," and further provides, that any "nets, seines, pounds, or other devices for catching fish, set or placed in violation of the provisions of this section, shall be confiscated wherever found, and the same shall be sold to the highest bidder, at public outcry, at a place to be selected by the fish commissioner, and the proceeds derived from such sale shall be placed to the credit of the fish and game fund and subject to the warrant of such commissioner." And it is further provided in said act as follows: "Any person convicted of a violation of any of the provisions of this act shall be fined for the first offense not less than twenty-five dollars, nor more than one hundred dollars, and in case of neglect or refusal to pay said

Constitutional Law; Fish and Game Law Unconstitutional.

fine, be imprisoned in the county jail not less than thirty days, etc.”

It is clear that this act makes the doing of these things an *offense*, and there is no provision for trial of property or notice to the owners thereof. Sifting the case of all unimportant matters, the only question in it is: Had the General Assembly the power to provide that “any nets, seines, pounds, or other devices for catching fish, set or placed in violation of the provisions of this section, shall be confiscated wherever found, and the same shall be sold to highest bidder, at public outcry, etc.?”

Section 12 of Article 1, of our constitution provides: “No conviction shall work corruption of blood, or *forfeiture of estate*.” This provision is the same as the one in the constitution of 1802, and has from time to time been construed by our Supreme Court. In the early case of *McMillen vs. Robins*, 5 Ohio, on page 34, Judge Hitchcock says: “We know, that in England, the conviction of many offenses, works ‘corruption of blood and forfeiture of estate.’ And this operates in many, if not in all cases, from the time of the commission of the offense. The forfeiture is to the king. The blood is also corrupted. The attainted person can not inherit lands from his ancestor, neither can he transmit an inheritance to his heirs. In truth the punishment of the offense is not confined to the individual offender, but is extended to his wife, his children and his heirs, by depriving them of his estate, and thereby, in some instances, of the means of subsistence. It was against a state of things like this, that the convention intended to provide, and they have, therefore, put it beyond the power of the Legislature to enact ‘that any conviction shall work a corruption of blood or forfeiture of estate.’” In the subsequent case of *Frazer vs. Fulcher*, 17 Ohio, pp. 263-4, the same judge used almost the same language in again construing this clause of the constitution. At a still later period the question again came before the Supreme Court in the case of *Miller, et al. vs. The State*, 3 Ohio, St., 489, when Judge Thurman said: “No

Constitutional Law; Fish and Game Law Unconstitutional.

man's property can be forfeited as a punishment for crime, the constitution providing that no conviction shall work 'a forfeiture of estate.' Hence there is no power to deprive a man of the use of his property, unless it be necessary in order to abate an existing nuisance."

The terms "confiscated" as used in the Statute, and "forfeited" as used in the constitution are synonymous in contemplation of law. If it should be said, the act does not authorize the confiscation of the nets, etc., as a *punishment for crime*, I answer that it clearly would be unconstitutional to confiscate them for any other reason or purpose, for section 19, of article 1 of the constitution provides: "Private property shall be held inviolate."

A very similar question to the one here arose in Cincinnati. An ordinance of that city provided: "It shall be unlawful for hogs, of any size or description, to be let loose and run at large in the streets, lanes, alleys, or commons within the city; * * * * * it shall be the duty of the marshal to cause all hogs, of whatever size or description, that shall be found running at large in the streets, lanes, alleys, or commons of the city, to be taken up, impounded and sold to the highest bidder, within three days after being impounded, having first caused the time and place of such sale to be proclaimed through the streets and by handbills, and to pay into the city treasury the proceeds of all such sales, after paying the necessary expenses." In determining the question the court said: "The ordinance commands the marshal to seize and impound the property, and then, without any reserve, without any notice to the party, by means of which he might be enabled to exculpate himself, directs it to be sold and the proceeds to be placed in the city treasury. Such an ordinance is as contrary to the spirit of the charter as it is alien from the general genius of our institutions."

The syllabus of the case is as follows: "The power given by the charter of the city to impose a forfeiture does not confer the right to seize and sell without any previous proceedings." 10 Ohio, 31.

*Assessor; To Assess and Return Property in Additions to
Town Plats, Under Section 2797 R. S.*

I am of the opinion the act is unconstitutional, in that it authorizes the confiscation and sale of private property without legal process and thereby works a forfeiture of estate.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

ASSESSORS; TO ASSESS AND RETURN PROPERTY IN ADDITIONS TO TOWN PLATS, UNDER SECTION 2797 R. S.

Attorney General's Office,
Columbus, Ohio, January 9, 1889.

T. H. Galmer, Esq., Prosecuting Attorney, Warren, Ohio:

DEAR SIR:—In yours of the 3d inst. you ask the question: "What assessor is meant in Revised Statutes, section 2797, in the phrase 'assessor of the proper locality;' " meaning as you say, is it the "real estate assessor or the assessor of personal property?" The question is not free from doubt, and it is probable I may be wrong about it. But I am of the opinion that the matter is controlled by the provisions of section 2753, Revised Statutes, which on the general subject of listing personal property, provides as follows: "At the time of taking the lists of personal property the assessor shall also take a list of all real property which shall have become subject to taxation and is not on the tax list, and affix a value thereto according to the rules prescribed, etc." If I am correct in this view it follows that the expression "assessor of the proper locality," as used in section 2797 means the assessor of personal property.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Township Local Option Law; Section 2 of the Act Construed—Corporations; "The Oglesby and Barnitz Company."

TOWNSHIP LOCAL OPTION LAW; SECTION 2 OF
THE ACT CONSTRUED.

Attorney General's Office,
Columbus, Ohio, January 9, 1889.

*George W. Sieber, Esq., Prosecuting Attorney, Akron,
Ohio:*

DEAR SIR:—I am of the opinion that section 2, of the act of March 3, 1888, Ohio Laws, Vol. 85, pp. 55, 56, prohibits the keeping of a place "where liquors are sold by the quantity of one-half pint and upwards, but not by the drink," in a township in which the electors have voted "against the sale," as provided in section 2 of said act.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

CORPORATIONS; "THE OGLESBY AND BARNITZ
COMPANY."

Attorney General's Office,
Columbus, Ohio, January 11, 1889.

Hon. J. S. Robinson, Secretary of State:

DEAR SIR:—I herewith return the proposed articles of incorporation of "The Oglesby and Barnitz Company," with the statement that in my opinion you should not file them. I have carefully examined the question of incorporating this company, and have read the very full and carefully prepared brief of Mr. Smith in its behalf, but I am clearly of the opinion that the matter is settled by the decision of the Supreme Court in the State vs. The Pioneer Live Stock Company, 38

Taxation; Personal Property Where Taxable When Owner Moves From One County to Another.

Ohio St. 347. I also concur in the opinion of my predecessor, Hon. J. A. Kohler, on a similar question as published in your report for 1887.

Very respectfully yours,
 DAVID K. WATSON,
 Attorney General.

TAXATION; PERSONAL PROPERTY WHERE TAX-
 ABLE WHEN OWNER MOVES FROM ONE
 COUNTY TO ANOTHER.

Attorney General's Office,
 Columbus, Ohio, January 9, 1889.

George G. Jennings, Esq., Prosecuting Attorney, Woodsfield, Ohio:

DEAR SIR:—In yours of the 7th inst. you submit the following facts and ask my opinion thereon: 'S. D. Kent on the day preceding the second Monday of April, 1888, (and for about 10 days thereafter), resided in Seneca Township, Monroe County, Ohio, but the assessor of said township had not called on him. On or about the 20th of April, 1888, he (Kent) moved permanently into Noble County, Ohio, taking with him credits amounting to about \$2,000.00 which he afterwards listed to the assessor of Noble, the assessor there claiming it should be so listed. Monroe and Noble are both claiming the tax on the above amount from Kent, both counties having it on duplicate. Which county is entitled to it? Section 2735, Revised Statutes, provided: " * * * and all other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon may reside at the time of the listing thereof. etc." Section 2736 says each person required to list prop-

*Criminal Law; What Constitutes a "Record" of a Case in
Common Pleas Court.*

erty shall, annually, *upon receiving* a blank for that purpose from the assessor, etc. In *Pelton vs. Transportation Co.*, 37 Ohio St., 450, it was held: "Personal property, other than merchants' and manufacturers' stock, or articles enumerated in the seventh section of said act of April 5, 1859, or personal property upon farms and real property not in towns, subject to taxation in the county where the owner or person chargeable with the taxes thereon resides, must be returned and taxed in the town, or township where the owner resides."

I am therefore of the opinion the tax should be paid in Noble County.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

CRIMINAL LAW; WHAT CONSTITUTES A "RECORD" OF A CASE IN COMMON PLEAS COURT.

Attorney General's Office,
Columbus, Ohio, January 17, 1889.

F. S. Rarey, Esq., Clerk Ohio Penitentiary:

DEAR SIR:—I have given the matter which you submitted to me some days ago as to what constitutes a "record" in the Common Pleas Court in a criminal case, and as to what fees the clerk is entitled to for making the same, as much consideration as possible under the circumstances, having been sick most of the time since receiving your communication. I have very reluctantly come to the conclusion that in this case the clerk is entitled to be paid the fees which he has charged for making the record. The question has been a very troublesome one, and I regret I have not been able to give it a more careful examination. I am advised by a letter from the prosecuting attorney of the county from

County Commissioners; Report of; Right to Publish in German Paper.

which the particular case arose that the principal ground of error was, that the verdict was contrary to the evidence, in which case the whole evidence had to be set out.

That some legislation is needed on this subject there is to my mind no doubt, but as at present advised I suggest you allow the clerk's charge, although, as above expressed I do this with much reluctance. I herewith return the certificate of sentence and cost bill in the present case.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

COUNTY COMMISSIONERS; REPORT OF; RIGHT
TO PUBLISH IN GERMAN PAPER.

Attorney General's Office,
Columbus, Ohio, January 18, 1889.

*Theodore K. Funk, Esq., Prosecuting Attorney, Portsmouth,
Ohio:*

DEAR SIR:—Replying to yours of the 17th inst., in which you ask: "Has a board of county commissioners the right to publish their annual report in a German paper of general circulation in the county?" In my opinion, under sections 4367 and 4368, of the Revised Statutes of Ohio, the board has such right.

Respectfully yours,

DAVID K. WATSON,

Attorney General.

Schools; Examiner; Can a Woman be a Member of County Board of Examiners.

SCHOOLS; EXAMINER; CAN A WOMAN BE A MEMBER OF COUNTY BOARD OF EXAMINERS.

Attorney General's Office,
Columbus, Ohio, February 6, 1889.

Hon. John Hancock, State School Commissioner:

DEAR SIR:—You recently submitted to me the question whether or not a woman could hold the position of examiner on a county board of school examiners.

The question is controlled by section 4069, R. S., Ohio School Laws, pp. 136-7. That section provides for the appointment of a board of examiners of three persons, who shall be residents of the county for which they are appointed and that they shall not be connected with or interested in any normal school or school for the special education or training of persons for teachers. It further provides that if an examiner become connected with or interested in any such school, "*his* office shall become vacant thereby." It is clear to my mind, from this language, that women are excluded from serving on such board of examiners. It may be that there are constitutional objections, but as the statute determines the question it is unnecessary to consider these.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Prosecuting Attorney; Duty to Prosecute Cases Certified to
Common Pleas From Mayor's Court.*

PROSECUTING ATTORNEY; DUTY TO PROSE-
CUTE CASES CERTIFIED TO COMMON PLEAS
FROM MAYOR'S COURT.

Attorney General's Office,
Columbus, Ohio, February 21, 1889.

M. E. Danford, Esq., McConnellsville, Ohio:

DEAR SIR:—Absence from the city on official business prevented my answering yours of the 7th inst. before today. You ask me whether it is your duty as prosecuting attorney to prosecute in the Common Pleas Court a cause certified to that court by the mayor of an incorporated village, under section 1827, Revised Statutes, and if so, how you are to prevent it. Section 1827 specially gives the Common Pleas Court jurisdiction over such cases, and section 1273 provides: "The prosecuting attorney shall prosecute * * all complaints, suits, and controversies, in which the State is a party * * within the county, in the Probate Court, Common Pleas Court, etc."

While the question admits of some doubt, and such cases are not always "in the name of the State," still they are essentially criminal cases, and I think it is the duty of the prosecutor to take charge of them when they reach the Common Pleas Court and see that they are properly tried; and that in presenting them to the court an indictment by the grand jury is not necessary, the affidavit before the mayor being sufficient. Since coming to this conclusion I found an opinion by my predecessor on file in this office, which agrees with the above in every respect. See also 36 Ohio St., 140.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Coroner; When Sheriff Interested in Case, No Longer
Proper Person to Serve Writs.*

CORONER; WHEN SHERIFF INTERESTED IN
CASE, NO LONGER PROPER PERSON TO
SERVE WRITS.

Attorney General's Office,
Columbus, Ohio, February 28, 1889.

*D. R. Crissinger, Esq., Prosecuting Attorney, Marion,
Ohio:*

DEAR SIR:—Yours of January 14th came while I was in Washington city on official business. I have since been so overwhelmed with official work here and at Akron, Ohio, that I could not send you an opinion sooner.

You ask: "Is the coroner still the proper person to serve writs when the sheriff is a party or interested?" or in other words, is section 4967, Revised Statutes, repealed by the repeal of sections 1208, 1212, 1213, 1214, 1215, 1216, 1218, 1219, 1220, 1238, 1239, in Vol. 84, Ohio Laws, 208.

The question is one of some doubt, but after a careful examination of the above mentioned sections it is my opinion the Legislature intended that the coroner should no longer perform the duties of sheriff in cases wherein the latter is interested. Section 1208, as amended, 84 Ohio Laws, 208 provides: "And when the sheriff is incapable, * * * or by reason of interest is incompetent to serve the same, (any process) the Court of Common Pleas, or any judge thereof in the district, if the court is not in session, may appoint some suitable person to serve such process, etc." Thus the Legislature has provided that another and different person shall perform the sheriff's duties when the sheriff is interested. If this provision and section 4967 are both allowed to remain, the object of the Legislature in passing the latter act will be destroyed. In the sections substituted for the ones repealed the word "coroner" is left out and he is no longer required to perform the duties therein mentioned; and by repealing sections 1238 and 1239 the coroner is al-

*County Auditor; Not Entitled to Fee For Keeping Up
Daily Records, Indexing, Etc.*

lowed no fees for serving such writs. Moreover the amendment (84 Ohio Laws 208) undertakes to revise the whole subject matter of the duties of coroners and sheriffs, and "where there is such a repugnancy between the provisions of a later act revising the whole subject matter of several former ones and expressly repealing one of them, and the provisions of another *not expressly repealed*, the latter will nevertheless be abrogated by implication." Endlich on Interpretation, section 203, p. 273.

It is evident that the Legislature, when it repealed section 1219, which uses the same language as section 4967, (but in different form and connection) intended to take away from the coroner such powers and duties. In the case you mention, however, I do not see how my opinion is going to help the matter; as the coroner, you say, is threatened with suit whether he acts or not. His safest course, I should say, would be to refuse to act.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

COUNTY AUDITOR; NOT ENTITLED TO FEE FOR
KEEPING UP DAILY RECORDS, INDEXING,
ETC.

Attorney General's Office,
Columbus, Ohio, February 28, 1889.

F. R. Fronizer, Esq., Prosecuting Attorney, Fremont, Ohio:

DEAR SIR:—Yours of January 31st I could not answer before today, owing to my absence from the city on important business for the State. You ask whether the county auditor is entitled to pay for indexing the *daily* transactions of the commissioners, under section 850, Revised Statutes, as amended, 82 Ohio Laws, 203.

I am of the opinion the Legislature intended that the

*Schools; Transfer of Funds for Support of Sub-District
Schools; Transfer of Territory From One District to
Another.*

auditor should not receive compensation for keeping up the daily records, which he is required to do as clerk of the board of county commissioners.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SCHOOLS; TRANSFER OF FUNDS FOR SUPPORT
OF SUB-DISTRICT SCHOOLS; TRANSFER OF
TERRITORY FROM ONE DISTRICT TO
ANOTHER.

Attorney General's Office,
Columbus, Ohio, March 4, 1889.

E. W. Maxon, Esq., Prosecuting Attorney, Ravenna, Ohio:

DEAR SIR:—Your favor of the 9th inst. I could not answer before today owing to my attending the trial of important canal cases at Akron. I answer your questions in their order.

1. In regard to the transfer of school funds for the support of joint sub-district schools, under section 3961, Revised Statutes, I think the state school commissioner is right in holding "that the contingent assessed and collected for joint sub-district uses is paid to the different township treasurers, by the county treasurers, and they in turn pay their respective shares to the treasurer of the township having control of the school."

The auditor "certifies to the clerk and treasurer of each township the amounts due to the joint sub-districts from such township, that the money may be properly paid by the treasurer of each township district to the joint sub-districts and that the accounts may be fully adjusted by each."

Ohio School Laws 1883, p. 52.

*Schools; Transfer of Funds for Support of Sub-District
Schools; Transfer of Territory From One District to
Another.*

2. "In transferring territory from one district to another under section 3893, is it necessary that the boards of education interested hold a joint meeting as provided in section 3928, for the formation of a joint sub-district?"

Section 3893 provides: "A part or the whole of any district may be transferred to an adjoining district, by the *mutual consent* of the boards of education having control of such districts, etc."

There is nothing in said section making a *joint* meeting necessary, and if in other respects the statute is complied with, I think a joint meeting is not necessary in such cases.

3. In case of a joint sub-district composed of portions of four townships, it is my opinion that under said section 3893, new territory can not be transferred by any one of the townships without the "consent of the boards of education having control of such districts."

4. "If in order to establish a joint sub-district or transfer territory thereto a joint meeting of all boards interested is necessary, what would be the legal standing of such a joint sub-district which had been formed or to which territory had been transferred a number of years before by resolutions of the different boards adopted at their usual places of meeting?"

I do not think the mere informality above mentioned, the law in every other respect having been complied with, would affect the legal status of such joint sub-district.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

County Commissioners; Counsel Fees for Defending Indigent Prisoner.

COUNTY COMMISSIONERS; COUNSEL FEES,
FOR DEFENDING INDIGENT PRISONER.

Attorney General's Office,
Columbus, Ohio, March 6, 1889.

J. W. Seymour, Esq., Medina, Ohio:

DEAR SIR:—Some time since you submitted to me the following question and asked my opinion thereon: "In case of State vs. Mary Garrett, the court appointed lawyers to defend her, she being indigent. The county commissioners only allowed them one hundred dollars, claiming that under the statute (section 7246) they had no right to pay more. Counsel for defendant each claim one hundred dollars under said section. Commissioners have asked me to get your opinion on the subject, they not being satisfied with mine. Hence I ask for your construction of above mentioned section."

I have carefully examined the section to which you refer, and the previous acts on the subject, and am of the opinion that the commissioners were correct, and that they had no power to allow more than one hundred dollars as compensation to both counsel. I will add, however, that I am informed that common pleas judges in different portions of the State have decided the question in different ways, some holding my views, and others that one hundred dollars can be allowed each of the two attorneys.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

County Treasurers; Fees for Collecting "Back Taxes" Under Sections 1094 and 2781 R. S.

COUNTY TREASURERS; FEES FOR COLLECTING
"BACK TAXES" UNDER SECTIONS 1094 AND
2781 R. S.

Attorney General's Office,
Columbus, Ohio, March 8, 1889.

Hon. E. W. Poe, Auditor of State:

DEAR SIR:—You recently submitted to me the question whether, under section 2781, Revised Statutes, as amended, 83 Ohio Laws, p. 82, county treasurers are entitled to the five per cent. penalty provided for under section 1094 of the Revised Statutes. Stating the question in another way I understand it to be this: Are county treasurers entitled to five per cent. (under section 1094 R. S.) for collecting "the back taxes" certified to them for collection by the auditors under section 2781 as above amended?

The question is not entirely free from doubt, but I am of the opinion that when the taxes mentioned in 2781, and amendments thereto, are placed upon the duplicate and certified to the treasurers for collection, they are, properly speaking, delinquent taxes, and that the treasurers would be entitled to the five per cent. for collecting the same.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Constitutional Law; Municipal Corporations, Can Not Be Created by Special Act.

CONSTITUTIONAL LAW; MUNICIPAL CORPORATIONS, CAN NOT BE CREATED BY SPECIAL ACT.

Attorney General's Office,
Columbus, Ohio, March 8, 1889.

Hon. L. C. Ohl, Columbus, Ohio:

DEAR SIR:—You yesterday submitted to me the question whether or not the Legislature could create a municipal incorporation by a special act of the General Assembly. While I am not under the statute called upon to give official opinions to individual members of the General Assembly, I nevertheless comply with your request with pleasure. Article XIII, section 1, of the constitution reads as follows: "The General Assembly shall pass no special act conferring corporate powers." Section 6 of the same article provides among other things as follows: "The General Assembly shall provide for organization of cities and incorporated villages by general laws, etc." In the case of the *State of Ohio ex rel. Attorney General vs. The City of Cincinnati*, 20 Ohio St. 18, the Supreme Court held: "Under the restrictive and mandatory provisions of the first and sixth sections of the thirteenth article of the constitution of 1851, the general assembly can not, by a special act create a corporation, nor can it, by special act, confer additional powers on a corporation already existing, and in the purview and application of the provisions of those sections of the constitution, there is no distinction between private and municipal corporations."

In view of these constitutional provisions and the construction placed upon them by the court, I am clearly of the opinion that the General Assembly has no power to provide for the incorporation of villages by special act.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Prosecuting Attorney; Not Entitled to Compensation for Work Done Under Section 1104 R. S.—County Commissioners; Compensation Attending Regular Meetings; Prosecuting Attorney, Compensation for Examining Commissioners' Report.

PROSECUTING ATTORNEY; NOT ENTITLED TO COMPENSATION FOR WORK DONE UNDER SECTION 1104, R. S.

Attorney General's Office,
Columbus, Ohio, February 7, 1889.

George W. Keys, Esq., Prosecuting Attorney, Ironton, Ohio:

DEAR SIR:—I have been unable to answer yours of the 26th of January before this. I am of the opinion that under section 1104, Revised Statutes, as amended, Vol. 83, Ohio Laws, pp. 156-7, you are not entitled to compensation for work done under that section unless your county contains a city of the first class and if it does, then your compensation is to be determined by the board of county commissioners.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

COUNTY COMMISSIONERS; COMPENSATION ATTENDING REGULAR MEETINGS; PROSECUTING ATTORNEY, COMPENSATION FOR EXAMINING COMMISSIONERS' REPORT.

Attorney General's Office,
Columbus, Ohio, March 8, 1889.

J. W. Seymour, Esq., Prosecuting Attorney, Medina, Ohio:

DEAR SIR:—Yours of the 28th of February duly received, in which you ask the question: "Have county com-

Sheriff Fees; For Washing Clothes of Prisoner.

missioners a right, under section 897, Revised Statutes, as amended, Vol. 83, Ohio Laws, p. 71, to charge for their hotel expenses while attending regular meetings of the board each month at the county seat, and also while traveling in the county on official business?" I have heretofore construed this statute, and held that the commissioners, while doing business in the county, are not entitled to charge for livery hire, railroad fare or hotel bills. They are in such case restricted to their per diem and mileage.

You also ask if you, as prosecuting attorney, are allowed compensation for examining the commissioners' reports under the provision of section 917 of the Revised Statutes. That section provides that the court "shall cause the same (the report) to be investigated and examined by the prosecuting attorney of the county, together with two suitable persons to be appointed by the court, and the two persons so appointed shall each be allowed and paid out of the county treasury, * * * the sum of three dollars per day; * * *"

This provision, I think, excludes the presumption that the prosecutor is to be paid, and in my opinion you are not entitled to the compensation. Very respectfully yours,

DAVID K. WATSON,
Attorney General.

SHERIFF FEES; FOR WASHING CLOTHES OF PRISONER.

Attorney General's Office,
Columbus, Ohio, March 8, 1889.

Isaac S. Motter, Esq., Prosecuting Attorney, Lima, Ohio:

DEAR SIR:—You recently asked for my opinion upon the following questions:

First—Should the sheriff be allowed extra for washing clothes of prisoners, where, as is provided under section

*County Commissioners; Compensation When Traveling on
Official Business in the County.*

1235, R. S., he receives fifty cents per day for keeping and providing for prisoners? Your second question I understand to be the same as this one but differently stated.

Some of the common pleas judges of the State have decided this matter in different ways. I understand that a test question is being made in one of the judicial districts of the State. The holdings of this office are to the effect that the sheriff is only entitled to fifty cents per day, under the provisions of section 1235, of the Revised Statutes.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

COUNTY COMMISSIONERS; COMPENSATION
WHEN TRAVELING ON OFFICIAL BUSINESS
IN THE COUNTY.

Attorney General's Office,
Columbus, Ohio, March 8, 1889.

John P. Bailey, Esq., Prosecuting Attorney, Ottawa, Ohio.

DEAR SIR:—Yours of the 12th of February received. It has been impossible for me to reply sooner.

I have heretofore held a number of times that county commissioners, when traveling on official business *in the county* (whether attending a regular session or not), are not entitled to livery hire or other traveling expenses; but their compensation is limited to the per diem and mileage, as fixed by the act of April 8, 1886, Ohio Laws 83, p. 71.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

*Intoxicating Liquors; Dow Law; Druggist Put Upon His
Guard Under 8th Section.*

INTOXICATING LIQUORS; DOW LAW; DRUG-
GIST PUT UPON HIS GUARD UNDER 8TH
SECTION.

Attorney General's Office,
Columbus, Ohio, March 9, 1889.

*R. S. Parker, Esq., Prosecuting Attorney, Bowling Green,
Ohio:*

DEAR SIR:—I have not been able to answer yours of the 15th ult. before today. The questions you submit are exceedingly difficult of determination. It is almost impossible to frame a law upon the liquor question (if not entirely impossible), which the wit of man can not in some way, to some extent avoid. I am of the opinion, however, that under the provisions of section 8, of the Dow Law, the druggist, or vender, is put upon his guard in making the sale. He is bound to know what the law is. The law provides that the prescription must be issued by a reputable physician in active practice, and *in good faith*. I do not believe the druggist is justified in selling under circumstances which lead him to believe that the physician is abusing the law. He can not go on and make these sales recklessly and then protect himself on the ground that a certificate had been issued, without being liable to pay the tax. The law does not intend to tolerate "set up jobs" between physicians and druggists.

You will however, recognize the practical difficulty in dealing with such cases.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

County Auditor; Taxation; Auditor Should Publish Delinquent Tax List.

COUNTY AUDITOR; TAXATION; AUDITOR
SHOULD PUBLISH DELINQUENT TAX LIST.

Attorney General's Office,
Columbus, Ohio, March 13, 1889.

Hon. E. W. Poe, Auditor of State, Columbus, Ohio:

DEAR SIR:—On the 27th ult. you addressed to me a communication as follows: "I desire to call your attention to section 2864, Revised Statutes of Ohio, which section refers to the duties of county auditors with reference to the publication of delinquent lands, as you will see by reference. I have a county auditor in the State, who willfully refused, for reasons known to himself, among which he gives out, 'that it would not pay'; 'The State is not injured nor anybody injured.' What I want to know is, what is my duty in the premises, and what, in your opinion, is the way out of the dilemma?" I have examined the section to which you refer, and other sections in connection therewith. No county auditor has a right to willfully refuse to comply with section 2864. Section 2868, however, provides as follows: "In all cases where any county auditor, by inadvertence or mistake, shall have omitted, or in any future year shall omit to publish the delinquent list of his county, according to the requirements of law, it shall be his duty, in case the taxes and penalty with which the land and town lots therein stand charged, shall not have been paid before the tenth day of August of the next succeeding year, to charge the said lands and town lots with the said taxes and penalty, and also the taxes of the current year, and record, certify, and publish the same as part of the delinquent list." I suggest that the difficulty in the case to which you refer can best be remedied by an amendment of this section, by inserting the words "or otherwise" after the word "mistake," so that the section as amended will read: "In all cases where any county auditor, by inadvertence, mistake, or otherwise, etc." I

*Elections; Members of School Boards in City District of
Second Class.*

recommend that you procure this section to be amended as herein suggested.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

ELECTIONS; MEMBERS OF SCHOOL BOARDS IN
CITY DISTRICT OF SECOND CLASS.

Attorney General's Office,
Columbus, Ohio, March 18, 1889.

E. C. Hamilton, Esq., Washington C. H., Ohio:

DEAR SIR:—Yours of the 12th inst. duly received. I will make an exception in your case and send you an opinion, though I feel I ought not to do so. Under the provisions of section 3887, R. S., yours is a city district of the second class, and I am of the opinion that under the provisions of section 3906, the opinion of your city solicitor as you quote it is correct. That is to say, the judges of the city election shall conduct the election for members of the school board, but there must be separate tickets, and such tickets must be deposited in separate ballot boxes, which must be provided by the board of elections. In other words the directions for conducting the election set out in section 3906 ought to be complied with. I will not go so far as to say that an election, in which but one set of ballot boxes and one set of tickets were used, *would necessarily for that reason be illegal*; but it would be such a departure from the provisions of the statute that I certainly should not recommend it being done.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Dow Law; Refunder Upon Discontinuing Business; County Auditor; Compensation According to Population, Under Section 1069, 1070, Revised Statutes.

DOW LAW; REFUNDER UPON DISCONTINUING BUSINESS; COUNTY AUDITOR; COMPENSATION ACCORDING TO POPULATION, UNDER SECTIONS 1069, 1070, REVISED STATUTES.

Attorney General's Office,
Columbus, Ohio, March 18, 1889.

John M. Swartz, Esq., Newark, Ohio:

DEAR SIR:—Yours of the 25th ult. duly received, also yours of more recent date. It has been impossible to answer sooner.

In reference to your first inquiry, I think it is a matter of great ambiguity as the statute reads, but I have conferred with the author of the bill, and he tells me it originally read so that there was no doubt from the language that the word "it" referred to the assessment, and that it was the intention of the Legislature that it should so refer. In view of these things I have construed the word "it" to refer to the assessment.

In reference to sections 1069, 1070, Revised Statutes, governing the compensation of the county auditors, I am of the opinion they refer to the same basis of enumeration. Section 1069 refers to the *annual* compensation of auditors. Section 1070 provides for additional compensation to that given in 1069, the same to be regulated according to population as provided in the sections.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Taxation; Dwelling Owned by College and Used by its
President as a Residence.*

TAXATION; DWELLING OWNED BY COLLEGE
AND USED BY ITS PRESIDENT AS A RESI-
DENCE.

Attorney General's Office,
Columbus, Ohio, March 25, 1889.

George W. Carpenter, Esq., Delaware, Ohio:

DEAR SIR:—Yours of the 21st inst. duly received, in which you submit for my opinion a question relating to the taxation of a dwelling house owned by the O. W. University and occupied by its president as a residence. Such a dwelling is subject to taxation in this State, notwithstanding it is used for the purposes mentioned and belongs to the university. The case of Kendrick vs. Farquhar, 8 Ohio Rep., 196, settles this doctrine in Ohio. This decision was affirmed in the case of Gerke vs. Purcell, 25 Ohio St., 229. I do not understand just what you mean by the second question in your letter. You say: "Would such property be exempt from *taxation* if by agreement, in consideration of the premises, such president's salary were reduced in an amount equal to the *rental* value thereof, or if, in consideration of the same, he should agree to take that much less than he otherwise would." I do not think that any agreement which the college authorities might make can affect the liability of the property for taxation. I am, therefore, of the opinion that the dwelling house in question is liable for taxation.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

PROBATE COURT; DITCH CASES; JURY FEES.

Attorney General's Office,
Columbus, Ohio, March 26, 1889.

J. Y. Todd, Esq., Prosecuting Attorney, Van Wert, Ohio:

DEAR SIR:—Some time since you wrote me as follows: "Does the county, under sections 4506 and 4507, have to pay jury fees? At first, of course, they must pay; but do not the parties who take an appeal and are defeated have to pay it back to the county? Section 5182, as I understand it, does not apply to juries in ditch cases. See also sections 4470, 4472 and 4473. Our county commissioners would like to know whether the county is liable."

I regret that I have not been able to answer sooner, but absence from the city on official business, illness and many other matters, together with the reason that I desired to thoroughly examine the question, have prevented me from doing so. It seems to me, after a careful examination of the sections to which you refer and the amendments thereto, that the whole question resolves itself into this: Are jury fees costs? I think the general acceptance of that term is that it includes jury fees; but there are many decisions to the contrary. Some time ago, in a proceeding by a railroad company to condemn private property, the question whether or not jury fees were part of the costs came before the Hon. Edward F. Bingham, then a judge of the Court of Common Pleas, now chief justice for the District of Columbia, reviewing the decision of the probate court, who gave a very elaborate opinion upon the question, in which he held that jury fees were not a part of the costs, within the meaning of the statute, and consequently the county must pay them. In view of these holdings, I am of the opinion that the county can not recover the jury fees from the parties; but

*County Commissioners; Allowance to Magistrates and Other
Officers in Lieu of Fees. Assessors; Time Extended
Under 1536 Revised Statutes.*

it is a question involved in doubt, and I wish to be understood as coming to this opinion with very great reluctance.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

COUNTY COMMISSIONERS; ALLOWANCE TO
MAGISTRATES AND OTHER OFFICERS IN
LIEU OF FEES. ASSESSORS; TIME EX-
TENDED UNDER 1536 REVISED STATUTES.

Attorney General's Office,

Columbus, Ohio, March 26, 1889.

Where a magistrate, under section 7136, Revised Statutes, binds the defendant over and he is subsequently not indicted under section 1309-12, the county commissioners may make an allowance to the officers in lieu of fees.

Under section 1536, Revised Statutes, time can be extended for assessors, and the \$2.00 per day paid.

Respectfully,

DAVID K. WATSON,

Attorney General.

Mining Law; Minor Able to Read and Write His Name Only.

MINING LAW; MINOR ABLE TO READ AND
WRITE HIS NAME ONLY.

Attorney General's Office,
Columbus, Ohio, March 27, 1889.

*Hon. R. M. Haseltine, Chief Inspector of Mines, Columbus,
Ohio:*

MY DEAR SIR:—You recently submitted to me a question arising under section 302, Revised Statutes, as amended, 85 Ohio Laws, p. 325, which reads as follows: "No boy under twelve years of age shall be allowed to work in any mine, nor any minor between the ages of twelve and sixteen years unless he can read and write; and in all cases of minors applying for work, the agent of such mine shall see that the provisions of this section are not violated," etc.

The question you submit is this: Does a boy who is merely able to read and write his name fill the requirements of the statute? The Legislature evidently intended to protect the interests of miners, and the statute was passed for their benefit. I do not think that the terms "read and write" as used in the statute, are fairly complied with, or the spirit or intention of the act fairly met, when a boy is simply able to write his name and read it; but think these terms as used in this section mean that a boy shall be able to read and write ordinarily well.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Ohio Penitentiary; Contract With Tool Company.

OHIO PENITENTIARY; CONTRACT WITH TOOL
COMPANY.

Attorney General's Office,
Columbus, Ohio, April 1, 1889.

Hon. E. G. Coffin, Warden of the Ohio Penitentiary:

DEAR SIR:—Concerning the construction of the contract between the managers of the Ohio penitentiary and Ohio Tool Company, submitted to me a short time since, I have this to say: Looking at the case without the aid of extrinsic testimony, but construing article B of said contract from its own language in connection with the whole contract, I am of the opinion that the expression in said article "Any men temporarily employed for said tool company" does not refer to any of the thirty-three men provided for in the contract. This expression, however, and the whole of article B is exceedingly ambiguous, and in its construction I can not disregard what seems to have been for a long time the interpretation which the prison authorities placed upon this article, and am consequently of the opinion that that construction ought to govern, for the very short time which this contract will remain in force. Otherwise my construction would be against the tool company.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*County Commissioners; Witness Fees in Sheep Cases.
Deputy Surveyor; Right to Take Acknowledgment of
Deed.*

COUNTY COMMISSIONERS; WITNESS FEES IN
SHEEP CASES. DEPUTY SURVEYOR; RIGHT
TO TAKE ACKNOWLEDGMENT OF DEED.

Attorney General's Office,
Columbus, Ohio, March 30, 1889.

*R. E. McDonald, Esq., Prosecuting Attorney, Carrollton,
Ohio:*

MY DEAR SIR:—You recently submitted to me two
questions for my official opinion:

First—"Is a person who is a witness before the
commissioners in sheep claims entitled to more than
one dollar and mileage, provided he is a witness for
several parties on the same day?"

Where a witness is called and testifies in a case and
before leaving the stand, is inquired of, about other cases,
I do not think it is the intention and spirit of the statute
that he shall receive more than one fee and his mileage;
but if, after testifying, he is allowed to depart and goes
home and is again called the same day, he would be entitled
to his fee and mileage for each time. Your question is so
limited in its scope I hardly understand what you mean
by it.

Second—"Has a *deputy surveyor* a right to
take the acknowledgment of deeds, under the
statutes?"

This question has given me considerable trouble, but
after a careful examination of the authorities I have come
to the conclusion that he has. Section 4106, Revised Stat-
utes, authorizes a *county surveyor* to take the acknowledg-
ment of deeds. Section 1166, Revised Statutes, provides
that he (the county surveyor) "may appoint *deputies*, not

*County Commissioners; Witness Fees in Sheep Cases.
Deputy Surveyor; Right to Take Acknowledgment of
Deed.*

exceeding three, and take from them such bond as he requires, and he shall be responsible for their official acts," etc. Section 10 provides: "A deputy, when duly qualified, shall have power to perform all and singular the duties of his principal." Section 4949 provides: "A duty enjoined by statute upon a ministerial officer, and an *act permitted to be done by him may be performed by his lawful deputy.*" Martindale, in his work on conveyancing, p. 216, says: "As a general rule, whenever an officer is authorized to have a deputy, such deputy may take and certify acknowledgments in the name of his principal, and in some States he may do this in his own name," and cites a number of authorities to sustain these propositions. Under the California statute county recorders were empowered to take acknowledgments of all instruments within their county which might be recorded under the statute. The same act authorized the recorder of each county to appoint a deputy. The act made no provision of the duties of the deputy, except as follows: "In case of a vacancy in the office of a recorder, or his absence or inability to perform the duties of his office, the deputy shall perform the duties of the recorder during the continuance of such vacancy, absence or inability." After a thorough examination of the question the court held: "Where the statute confers on an officer power to appoint a deputy, but does not prescribe the duties of the deputy, the deputy has full power to do any and all acts which his principal may perform by virtue of his office." *Muler vs. Boggs et al.*, 25 Cal. 175. The taking of an acknowledgment of a deed is a ministerial act. *Hill vs. Bacon*, 43 Ill. 479. In *Abrams vs. Irvin*, 9 Iowa, 87, it was held: "When the duties of a public officer are of a *ministerial* character, they may be discharged by deputy." In 8 Barbour, 463, it was held: "A commissioner of deeds, in taking the acknowledgment of the execution of a deed, acts ministerially and not judicially. The county clerk, in certifying to the

*County Commissioners; Witness Fees in Sheep Cases.
Deputy Surveyor; Right to Take Acknowledgment of
Deed.*

official act of the commissioners, and the genuineness of his signature, also acts ministerially, and that act may be performed *by deputy*." By an act of the General Assembly of Alabama, the deputy clerk was authorized to do all acts in the absence of the clerk which the principal could do were he present. The principal being absent the deputy probated the deed. The Supreme Court held upon these facts: "The deputy clerk may take the probate of a deed, in the absence of his principal." *Kemp et al. vs. Porter*, 7 Ala. 138. There are other cases sustaining the doctrine that ministerial duties may be performed by deputy, even to the extent of taking acknowledgments to deeds. It is true that the Supreme Court of this State in the case of *Hulse vs. State*, 35 Ohio St., 421, held that neither a deputy clerk of the Court of Common Pleas, nor a deputy county auditor has any power to act, in selecting the names of persons for a struck jury. In this case the court had occasion to comment upon the provisions of sections 10 and 4949, of our Revised Statutes, to which I have referred. But on page 426 of the report, Okey, J., in his opinion says that in the selection of struck jurors the statute designates the *persons* who are to perform the act, and that the statute does not have reference to the performance of the act by *officers* as such; and this is why, says the judge, in the case of the absence or disability of the clerk, the *judge* must select some person to act in his place, and this is the reason which the court assigns why the provisions of section 4949 do not apply in such cases.

I am of the opinion, upon an examination of the authorities cited herein, and others which I have examined, that deputy county surveyors can take the acknowledgment of deeds in this State.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

*Inquest of Lunacy; Costs; When Patient Becomes Again
Insane After Being Discharged.*

INQUEST OF LUNACY; COSTS; WHEN PATIENT
BECOMES AGAIN INSANE AFTER BEING DIS-
CHARGED.

Attorney General's Office,
Columbus, Ohio, April 5, 1889.

W. H. Barnhard, Esq., Mt. Gilead, Ohio:

MY DEAR SIR:—Yours of recent date duly received. Your former letter was received during my illness and by some inadvertence was overlooked after my recovery—probably filed away as answered when it had not been. It is the only time such a thing has occurred, and I must ask your pardon for the error.

I have carefully examined the inquiry submitted in your former letter, and have also communicated with the asylum authorities on the subject. They inform me that their record shows that the patient, Smith, was discharged, but there is no qualification of this discharge. That is to say, he was not discharged as incurable nor as "improved but not cured," but simply discharged. They also inform me that the actual facts are these: Smith was allowed to go home on a visit. After being there some time, his friends made application for his discharge, upon the ground, as I suppose, that his confinement was unnecessary. That he was subsequently again confined under the circumstances as stated by you, I have no doubt. I think the case is controlled by section 712, Revised Statutes, and although it may not come up to the strict *letter* of that section, I think it is within its spirit, and that the county is responsible for the costs, rather than the State, and that they should be paid on the certificate of the probate judge out of the county treasury. I believe this answers all your questions.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*County Commissioners; Expenses When Going About
County Under Direction of Board—Pauper; Unknown
Person Found Dead; Burial of.*

COUNTY COMMISSIONERS; EXPENSES WHEN
GOING ABOUT COUNTY UNDER DIRECTION
OF BOARD.

Attorney General's Office,
Columbus, Ohio, April 12, 1889.

John P. Bailey, Esq., Ottawa, Ohio:

DEAR SIR:—You recently submitted the following question for my official opinion: "Under act of April 8, 1886, Ohio Laws, 83, Vol., p. 71, when a county commissioner goes about the county, under the direction of the board upon official business for the county, is he not entitled to have paid by the county his reasonable and necessary expenses in addition to his per diem and mileage?"

Upon a careful examination of said section I am of the opinion that county commissioners, when performing such official work for the county, other than in attending regular or called sessions of the board, are entitled to their reasonable and necessary expense actually paid in the discharge of their official duties, in addition to their per diem and mileage. I think said act expressly so provides.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

PAUPER; UNKNOWN PERSON FOUND DEAD;
BURIAL OF.

Attorney General's Office,
Columbus, Ohio, April 19, 1889.

Clarence Curtain, Esq., Circleville, Ohio:

DEAR SIR:—Yours of the 12th inst. asking for a construction of section 1500a, Revised Statutes, duly received,

County Commissioners; Report to be Published in "Compact Form."

but it has been impossible to answer it sooner, owing to a press of official business. I am of the opinion that under the section referred to it is the duty of the township trustees, upon receiving information "that the dead body of any pauper, or unknown person, not the inmate of any penal, reformatory, benevolent or charitable institution," has been found in such township, and such "body is not claimed by any person for private burial, or delivered for the purpose of medical or surgical study or dissection," to cause said body to be buried at the expense of the township, and they shall certify such expense to the county commissioners, which amount is then to be paid to the township out of the county treasury, on the warrant of the county auditor. That is all there is to it, as I understand the section.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

COUNTY COMMISSIONERS; REPORT TO BE PUBLISHED IN "COMPACT FORM."

Attorney General's Office,
Columbus, Ohio, April 22, 1889.

J. L. McIlvaine, Esq., New Philadelphia, Ohio:

MY DEAR MR. MCILVAINE:—Yours of the 12th inst. duly received, and would have been promptly answered had I not been so crowded with work of an official character that it was impossible to do so. The section to which you refer is by no means easy of construction, but upon an examination of it I am inclined to the opinion that the report made to the court should be published as made. One object in having the report published in papers of opposite politics is to give the people of the county an opportunity to know

County Commissioners; Report to be Published in "Compact Form."

what the commissioners have been doing. This could hardly be done by publishing such a report as your commissioners seem to contemplate. Again, if the statute used the word "abbreviated" or "condensed," then the construction of the commissioners would seem more reasonable. The word "compact," as used in the statute, hardly conveys the idea for which the commissioners contend. I am inclined, therefore, to the opinion that you have placed the right construction upon the statute. Of course, what I say is what I believe to be the law upon the question, but I cannot send you an *official opinion*, for that would be interfering with the functions of your prosecuting attorney. With kind regards for yourself and family, and hoping that when you are in the city you will call on me, I am,

Yours truly,

DAVID K. WATSON,

Attorney General.

P. S.—Since writing the above opinion, my clerk has found an opinion in the records of the office by ex-Attorney General Lawrence, which fully sustains my position. Among other things he says: "The statement thus required to be published evidently means the detailed report mentioned before, and the provision that it shall be published in a compact form refers to the manner of such publication and not to the matter to be published." You will thus see that there is an official opinion on file which fully sustains the views of the "printers."

*Habeas Corpus; Releasing Boy From Reform School;
Practice—Elections; Judges and Clerks; Compensation
in Township Elections.*

HABEAS CORPUS; RELEASING BOY FROM RE-
FORM SCHOOL; PRACTICE.

Attorney General's Office,
Columbus, Ohio, April 23, 1889.

J. Y. Todd, Esq., Van Wert, Ohio:

DEAR SIR:—Replying to yours of the 19th inst. in which you ask for a construction of section 752 of the Revised Statutes, as amended, Ohio Laws, 83, p. 6, I am of the opinion that an order from the court, served upon the superintendent of the school, that he produce the boy before the court, in pursuance of the terms of the order, will be sufficient.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

ELECTIONS; JUDGES AND CLERKS; COMPENSA-
TION IN TOWNSHIP ELECTIONS.

Attorney General's Office,
Columbus, Ohio, April 24, 1889.

W. F. Trader, Esq., Xenia, Ohio:

DEAR SIR:—Yours of the 2d inst. duly received. Owing to the press of public business in this office it has been impossible to answer it sooner.

You ask for a construction of section 2963, Ohio Laws, Vol. 84, p. 217. I admit that it is not an easy thing to construe this section, as applied to the facts set forth in your letter. After a careful examination of the section, however, I am of the opinion that in all township elections—by this

Schools; Sub-districts to Pay Costs and Expenses of Suit.

I mean for the election of township officers only—the judges and clerks are to be paid by the township. It necessarily follows that in other elections, that is to say, for county or municipal officers, the county is to pay the judges and clerks. It may not seem just or right that the county should bear the expense of a city election or a mixed election, but the fault lies with the statute. I do not believe this section conveys the idea which the legislature intended it should, but that feeling would not justify a construction of the statute in plain contravention of its provisions.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SCHOOLS; SUB-DISTRICTS TO PAY COSTS AND
EXPENSES OF SUIT.

Attorney General's Office,
Columbus, Ohio, April 26, 1889.

M. A. Daugherty, Esq., Lancaster, Ohio:

DEAR SIR:—Yours of the 13th inst. duly received, but owing to an unusual amount of official work I have been unable to answer it until today. You submit the question, who is to pay the costs and attorney's fees in a case where a teacher brings suit against the directors of a sub-district, the prosecuting attorney not attending to the case, but other counsel being employed. Although the language of section 4019 is not as clear as it should have been, I am of the opinion that under the provisions of that section the sub-district should pay the costs of the suit and attorney's fees. If the directors of sub-districts can be sued, they must have, by implication at least, the power to defend, and consequently must take their chance like any other litigant. I am of the opinion, therefore, that under section 4019, the sub-

*Dow Law; Refunder Upon Discontinuing Business Under
Town Ordinance.*

district is liable for the costs and attorney fees as well as the judgment.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

DOW LAW; REFUNDER UPON DISCONTINUING
BUSINESS UNDER TOWN ORDINANCE.

Attorney General's Office,
Columbus, Ohio, April 26, 1889.

William H. Dore, Esq., Tiffin, Ohio:

DEAR SIR:—Yours of the 18th inst. duly received. The difference, in my opinion, between the two sections of the act to which you refer is this: Under section 3 the word "discontinues" refers to a person voluntarily going out of business, while in section 11, the prohibition or discontinuing of the traffic is brought about by the municipal authority. I think, therefore, that section 11 should control, in places where prohibitory ordinances have been passed, rather than section 3, and that the words in section 11 "a ratable proportion of the tax paid by the proprietors thereof for the unexpired portion of the year, shall be returned to such proprietors," means that the amount to be returned shall be proportionate to the time the business has been conducted since the beginning of the year. Or what is the same thing, if a man has paid his tax for the year, and at the end of ten months his business is prohibited by municipal ordinance, there should be refunded to him two-twelfths of the whole amount which he paid.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Township Treasurer and Clerks; Term of Office—Taxation; Probable Average Value of Personal Property Intended to be Used in Business.

TOWNSHIP TREASURER AND CLERKS; TERM OF OFFICE.

Attorney General's Office,
Columbus, Ohio, April 29, 1889.

John P. Stein, Esq., Sandusky, Ohio:

DEAR SIR:—Yours of the 15th inst. duly received, but owing to a press of official business it has been impossible to answer it before this. Your letter relates to the term of township officers, who were elected in April, 1888, and whether those elected in April, 1889, should "qualify and enter upon the discharge of their respective duties within ten days from April 1, 1889."

In my opinion section 3 on page 196, Ohio Laws, Vol. 85, controls, and that township treasurers and clerks elected in April, 1888, hold until the first of September, 1889. This act was passed subsequently to the act found in the same volume, p. 131, and by implication repeals at least that portion of section 1448 which refers to the terms of office of township treasurers and clerks.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

TAXATION; PROBABLE AVERAGE OF PERSONAL PROPERTY INTENDED TO BE USED IN BUSINESS.

Attorney General's Office,
Columbus, Ohio, May 2, 1889.

Hon. F. K. Dissette, Cleveland, Ohio:

DEAR SIR:—The recent letter of Mr. Ford, to which was added your foot note, was duly received by me, but

Sheriff's Fees; For Summoning Jurors.

owing to an unusual amount of official business I have been unable to answer it sooner. Since I have occupied this office the work has never been so laborious as in the past month. I have, however, examined the question which you and Mr. Ford submitted. Section 2743, among other things, provides: "Such person shall *report* to the auditor of the county the probable average value of the personal property by him intended to be employed," etc. It is true the provision in the old section in S. and C., was that he should *pay* tax on the amount of stock thus reported, and that that provision is omitted in the present statute, but I am inclined to think that a liberal construction should be given to section 2743, and that the merchant should pay taxes on the stock he reports to the auditor. Otherwise a person could always avoid paying taxes on his goods. The question, however, is not free from doubt, and looking at the letter of the statute only is difficult of solution, but I do not think there should be any penalty added.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SHERIFF'S FEES; FOR SUMMONING JURORS.

Attorney General's Office,
Columbus, Ohio, May 4, 1889.

Isaac Cahill, Esq., Bucyrus, Ohio:

DEAR SIR:—Yours of the 2d inst. duly received. You ask my opinion as to whether the sheriff is entitled to forty cents for summoning each juror, either grand or petit, in addition to the four dollars and fifty cents allowed by section 1230, Revised Statutes.

It has been held by several of my predecessors that the sheriff is entitled in such case to four dollars and fifty cents

Intoxicating Liquors; Dow Law; Town Councils; Can Not Tax, But May Prohibit Business.

only. I am of the opinion that this ruling is correct, and while the compensation may be entirely inadequate, the fault lies with the General Assembly.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

INTOXICATING LIQUORS; DOW LAW; TOWN COUNCILS; CAN NOT TAX, BUT MAY PROHIBIT BUSINESS.

Attorney General's Office,
Columbus, Ohio, May 6, 1889.

W. W. Hanlon, Esq., Barnesville, Ohio:

DEAR SIR:—Yours of the 4th inst. duly received. While it is really improper for me to give an opinion on miscellaneous matters, falling entirely outside my official duties, I will, nevertheless, answer yours of above date. Town councils have no right to assess a tax on the business of trafficking in intoxicating liquors *in addition to* the State tax. If the council has passed a prohibitory ordinance, closing the saloons, I presume the penalty for violating that ordinance lies within the discretion of the council, and they could make the fine any sum they pleased.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

*Insurance Companies; Joint Stock Fire Insurance Company;
Must Have Capital Stock Entirely Paid Up.*

INSURANCE COMPANIES; JOINT STOCK FIRE IN-
SURANCE COMANY; MUST HAVE CAPITAL
STOCK ENTIRELY PAID UP.

Attorney General's Office,
Columbus, Ohio, May 8, 1889.

Hon. Samuel E. Kemp, State Insurance Commissioner:

DEAR SIR:—You recently submitted to me in writing and requested my official opinion thereon, "whether or not the \$100,000.00 capital stock required of a joint stock fire insurance company must be entirely paid up before such company can receive authority to commence business." You also submitted to me at the same time certain correspondence between yourself and Mr. A. T. Brewer, of Cleveland, in which he contended that the statute would be satisfied when such a company paid in ten per cent. of its capital stock.

I have read the correspondence with pleasure and note with interest Mr. Brewer's discussion of the subject, but am not able to reconcile his conclusions with the provisions of the law. Such companies are organized under Chapter II, Vol. 1, p. 744, Revised Statutes.

Section 3634 provides: "No company shall be incorporated under this chapter with a smaller capital than one hundred thousand dollars," etc.

Section 3635, among other things: "The subscription books shall be kept open until the full amount specified in the articles is subscribed."

Section 3637 directs how the capital of such company shall be invested.

Section 3638 directs the investment of funds accumulating in business, or surplus money *above the capital stock of a company*.

Section 3639 contains certain limitations on the power of such investment.

Section 3640 provides: "When a company notifies the

*Insurance Companies; Joint Stock Fire Insurance Company;
Must Have Capital Stock Entirely Paid Up.*

superintendent of insurance that the proceedings required by the preceding section have been had, he shall make an examination of the condition of the company, and if he finds that the capital required of the company has been paid in and is possessed by it in money, or in such stocks, bonds and mortgages as are required by this chapter, he shall so certify," etc.

While it is true, the statute does not in plain words say, that the full amount of the capital of such a company shall be paid in, it is equally true that it nowhere provides for paying in a certain per cent. of its capital. But the statute does say (section 3637) that a company *shall invest its capital* in certain ways, not a *portion* of its capital, or that portion which is paid in, but *its capital*—meaning the whole of it.

The statute further provides when certain things are done the superintendent of insurance "shall make an examination of the condition of the company, and if he finds that *the capital required of the company has been paid in and is possessed by it in money, etc.*" he shall so certify. What is he to certify to?

That the full amount of the capital is paid in, or that only ten per cent. of it has been paid in? Under section 3634 the capital required of the company is one hundred thousand dollars, and there is no provision that it would be sufficient to pay in a certain per cent. of this sum.

The foregoing provisions taken together I think are conclusive of the question, and it is my opinion they require the full amount of the capital of such company should be paid in before you should make the certificate required by section 3640.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Costs; Extradition From Foreign Country; Tinkler Case.

COSTS; EXTRADITION FROM FOREIGN COUNTRY; TINKLER CASE.

Attorney General's Office,
Columbus, Ohio, May 14, 1889.

F. S. Rarey, Esq., Clerk Ohio Penitentiary, Columbus, Ohio:

DEAR SIR:—You recently submitted to me for an opinion thereon the cost bill in the case of the State of Ohio vs. Charles G. Tinkler, as allowed by the commissioners of Hamilton County and approved by the Hon. Miller Outcalt, Judge.

The first item contains the expense of the agent designated by the governor to go to Europe and bring back the defendant, and also the expenses of a person who accompanied him for some purpose of which I am not now aware, but probably to assist in bringing the prisoner back. I am of the opinion that under section 920, of the Revised Statutes, as amended, Vol. 79, p. 100, the State can only pay the expenses of the *agent* designated by the governor to pursue the fugitive, and if such agent employs a detective to assist him, the State is not bound to pay for such employment. I am also of the opinion that the stated salary of the agent during the time he was gone should not be charged up by his employers against the State, and if it is, the State should not pay the same. I therefore suggest that the expenses of the assistant who went with the designated agent and the salary of the agent be not allowed.

I further suggest that you require a carefully itemized account of the expenses, and in that connection call your attention to item 2, which makes a charge of \$368.65 for "expenses of agent and compensation of same going to Columbus, Washington and New York for extradition papers."

I will also call your attention to item 5, and suggest that you inquire carefully as to the date of the cablegrams and telegrams mentioned therein. If you find that this ex-

Juries; Grand Jury to be Filled From Petit Jury Panel.

pense was incurred in locating the prisoner, you should not allow the charge.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

JURIES; GRAND JURY TO BE FILLED FROM
PETIT JURY PANEL.

Attorney General's Office,
Columbus, Ohio, May 25, 1889.

*Charles W. Mellhorn, Esq., Prosecuting Attorney, Kenton,
Ohio:*

DEAR SIR:—Replying to your telegram just received will say I recently received a telegram from the prosecuting attorney at Canton, Ohio, asking “Whether, under the amendment passed last winter, the grand jury should be filled from by-standers or from the petit jury panel.” The telegram requested an immediate answer by telegram. After an examination of the question (which from the necessities of the case was not as thorough as I should have liked to have had it) I replied as follows: “Better fill the grand jury from the petit jury panel.”

As the laws are exclusively under the control of the secretary of state I can not send you a copy, as you request, but will ask the secretary of state to do so.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Taxation; Chattels Controlled by Agent in This State and Owned by a Non-resident. Taxation; Money in Hands of an Attorney in This State and Owned by a Non-resident.

TAXATION; CHATTELS CONTROLLED BY AGENT
IN THIS STATE AND OWNED BY A NON-
RESIDENT. TAXATION; MONEY IN HANDS
OF AN ATTORNEY IN THIS STATE AND
OWNED BY A NON-RESIDENT.

Attorney General's Office,
Columbus, Ohio, May 25, 1889.

George G. Jennings, Esq., Woodsfield, Ohio:

DEAR SIR:—Yours of the 9th inst. was duly received, but I have been prevented from answering it until this time. Concerning the chattel property owned by a gentleman living in Philadelphia and controlled as agent by a gentleman in your county, I am of the opinion that it should be listed for taxation by the agent. Your other question as to "whether an attorney who has claims in his hands for collection, or moneys in his hands which he has collected for clients on the day preceding the second Monday of April, is legally bound to list the same for taxation as attorney," I am of the opinion that he is.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Schools; Township Educating Pupils Who Live in Another Township—Taxation; Auditor to Add Fifty Per Cent. to Amount Returned After Examination by Board of Equalization.

SCHOOLS; TOWNSHIP EDUCATING PUPILS WHO LIVE IN ANOTHER TOWNSHIP.

Attorney General's Office,
Columbus, Ohio, May 25, 1889.

E. W. Maxson, Esq., Ravenna, Ohio:

DEAR SIR:—Yours of the 16th inst. duly received. Such a proceeding as you suggest in yours of above date (if I understand your proposition correctly,) can not, in my opinion, take place under section 3893. The whole case put by you is substantially embraced in your last question, "Or in other words, how does the township educating the pupils get pay for it from the township in which the pupils belong, where such pupils reside?"

This matter is controlled by section 4022, Revised Statutes, to which I respectfully call your attention.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

TAXATION; AUDITOR TO ADD FIFTY PER CENT. TO AMOUNT RETURNED AFTER EXAMINATION BY BOARD OF EQUALIZATION.

Attorney General's Office,
Columbus, Ohio, June 3, 1889.

George G. Jennings, Esq., Woodsfield, Ohio:

DEAR SIR:—Yours of the 28th ult. was duly received, in which you ask the following question: "When the annual board of equalization under section 2804 calls a person be-

*Workshops and Factories; Inspector; Fire Escapes; Owners
and Holders of Buildings Liable.*

fore it who has been reported by the assessor as having 'refused to swear' to his return, and it requires him to answer questions under oath in regard to his own property, moneys, etc., and the amount returned by the assessor for the person is increased by his statements under oath, must the auditor add the fifty per cent. penalty as required by section 2784, to the whole amount as ascertained by such person's evidence?"

After a careful examination of section 2784, Revised Statutes, I am of the opinion that the auditor should add fifty per cent. to the amount ascertained from the examination of the party, by the board of equalization, *to have been the true amount which should have been returned.* The meaning of the statute is not entirely clear, but upon the whole I am inclined to this opinion, as it was the intention of the legislature to provide a penalty for persons guilty of delinquencies.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

WORKSHOPS AND FACTORIES; INSPECTOR;
FIRE ESCAPES; OWNERS AND HOLDERS OF
BUILDINGS LIABLE.

Attorney General's Office,
Columbus, Ohio, June 4, 1889.

*Hon. W. Z. McDonald, Chief Inspector Workshops and
Factories:*

DEAR SIR:—You recently submitted to me for an official opinion thereon the following communication: "As there has some dispute arisen as to who is to be held responsible for compliance to orders issued from this department in reference to erection of fire escapes, will you please render

Juries; Grand Jury to be Filled From Petit Jury Panel; Witness Fees; In Criminal Cases; How Paid.

a written opinion of your construction placed on section 2573c of the Revised Statutes of Ohio, as to whether the owner of the building or the tenant or both shall be held responsible for compliance."

I have examined the section of the statutes referred to with reference to the subject of fire escapes, and am of the opinion that after the owners or proprietors of buildings have each been duly notified to erect proper fire escapes, and neglect to do so, each is liable for the penalty provided by the statute.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

JURIES; GRAND JURY TO BE FILLED FROM
PETIT JURY PANEL; WITNESS FEES; IN
CRIMINAL CASES; HOW PAID.

Attorney General's Office,
Columbus, Ohio, June 10, 1889.

C. J. Smith, Esq., Hamilton, Ohio:

DEAR SIR:—Yours of May 31st duly received. A few days ago I received a telegram from the prosecuting attorney at Canton, Ohio, asking "Whether, under the enactment passed last winter, the grand jury should be filled from by-standers or from the petit jury panel." The telegram requested an immediate answer by telegram. After an examination of the question (which from the necessities of the case was not as thorough as I should like to have had it) I replied as follows: "Better fill the grand jury from the petit jury panel." I will add that in the case of Charles Julian vs. the State, on error to the Common Pleas Court of Stark County, the Supreme Court now has the question before it.

Taxation; Borrowed Capital; Probable Average Value of Personal Property; Purpose of Report; "Transient Trader."

As to your question under section 1302, Revised Statutes, as amended, 81 Ohio Laws, 59, I am of the opinion that you are right and that said section makes it clear that all witnesses attending a court of record in a criminal case, by order of the prosecutor or defendant, are entitled to draw their fees out of the county treasury on the order of the auditor, being certified to the auditor by the clerk of the court.

Very respectfully yours,
 DAVID K. WATSON,
 Attorney General.

TAXATION; BORROWED CAPITAL; PROBABLE AVERAGE VALUE OF PERSONAL PROPERTY; PURPOSE OF REPORT; "TRANSIENT TRADER."

Attorney General's Office,
 Columbus, Ohio, June 13, 1889.

Theodore K. Funk, Esq., Portsmouth, Ohio:

DEAR SIR:—I infer, from your letter of late date, that you desire my official opinion upon substantially the following question: Where a party engages in business upon borrowed capital, which capital has already been taxed while in the hands of the lender, is the business subject to taxation also? I am of the opinion that it is. A manufacturer, or general business man, is not relieved from paying taxes on his business or stock of goods, or money invested therein, because he commences business after the second Monday of April, or because he has invested borrowed capital which has already been taxed.

The purpose of the report which is required to be made by section 2743, Revised Statutes, is to advise the auditor

County Clerk; Fees of in Pension Cases.

of the county of the "probable average value" of the personal property invested or employed in a given business after the second Monday of April of a given year and until the next tax listing day.

By "transient trader" is meant one who trades "on the wing." That is to say, a person who engages in business in a place with the intention of remaining there but a short time.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

COUNTY CLERK; FEES OF IN PENSION CASES.

Attorney General's Office,
Columbus, Ohio, June 22, 1889.

Marcus G. Evans, Esq., Prosecuting Attorney, Chillicothe, Ohio:

DEAR SIR:—Yours of the 19th inst. duly received, in which you submit the following questions:

First—"Can the clerk charge for certifying to the official character of justices of the peace in pension cases?"

Second—"Can he charge for acknowledging articles of agreement between a pensioner and agent?"

A few days since I received a letter of which the following is a copy from the clerk of your court, Mr. Charles Reed: "Will you please give me your construction of section 1264, Revised Statutes of Ohio. We have been in the habit of doing all pension work free of charge, such as taking affidavits, certifying to official capacity of justices and notaries, and acknowledging articles of agreement between applicants

County Clerk; Fees of in Pension Cases.

and attorneys. We are informed that clerks in most of the counties in the State charge for certifying to official capacity of justices and notaries and acknowledging articles of agreement. Are they entitled to make such charges?" To which I sent the following reply: "It is clear that you are not entitled, under section 1264, of the Revised Statutes of this State, to make any charge 'for certificates made for pensioners of the United States, or for any oath administered on pension vouchers, applications or affidavits.' Here the limitation seems to end, but your question goes farther, and you ask if you are 'entitled to charge for certifying to the official capacity of justices and notaries public, and acknowledging articles of agreement.' I do not think that section 1264 prevents you from making a charge for these last mentioned services. By looking at sections 206, 7, 8, 9 and 10, Revised Statutes, you will see that I have gone beyond my official duties, and I hope you will not treat this as an official opinion."

Concerning your first question, I have this to say: If it is necessary for the clerk of the court "to certify to the official character of justices of the peace" in pension claims in order to make his certificate for pensioners, then he is not entitled to charge for certifying to such official character. Let me put this in another way: Section 1264 provides, "the clerk of the court shall not make any charge whatever for *certificates made for prisoners,*" etc.; now, if in order to make the certificate, *it is necessary for the clerk to certify to the official character of justices of the peace, he is not entitled to charge for it,* but whether certifying to such official character is properly a part of the certificate referred to in the statute, is a matter I can not determine, without an examination of the certificate which the clerk makes. When I wrote Mr. Reed I was inclined to think it was not, but of this he and you can judge.

Your second question I do not fully understand. I know of no statute requiring such an agreement as you speak of to be acknowledged. If there is a Federal statute or any

Taxation; Unincorporated Banks.

rule of the department requiring such an acknowledgment you have not cited me to it and I am not aware of it.

Hoping the above is satisfactory, I am,

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

TAXATION; UNINCORPORATED BANKS.

Attorney General's Office,
Columbus, Ohio, July 16, 1889.

Philip Handrehan, Esq., Winchester, Ohio:

DEAR SIR:—Yours of the 8th ult. was duly received, but an absence of several days from the city, together with an unusual amount of public business, made it out of the question to answer sooner.

You ask "whether incorporated banks, under the provisions of section 2759, Revised Statutes, as amended April 17th, '82, Vol. 79, Ohio Laws, p. 110, are exempt from taxation on their paid in capital, or whether they, or the shareholders are required to list it for taxation."

After a careful examination of section 2759 I am not able to see how incorporated banks can escape the payment of taxes, in the manner provided in that section. The provisions of section 2759a are intended, I think, to simply require the bank to report the amount of capital paid in or employed in such business and the number of shares held by each partner, as a matter of information for public convenience, and does not require the shareholder to list the property for taxation.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Inspector of Workshops and Factories; Power to Inspect Boilers—County Clerk; Fees of, For Statistical Information.

INSPECTOR OF WORKSHOPS AND FACTORIES;
POWER TO INSPECT BOILERS.

Attorney General's Office,
Columbus, Ohio, July 19, 1889.

Hon. William Z. McDonald, Chief Inspector:

DEAR SIR:—You recently submitted to me the question whether, under section 3, p. 158, and section 2573c, p. 159, Vol. III Williams' Revised Statutes, you have the authority to inspect boilers.

It is to be regretted that the statute is not more definite upon this subject, but after a careful consideration of the entire act and the purposes which it was intended to accomplish, I am of the opinion that the language of the above sections is sufficiently broad to warrant you in making such inspection.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

COUNTY CLERK; FEES OF, FOR STATISTICAL
INFORMATION.

Attorney General's Office,
Columbus, Ohio, July 27, 1889.

J. H. Southard, Esq., Toledo, Ohio:

DEAR SIR:—Yours of the 24th inst. duly received, in which you ask my opinion upon the following: "The clerk of the Common Pleas Court is required annually to make out and forward to the secretary of state his report as to the number of cases tried in his court during the preceding year;

Coroners; Entitled to Hold Inquests in Benevolent Institutions.

the number of cases of different kinds therein specified; the number of judgments obtained; the total as well as the average amount of said judgments; the number of divorce and criminal cases and the result of the same, etc. Said report embodies considerable statistical information for which blanks are furnished by said secretary of state. What compensation, if any, is the clerk of said court entitled to receive for said work? I call your attention to sections 140 and 1248 of the Revised Statutes."

I am of the opinion that the report required of the clerk of the court by section 1248, Revised Statutes, refers to his report of the criminal cases, and that his compensation for making such report is controlled by section 1250. That is to say, for the first fifty cases he is entitled to twenty-five cents each, and for each additional case he is entitled to ten cents.

Concerning other reports, such as you mention in your letter, the clerk is controlled by section 140.

Respectfully yours,
DAVID K. WATSON,
Attorney General.

CORONERS; ENTITLED TO HOLD INQUESTS IN
BENEVOLENT INSTITUTIONS.

Attorney General's Office,
Columbus, Ohio, July 27, 1889.

To the Superintendent Dayton Asylum, Dayton, Ohio:

DEAR SIR:—I regret now that I did not inquire of you more fully when you were here concerning the facts you mentioned to me.

The question you submit is whether the coroner is entitled to go to your institution and hold an inquest upon the

Coroners; Entitled to Hold Inquests in Benevolent Institutions.

body of a patient who appears to have died a natural but unexpected death; say as an illustration, the patient retires in apparently sound health, but is found in the morning dead in bed, without any marks of violence or evidence of death being caused by unnatural means.

The question is by no means free from difficulty. Section 1221 of the Revised Statutes provides as follows:

“When information is given to any coroner, that the body of a person *whose death is supposed to have been caused by violence*, has been found within his county, he shall appear forthwith at the place where such body is, etc.”

This language seems to be mandatory upon the coroner, and yet he ought certainly to exercise some discretion concerning the source of his information, its reliability, etc. I am inclined, however, upon a careful reading of the statute, to the opinion that when the coroner has information which to him is sufficient to warrant action on his part, the fact that the place where the body is reported to be is an institution of such a character as you represent, should not prevent him from going and he would probably have the legal right to hold an inquest.

Respectfully yours,

DAVID K. WATSON,

Attorney General.

Railroads Running Over Same Line, "Operating" Said Road; Liable For Fee of \$1.

RAILROADS RUNNING OVER SAME LINE, "OPERATING" SAID ROAD; LIABLE FOR FEE OF \$1.

Attorney General's Office,
Columbus, Ohio, August 3, 1889.

Hon. W. S. Cappeller, Commissioner of Railroads:

DEAR SIR:—You recently submitted the following question to me and asked my written official opinion thereon:

"Where two or more railroad corporations or companies are running over the same line, under a lease or contract, in such case, under the act of April 15, 1889, Ohio Laws, 86, p. 351, supplement to section 251 of the Revised Statutes, are each of the roads to be held as operating such piece of road or track, and are they each required to pay the fee of one dollar per mile of track 'operated by them?'"

I have examined the section to which you refer, and am of the opinion that each corporation or company which operates a railroad by running its trains over a given line is required by the statute to pay the fee of one dollar per mile. The fact that some other railroad company is running its trains over the same line does not, in my opinion, relieve the company from paying the fee. In such a case each corporation is "operating" the road, within the meaning of the statute, and consequently each is liable under the statute for the fees described by it.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

*Taxation; Delinquent Taxes; When Treasurer to Collect
Penalty, Etc.*

TAXATION; DELINQUENT TAXES; WHEN
TREASURER TO COLLECT PENALTY, ETC.

Attorney General's Office,
Columbus, Ohio, August 12, 1889.

Robert N. Nevin, Esq., Prosecuting Attorney, Dayton, Ohio:

DEAR SIR:—You recently submitted to me the following statement and asked my opinion thereon: "Certain taxes have been listed and collected by our county treasurer as provided by section 2781 of the laws, passed April 14, 1886, Vol. 83, p. 82. These you have held and certain courts have decided to be delinquent taxes. Our treasurer asks five per centum for making collection as provided by section 2856, Ohio Laws, as amended, passed April 15, 1880, Vol. 77, pp. 226-7."

I think the five per centum allowed the treasurer by section 2856 means the five per centum on the duplicate mentioned in section 2855. The language of section 2856 bears me out, I believe, in this construction, for it says: "The treasurer shall forthwith proceed to collect the taxes and penalty on said duplicate," meaning the duplicate mentioned in the preceding section, to wit: the duplicate made by the county auditor *immediately after the semi-annual settlement in August*. This view is also supported by the language of section 2857.

I do not see any logical connection between the taxes placed upon the duplicate under section 2781, as amended, Ohio Laws, Vol. 83, p. 82, and the five per cent., allowed the treasurer by section 2856, as amended, Ohio Laws, Vol. 77, p. 226-7, nor do I think the treasurer can be allowed the five per cent. mentioned in this last section on money collected by him under section 2781. In other words (and in the hopes of making myself thoroughly understood), section 2781, as amended, and section 2856, as amended, have nothing to do with each other, and therefore for taxes which

Taxation; Delinquent Taxes; When Treasurer to Collect Penalty, Etc.

the treasurer collects under section 2781 he is not entitled to the five per cent. mentioned in section 2856; because:

a. The five per cent. referred to in section 2856 is a per cent. on a special tax duplicate or tax list.

b. The time when this special tax list or duplicate is made is a fixed annual time.

c. The taxes contemplated by section 2781 are not in one sense delinquent taxes, and yet they are delinquent in the sense that they are due, but have not been paid. Therefore they are payable whenever the auditor sends his certificate to the treasurer. This being so, they do not come within the provisions of section 2856. But there is another matter for consideration in this connection, growing out of the provisions of section 2781. That section was evidently intended to apply in the case of omitted, or hitherto undiscovered or falsely returned property, and the auditor, being satisfied that it should be on the duplicate, placed it there and certified it to the county treasurer, who (the statute says) "shall collect the same as other taxes." This language, "shall collect the same as other taxes," at first seems ambiguous, but I am satisfied upon reflection that the construction given it by Judges Stone and Lawson, of Cleveland, is correct, to wit: "Shall collect the same as other taxes which have become due and payable, but which have not been paid." When therefore the county treasurer receives from the auditor such a certificate as is mentioned in section 2781, it is his duty to proceed and collect the taxes mentioned in said certificate in the same manner as he does other taxes which are due and unpaid, and for which he may receive compensation to be paid in the same way.

This brings us to the consideration of section 1094, Revised Statutes, which provides among other things, "* * * ; the county treasurer shall proceed to collect the same by distress or otherwise, together with a penalty of *five per cent. on the amount of taxes so delinquent, etc.*" I do not hesitate to say that the taxes certified to the treasurer by the

Taxation; Delinquent Taxes; When Treasurer to Collect Penalty, Etc.

auditor under section 2781, are delinquent in the sense that they are past due taxes, although they have never been upon the duplicate. The fact that they are certified to the treasurer by the auditor under the provisions of section 2781, is equivalent to their having been upon the duplicate and not paid. They are therefore in effect delinquent taxes, so as to come within the provisions of section 1094, and when the treasurer collects them by any means mentioned in that section, that is to say, by distress *or otherwise*, he is entitled to add a penalty of five per cent. and collect it, which is the compensation for performing the labor. The expression "or otherwise," as used in this last mentioned section, is certainly indefinite, but I think a liberal construction should be given it in favor of the treasurer, and hold that if he collects the tax by notifying the person to come in and pay, or in any such manner secure payment of the tax, he is entitled to his five per cent. The person who has the tax to pay, certainly has no right to complain, for by his non-compliance with the law he has put the treasurer to extra labor, and he should be willing to render him that compensation which the law provides.

I trust you will have no trouble in understanding my conclusions upon these questions. In brief, they are, that the treasurer is entitled to five per cent. on the amount which he collects under the provisions of section 2781; but he must collect it according to the provisions of section 1094, and the five per cent. should be paid by the party paying the taxes. I have carefully examined the opinions of Judges Stone and Lawson on similar questions, and believe that I am in harmony with them.

I deeply regret that I have been unable to answer your inquiry at an earlier date, but have done so as soon as the duties of my office would permit.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Taxation; Delinquent Taxes; Treasurer to Collect Penalty.TAXATION; DELINQUENT TAXES; TREASURER
TO COLLECT PENALTY.

Attorney General's Office,
Columbus, Ohio, August 17, 1889.

R. E. McDonald, Esq., Carrollton, Ohio:

DEAR SIR:—Yours of the 15th inst. duly received. You state the following case, and ask my official opinion thereon: "Through the efforts of the tax inquisitor and the county auditor certain parties were brought before the auditor for a hearing concerning omissions in listing their property for taxation. After the investigation the matter was settled by the parties consenting to pay a certain sum into the county treasury. The treasurer demanded five per cent. of the amount of the parties, under section 1094, Revised Statutes." You desire to know if he is entitled to it.

I wish you had stated the case more fully; I do not know from your statement whether you certified the amount to the treasurer, under section 2781, as amended, Vol. 83, p. 82, for collection, but *presume* you have. I have recently had occasion to go over this question very thoroughly, and the conclusion I came to was that where the county auditor gave a certificate to the treasurer, under section 2781, above referred to, and in pursuance of such certificate the treasurer collected the taxes, he was entitled to five per cent. additional on the amount so collected, to be paid by the party who had omitted to make the proper return.

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

Insurance Companies; Act of April 10, 1889, Against Discrimination Not Applicable to Associations Organized Under Section 3630 Revised Statutes.

INSURANCE COMPANIES; ACT OF APRIL 10, 1889,
AGAINST DISCRIMINATION NOT APPLI-
CABLE TO ASSOCIATIONS ORGANIZED UN-
DER SECTION 3630 REVISED STATUTES.

Attorney General's Office,
Columbus, Ohio, August 19, 1889.

Hon. Samuel E. Kempf, Commissioner of Insurance:

DEAR SIR:—You recently submitted to me the following and requested my official opinion thereon: "I have recently received numerous inquiries as to whether the provisions of an act passed April 10, 1889, commonly called the anti-rebate law, were intended to apply to that class of associations organized and operated under the provisions of section 3630 and supplemental sections. Inasmuch as there is provision made for a penalty for the violation of this law, I have thought it best to ask your official opinion before answering these inquiries."

Section 1 of the act of April 10, 1889, to which you refer, provides that "No life insurance *company* doing business in Ohio, etc," and this expression is continued throughout said section. No mention is made of any insurance "association," and I am inclined, upon a careful reading of the whole section, to the opinion that associations organized and operated under section 3630, of our Revised Statutes, do not come within the provisions of the act. Since coming to this conclusion, I have seen an opinion by the attorney general of New York construing a similar act passed by their legislature last winter, and was pleased to notice that he gave it the same construction as I do the act of our General Assembly.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Taxation; Omitted Taxes; How Fifty Per Cent. Penalty
Should be Added.*

TAXATION; OMITTED TAXES; HOW FIFTY PER
CENT. PENALTY SHOULD BE ADDED.

Attorney General's Office,
Columbus, Ohio, August 17, 1889.

James T. Close, Esq., Upper Sandusky, Ohio:

DEAR SIR:—In yours of the 9th inst. you ask my opinion upon the following statement:

A listed to the township assessor for the year 1888 under the head of moneys and credits	\$4,000 00
He died soon after and his executor filed an inventory in probate court, showing credits over debts	12,000 00
County auditor finds that the true amount A should have listed is	12,000 00
To which he adds 50 per cent penalty..	6,000 00

Total including penalty	\$18,000 00
Deduct amount A listed to assessor ...	4,000 00

Making omitted amount and penalty
on which the taxes are charged

.....	\$14,000 00
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I hold this method wrong in adding fifty per cent. to the true amount, viz: \$12,000.00, when \$4,000.00 of that amount had been listed, etc.; and say that county auditor should follow this rule:

True amount A should have listed	\$12,000 00
Deduct therefrom amount A did list ..	4,000 00

Total amount omitted	\$8,000 00
To which add fifty per cent. penalty ...	4,000 00

Omitted amount and penalty on which charge taxes	\$12,000 00
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This last method, as you perceive, favors tax payer \$2,000.00. Please give me your opinion as to which course auditor should take.

Taxation; Omitted Taxes; How Fifty Per Cent Should be Added.

While a strict construction of the language of the statute might in certain cases warrant the view taken by the auditor in this case, I am of the opinion that your construction is the correct one, and that the amount of property which had been listed should be deducted from that which ought to have been listed. In other words the 50 per cent. ought not to be added to property which was returned. As to the second case submitted by you in yours of above date, I do not think that it is sufficiently plain and clear to justify the addition of the penalty.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

TAXATION; OMITTED TAXES; HOW FIFTY PER CENT. SHOULD BE ADDED.

Attorney General's Office,
Columbus, Ohio, August 20, 1889.

James T. Close, Esq., Upper Sandusky, Ohio:

DEAR SIR:—Your last communication received. My attention was called to section 2781, as amended Vol. 83, p. 82. Upon a careful examination of the language of that section I thought that upon a strict construction of the statute the auditor's construction would be right, but thought that a liberal rule should be applied in such cases, rather than a strict one. I think, however, the case you refer to is decisive of the matter. Concerning your second question, from the manner in which you state it, I am of the opinion that the fifty per cent. should not be added, because I do not believe that he made a false return within the meaning of section 2781-82. See *Insurance Company vs. Cappeler*, 38 Ohio St. 560, 573-4.

*Workshops and Factories; Inspector; Power in Cities for
First and Second Grades of First Class.*

You are, however, familiar with all the facts in the case and the auditor should follow your opinion.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

WORKSHOPS AND FACTORIES; INSPECTOR;
POWER IN CITIES FOR FIRST AND SECOND
GRADES OF FIRST CLASS.

Attorney General's Office,
Columbus, Ohio, August 20, 1889.

Hon. William Z. McDonald, Chief Inspector:

DEAR SIR:—You recently submitted to me a communication on which you desired my official written opinion, calling my attention to the fact that House Bill No. 839, passed March 27, 1889, by the General Assembly of this State created the office of supervising engineer in cities of the first and second grades of the first class, and giving said engineer power to compel the erection of fire escapes on certain buildings in said cities. The exact question you submit for my determination is: "Does House Bill No. 839 in any way repeal the authority of this department over workshops and factories in regard to the erection of fire escapes in cities of the first and second grades of the first class?"

I have carefully examined section 2573c of the Revised Statutes relative to your powers and duties in ordering the erection of fire escapes, etc. I have also examined with care the language of section 6 of the act of March 27, 1889 authorizing mayors of cities of the first and second grades of the first class to appoint supervising engineers within their cities, and the power of said engineers, under said section, and am of the opinion that the power and authority conferred

Corporations; "Mutual Endowment Association."

upon said engineers under said section are in conflict with the power and authority conferred upon you under section 2573c. Section 10 of the act of 1889, above referred to, provides as follows: "All acts or parts of acts inconsistent or in conflict with this act, be and the same are hereby repealed."

I am therefore of the opinion that the act conferring upon you the authority to order the erection of fire escapes in cities of the first and second grades of the first class, is repealed by the act of March 27, 1889.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

CORPORATIONS; "MUTUAL ENDOWMENT ASSOCIATION."

Attorney General's Office,
Columbus, Ohio, August 21, 1889.

Hon. Daniel J. Ryan, Secretary of State:

DEAR SIR:—You recently submitted to me for my examination and opinion, the proposed articles of incorporation of the "Mutual Endowment Association."

I have examined the purposes of said association as set out in its proposed articles of incorporation, and herewith return the same to you, stating it as my opinion that they should not be filed.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

*Elections; Majority of Votes Cast on a Given Question at
General Election.*

ELECTIONS; MAJORITY OF VOTES CAST ON A
GIVEN QUESTION AT GENERAL ELECTION.

Attorney General's Office,
Columbus, Ohio, August 21, 1889.

R. B. Miller, Esq., Ironton, Ohio:

DEAR SIR:—I recently received a communication from you, in which you submitted the following facts and questions, and asked my official opinion thereon:

“At our last municipal election, the electors of this city, in addition to voting for various officers, voted also upon a proposition to purchase certain real estate for a park. The ordinance submitting said proposition was based upon Revised Statutes, section 2232 amended Ohio Law, Vol. 85, p. 177, and provided, that those voting in favor of the purchase should have written or printed on their ballots, ‘Park yes,’ and those voting against the same, ‘Park no,’ and that ‘if a majority of the votes cast at the election shall be in favor of the purchase,’ the council shall proceed to purchase and dedicate the real estate to park purposes. At said election, 1,745 votes were cast on the question of who should be mayor, there being but one candidate; while there were 2,250 votes cast on the question of who should be marshal, there being two candidates. On the park question 1,850 electors voted either ‘Park yes,’ or ‘Park no,’ and a majority of these voted ‘Park yes,’ but the number thus voting in favor of the purchase was not a majority of the entire number of electors who voted at the election, as indicated in the vote on marshal, where the greatest contest was. The question is, whether in view of these facts, viz: The provisions of the statute and the ordinance of submission, and the result of the election, the proposition to purchase the park carried or not: Does the ‘majority of voters,’ who must endorse the proposition to purchase under section 2,232, as amended, mean a majority of the votes

*Elections; Majority of Votes Cast on a Given Question at
General Election.*

upon the proposition submitted, that is, a majority of the electors who vote either for or against such proposition. or, on the other hand, does it mean a majority of the entire number of electors, who, for whatever purpose, and to vote for whatever officer or matter, take part in the election, where the proposition is submitted?"

I trust that in going beyond my official duties and giving you an opinion, I shall not be regarded as a mere volunteer. Section 2232, Revised Statutes, as amended Vol. 85, p. 177, authorizes each city and village to enter upon, and hold real estate within its corporate limits for certain purposes therein enumerated. Section 10 of said amended act contains, among other things, the following provisions: "For public parks, after the proposition to purchase and appropriate has been voted upon and endorsed by a *majority of the voters in the village or city* proposing to so appropriate land, etc."

It appears from the statement you submit that the vote upon this proposition was held upon the same day and at the same time and place as the regular election for city officers in your city. It also appears that more votes were cast for the candidate for mayor and for candidate for marshal of the city than were cast upon the park proposition, but that, of *those voting upon such proposition*, a majority voted in favor of it. A case very similar to this came before the Supreme Court of Wisconsin in the following way: The constitution of that state conferred the right of suffrage upon certain persons and then provided: "That the Legislature may at any time extend by law the right of suffrage to persons not herein enumerated; but no such law shall be enforced until the same shall have been submitted to a vote of the people, at a general election, and *approved by a majority of all the votes cast at such election.*" At an annual election for state officers in that state, the question was submitted to the electors thereof, whether the right of suffrage should be extended to

*Elections; Majority of Votes Cast on a Given Question at
General Election.*

certain other persons residing therein and possessing necessary qualifications of electors. It appears that a majority of the votes cast at such election upon that particular question or proposition was in favor of such extension of the right of suffrage; but it also appears that more votes were cast at such election, for some of the state officers than were cast upon said suffrage proposition. After a very thorough consideration of the whole question, the Supreme Court held: "The act * * * submitting to a vote of the people the question of extending the right of suffrage to colored persons, became a law when it had been approved by a majority of the votes cast upon *that subject* at the general election next after the passage of the act." See *Gillespie vs. Palmer et al*, 20 Wis. 544. This decision was approved by Chief Justice Dickson, in the case of *Sanford vs. Prentice and others*, 28 Wis. 358. The statute which the court was called upon to construe provided: "A majority of the legal voters of said district may, at any legally called special or annual meeting of said voters, determine the amount of money to be levied and collected, etc." It was held: First—"That a majority of all the *qualified electors* of the district is not required for the levy of the tax, but only of those actually present and voting at a meeting duly called. Second—That the phrase 'qualified elector,' in an act of the Legislature, means a person who is legally qualified to vote; while 'a legal voter' means (unless a different meaning appears from other language in the act) a qualified elector *who does in fact vote*." I am of the opinion therefore, in view of these adjudications, that the language of the statute which requires the proposition to purchase and appropriate to be voted upon and endorsed by *a majority of the voters in the city*, means a majority of the voters in the city *who voted upon that particular proposition only*, and not a majority of *all* the voters in the city. A somewhat similar question was submitted to me some time ago by the prosecuting attorney of Champaign County arising under section 3704, of the Revised Statutes,

Taxation; Delinquent Taxes; When Treasurer to Collect Penalty.

which provided, among other things, that a certain tax could not be levied until the question was submitted to the electors at some general election, * * * "and if a majority of the votes passed, etc." I held, the expression "a majority of the votes cast at such election" meant "a majority of the votes cast on the given question, or proposition," and not "a majority of all the votes cast at that election."

In the case which you have submitted to me, my conclusions are that the proposition to purchase real estate for the purpose of a park, having received more votes for it than were cast against it, was carried.

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

TAXATION; DELINQUENT TAXES; WHEN
TREASURER TO COLLECT PENALTY.

Attorney General's Office,
Columbus, Ohio, August 23, 1889.

Robert E. McDonald, Esq., Prosecuting Attorney, Carrollton, Ohio:

DEAR SIR:—YOURS of the 20th instant duly received. Section 1094 (referring to certain delinquent taxes) provides: "The county treasurer shall proceed to collect the same by distress *or otherwise*." It has been held by two Common Pleas judges in this State, and prior to their decision I held the same way, that taxes such as you mention, to-wit, taxes due on property which has not been returned for taxation, were delinquent within the meaning of section 1094. What the expression "or otherwise" means is very difficult to determine; but I am of the opinion that it

Intoxicating Liquors; Selling Within Two Miles of County Fair.

should be construed liberally, and in such a case as you mention the treasurer is entitled to the compensation.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

INTOXICATING LIQUORS; SELLING WITHIN
TWO MILES OF COUNTY FAIR.

Attorney General's Office,
Columbus, Ohio, August 23, 1889.

John J. Malley, Esq., Napoleon, Ohio:

DEAR SIR:—Yours of the 20th instant duly received and contents noted. While I am not the legal adviser in such cases as you mention, I do not feel at liberty to disregard such a frank and gentlemanly letter as yours of above date.

Section 6946, of the Revised Statutes as amended Ohio laws, Vol. 85, page 19, provides among other things:

“Whoever sells intoxicating liquors * * * within two miles of the place where any agricultural fair is being held * * * shall be fined, etc.”

I do not know what kind of a fair “The Henry County Joint Stock Agricultural Association” holds; but I suppose it is an ordinary county fair, and if it is, it is unlawful in my opinion, to sell intoxicating liquors within two miles of where it is held, and it is the duty of the authorities to prevent such sales within such territory.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

County Commissioners; Must Pay Expenses of Burial of Pauper—County Auditor; Power to Release Prisoner Under Game Law; "Fine" and "Amercement" Considered.

COUNTY COMMISSIONERS; MUST PAY EXPENSES OF BURIAL OF PAUPER.

Attorney General's Office,
Columbus, Ohio, August 24, 1889.

Virgil C. Lowry, Esq., Logan, Ohio:

DEAR SIR:—Yours of the 19th instant in which you submit to me the following question, duly received: "Under section 1500a, Vol. 84, page 29, must the county commissioners or the infirmary directors pay the burial expenses therein provided for in counties having infirmaries? And if the county commissioners must pay said burial expenses, out of what fund must they pay it?" It is my opinion that such expenses mentioned in the above section is first to be borne by the township trustees, and then to be refunded by the county commissioners out of the county treasury as provided for in said section, and that they should be paid out of the county fund.

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

COUNTY AUDITOR; POWER TO RELEASE PRISONER UNDER GAME LAW; "FINE" AND "AMERCEMENT" CONSIDERED.

Attorney General's Office,
Columbus, Ohio, August 23, 1889.

D. W. Jones, Esq., Gallipolis, Ohio:

DEAR SIR:—In yours of the 19th instant, which was duly received, you submit the following question and ask

County Auditor; Power to Release Prisoner Under Game Law; "Fine" and "Amercement" Considered.

my opinion thereon: "A. B. was convicted under the fish and game law, and fined \$25.00 and costs. The fine has been settled; the J. P. now issues execution for the costs, and takes the body of the defendant, and he is committed to jail. Can the auditor release him under section 1028? 85 O. L., p. 285 provides that 'if defendant be acquitted, or if he be convicted and committed to jail in default of payment of fine and costs the justice, etc., before whom the case was brought shall certify such costs to the county auditor who shall examine, and if necessary, correct the account, and issue his warrant to the county treasury in favor of the respective officers to whom costs are due for the amount due to each.' There being no money in the fish and game fund, these costs have not been paid. Can the costs in the case, due and unpaid, be deemed 'due the county' and the auditor authorized to release the prisoner?" I do not think the auditor has the power in this case to discharge the defendant, although the question is one of very great doubt, and perhaps upon a fuller statement of the facts and a more familiar history of the case I might make a different holding. At present, however, I am inclined to the opinion that the costs in this case are not "due the county," within the meaning of section 1028. There is another question in the case, to-wit, the auditor is only authorized by the above section to discharge from imprisonment for the non-payment of any *fine or amercement*. From your statement, I take it that the *fine* in this case has been paid, to-wit, the \$25.00. Query: Can the costs which are made in the case be considered an amercement, within the meaning of section 1028?

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Claim of Mrs. J. M. Wheaton Against the State.

CLAIM OF MRS. J. M. WHEATON AGAINST THE
STATE.

Attorney General's Office,
Columbus, Ohio, August 29, 1889.

Hon. E. W. Poe, Auditor of State:

DEAR SIR:—Some time since you directed to me the following communication and desired my official opinion thereon, which I herewith submit:

“I find upon inquiry that Senate Bill No. 412, seeking to appropriate certain sums of money to Mrs. Wheaton, widow of the late Dr. J. M. Wheaton, for labor performed as therein set forth, only received twenty-three votes in the Senate, being one less than two-thirds of the members thereof. I wish to be informed whether this is an appropriation such as required a two-thirds vote of the members elected to each branch of the General Assembly, as required in section 29, art. 2 of the Constitution of Ohio, or in other words, is such an appropriation as by law I am authorized to issue my warrant on the State treasury in payment thereof.”

The bill to which you refer is entitled “An act to provide for the payment to Mrs. J. M. Wheaton, widow of the late J. M. Wheaton, for labor performed in preparing and writing the report on the birds of Ohio, contained in Vol. 4 of the Ohio Geological Survey report, and for other services connected therewith; and to reimburse him for expenses incurred in the preparation of such report.” It then appropriates “from any moneys in the treasury to the credit of the general revenue fund not otherwise appropriated” a certain sum of money, and provides that it shall be paid to Lida D. Wheaton, widow of the late Dr. J. M. Wheaton, “for the purposes herein named. For preparing and writing the ‘Report on the Birds of Ohio’ contained in Vol. IV,

Claim of Mrs. J. M. Wheaton Against the State.

Ohio Geological Survey Report, Zoology and Botany, pp. 188-628." Then follow certain other provisions relative to labor performed and expenses incurred. The act was passed April 12th, 1889, and is found in Ohio laws, Vol. 86, p. 263.

The constitutional provision to which you refer is as follows, being article two, section 292:

"* * * ; nor shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation or claim be allowed by two-thirds of the members elected to each branch of the General Assembly."

I think the claim is one which comes within the provisions of the above section, and not having received a two-thirds vote in each branch of the General Assembly, you would not be justified in issuing your warrant on the treasury in payment of the amount appropriated, unless "the subject matter thereof has been provided for by (a) pre-existing law." What is the *subject matter* of a claim? Fortunately the Supreme Court has told us. In *Fordyce vs. Goodman, Auditor of State*, 20 Ohio St. 14, Scott, J., says: "*By the subject matter of a claim, we understand the facts or circumstances out of which the claim arises or by reason of which the supposed right accrues to the claimant to demand and receive money from the State.*"

Bearing this definition in mind, let us examine the legislation of our State relative to this subject.

On April 3, 1869, the General Assembly passed an act providing for a geological survey of Ohio; see Ohio laws, Vol. 66, p. 40. It provided, among other things, that the governor of the State "should appoint, by and with the advice and consent of the Senate, a chief geologist * * * and, upon consultation with said chief geologist, the governor should also appoint suitable assistants, not exceeding three, etc." In pursuance of said act, Hon. Rutherford B.

Claim of Mrs. J. M. Wheaton Against the State.

Hayes, who was then governor, appointed Prof. J. S. Newberry chief geologist, and also the authorized number of assistants. In 1870 Prof. Newberry submitted an extended report of the progress of the survey to that time, in which, on page 12, he says: "The plan which has been adopted for the preparation of the final report, required of me by section fifth of the law providing for a geological survey, is represented by the following schedule: Vol. I, Geology and Palaeontology, Vol. II, Geology and Palaeontology, Vol. III, Economical Geology, Vol. IV, Agriculture, Botany and Zoology."

It appears that Prof. J. M. Wheaton was employed to work upon that part of Vol. IV, which pertained to Zoology, and I find by examination that his report covers nearly 450 pages in that volume, and was completed and submitted to Prof. Newberry November 1st, 1879. I also find in the general appropriation act of 1878, Ohio laws, Vol. 75, p. 551, among other provisions, under the general head "For Geological Survey" the following: "For publishing 20,000 copies of volume four Zoology and Botany, \$8,000."

The *subject matter* therefore of the claim which you referred to me grew out of the fact that the General Assembly passed a law providing for a geological survey of the State, and the persons appointed to make the survey subdivided the work so as to include Zoology, the report on which constitutes a very large portion of the fourth volume of the work known as the "*Geological Survey of Ohio*," and published by authority of the General Assembly. The next question which arises is, has the subject matter of this claim been provided for by pre-existing law? That is to say, at the time the work was performed by Dr. Wheaton, as already shown, was there a law which authorized his employment and compensation? The solution of this question, it seems to me, must determine the allowance or rejection of this claim. I find, upon examination, that on May 2d, 1871, Ohio laws, Vol. 68, p. 141, the General Assembly in appropriating money for salaries of the chief geologist

Claim of Mrs. J. M. Wheaton Against the State.

and his three assistants, as provided for in the original act of 1869, made an additional appropriation under the general head of Geological Survey, as follows: "For contingent expenses of survey, including traveling expenses of the geological corps, and *hire of local assistants*, \$12,000."

This act clearly shows that the General Assembly not only appropriated money for the payment of the chief geologist and his three original assistants, but also provided by appropriation for the *hire* of additional or local assistants. The word "hire" could only have been intended by the General Assembly to confer authority to employ other persons to assist in the survey than those originally appointed by the governor, and if the power to *employ* expressly existed, it necessarily follows that the power to compensate also existed, if not by express provision, certainly by the strongest implication. There is indisputable evidence that Dr. Wheaton was employed as one of the local assistants, he is referred to on the title page of the fourth volume of the survey as a special assistant in Zoology and Botany.

It seems to me, therefore, after a careful examination of the whole subject, that the provisions of the act of 1871, making appropriations for the geological survey, and appropriating money for the hire of additional assistants, disposes of the last question, and that the present claim is one, the subject matter of which was provided for by pre-existing law; and I am of the opinion that you would be fully authorized and justified in drawing your warrant on the state treasurer in payment of the claim of Lida D. Wheaton under and in accordance with the provisions of the act of April 12, 1889.

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

*County Commissioners; Duty to Furnish Armory for Militia
to Drill in.*

COUNTY COMMISSIONERS; DUTY TO FURNISH
ARMORY FOR MILITIA TO DRILL IN.

Attorney General's Office,
Columbus, Ohio, September 6, 1889.

Thomas Emery, Esq., Bryan, Ohio:

DEAR SIR:—On returning to the city yesterday after an absence of several days on important business, I found yours of the 31st ult. which I have carefully read.

You are of course familiar with section 3085, Revised Statutes, which makes it mandatory upon the county commissioners to furnish a suitable armory for the militia to drill in, and for the safekeeping of their arms, etc. There ought not to be any hesitation on the part of the commissioners to do this, and in the event they do hesitate, they are unquestionably, in my opinion, liable to an action in mandamus to compel them to furnish such armory, etc. Any one can institute such a suit in the name of the State, and I am not prepared to say that it would conflict with your official duties if you should bring such action. However, it might be more appropriate if some other attorney should institute the suit, or threaten to do so. The commissioners would probably then ask you what they should do, and I infer from your letter, that you are clearly of the opinion that they should furnish such an armory, and no doubt you would advise them to do so. This perhaps would be the better course, but it seems to me the clear duty of the commissioners to furnish the armory, and thus render unnecessary any such steps being taken.

Respectfully yours,

DAVID K. WATSON,
Attorney General.

Intoxicating Liquors, Dow Law; "Retail Dealer" Selling Bottled Beer.

INTOXICATING LIQUORS, DOW LAW; "RETAIL DEALER" SELLING BOTTLED BEER.

Attorney General's Office,
Columbus, Ohio, September 10, 1889.

Isaac Cahill, Esq., Prosecuting Attorney, Bucyrus, Ohio:

DEAR SIR:—Yours of the 6th instant duly received, containing a statement made by Frank Strong, of Sandusky, Ohio, on which you ask my opinion as to Strong's liability for the Dow tax. The germane points in the statement are these:

1. Strong is a manufacturer at Sandusky, Ohio. 2. He ships his goods to Crestline, where he has a depot or storehouse. 3. At this storeroom he "sells both bottled beer and keg beer." 4. "The beer sold in bottles is bottled at the storeroom aforesaid, and is not sold in less quantities than two dozen quart bottles to any one person at one time."

It is not claimed that the sales at Crestline are limited to dealers in the beverage. On the contrary, it is expressly stated that sales are made of bottled beer at the storeroom, but not in less quantities than two dozen quart bottles to any person, at any one time. That is to say, as I understand it, a dealer may purchase at one time twenty-four quart bottles, and a person who is not a dealer (by the term "dealer" I mean one who buys to sell again), may also purchase the same quantity at one time.

The eighth section of the Dow law as amended March 21st, 1887, 84 Ohio laws, p. 224, defines the phrase "trafficking in intoxicating liquors," and says that it does not "include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the *manufactory*, by the manufacturer, etc." The original section, in defining the term "trafficking in intoxicating liquors," omitted the expression "at the manufactory." See Ohio laws, Vol. 83, p. 157, section 8.

*Vacancy in Elective Office; How Person Appointed, Etc.,
County Treasurer.*

In the case of *Kauffman vs. Village of Hillsboro*, 45 Ohio State, page 700, the court settles the question as to what is a sale at retail, and holds:

“A sale, by one who is not a manufacturer, of twenty-five quarts of beer, put up in bottles of one quart each, not upon the prescription of a physician nor for any known mechanical, pharmaceutical or sacramental purpose, but to be drunk by the person to whom sold, is a sale at retail within the meaning of the eleventh section of the act known as the Dow law.”

Under this decision I think Mr. Strong is a retail dealer in Crestline, and consequently is liable for the tax.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

VACANCY IN ELECTIVE OFFICE; HOW PERSON
APPOINTED, ETC., COUNTY TREASURER.

Attorney General's Office,
Columbus, Ohio, September 19, 1889.

John P. Stein, Esq., Prosecuting Attorney, Sandusky, Ohio:

DEAR SIR:—Yours of the 16th instant duly received, in which you desire my opinion upon the following statement of facts:

“James Alder was elected treasurer of Erie County, Ohio, November 6th, A. D. 1888, and died two or three days after his election. Mr. Alder, had he lived, would have entered upon the term for which he was elected last fall, September 2, 1889, but his death left the vacancy in the office. Now what I desire your opinion on is whether the county commissioners should appoint a person to fill said

*Vacancy in Elective Office; How Person Appointed, Etc.,
County Treasurer.*

vacancy until the next general election or whether they should appoint for two years. The point of which I wish to be informed on, is whether the vacancy caused by the failure to qualify, of the person elected last fall, is until the next general election, or, for the full term of two years. The person appointed immediately after Mr. Alder's death has been reappointed to fill the unexpired term of Mr. Alder, which is, as we interpret the law, for a period of two years from the first Monday in September, 1889."

It appears from the foregoing statement that Alder was elected treasurer of Erie County in November, 1888, but he would not have entered upon his official duties till September 2d, 1889. See section 1079, Vol 1, Revised Statutes of Ohio. In fact he never took possession of his office. There was, therefore, really no vacancy in the office as such, caused by the death of Mr. Alder until the second of the present month, the time at which Alder should have gone into office. Section 11 Revised Statutes provides as follows:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy."

The vacancy in the office occurred on the second of the present month, and since "more than thirty days" intervened "after the occurrence of the vacancy" before the next general election, Alder's successor should be elected in the coming November election; but, under section 1079, above referred to, he will not go into office until the first Monday of September, 1890, and then he would hold the position for two years. "A fractional term of an elective office cannot be filled by an election. Whenever the people of a county, by their votes, given at the proper time, choose

Schools; Power of Township Board of Education to Apportion Contingent Fund.

a treasurer, they thereby confer on him the office for the full term allowed by law." See 7 Ohio St., p. 129, *Ellis vs. Commissioners*.

It is my opinion that, in the above case, the successor to Mr. Alder should be elected next November; that he would go into office on the first Monday of September, 1890, and that the person appointed to take Mr. Alder's place holds until the last mentioned date.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

SCHOOLS; POWER OF TOWNSHIP BOARD OF EDUCATION TO APPORTION CONTINGENT FUND.

Attorney General's Office,
Columbus, Ohio, September 20, 1889.

R. S. Parker, Esq., Bowling Green, Ohio:

DEAR SIR:—You recently asked my official opinion upon the matter set forth in the enclosed letter. I have given it as careful an examination as my time would permit, and submit the following as my opinion thereon.

Under section 3967 Revised Statutes as amended Ohio laws, Vol. 82, p. 92, no authority existed for dividing the fund, as seems to have been done by the board of education. That section provides as follows:

"So much of the contingent fund as may be set apart by a township board for the continuance of schools after the State funds are exhausted, shall be so apportioned by the board that the schools in all the sub-districts of the township shall be continued the same length of time each year; etc."

Schools; Power of Township Board of Education to Apportion Contingent Fund.

In construing this section, in Ohio School Laws, of 1883, p. 55, the school commissioner held as follows:

"The custom which has prevailed in some township districts of dividing the contingent fund and placing it in the hands of directors, is not legal. All school funds should be retained in the custody of the township treasurer until drawn out for the payment of expenses legally incurred."

He also held:

"In case the township tuition fund is distributed by the board illegally, complaint should be made to the county commissioners under this section."

I do not believe the board of education had the right to apportion the funds in question so as to make up the deficiency for the sub-district mentioned in the enclosed letter. If this be true, it follows that the debt mentioned must rest where it was placed by the directors of the sub-district, namely, upon the district.

The information which I gather from the letter is not as satisfactory or full as I should have desired, but from such understanding as I can gather from the letter I am of the opinion as above expressed.

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

Schools; Power of Director to Vote for Teacher Whose School Term Begins After Expiration of office of Director.

SCHOOLS; POWER OF DIRECTOR TO VOTE FOR
TEACHER WHOSE SCHOOL TERM BEGINS
AFTER EXPIRATION OF OFFICE OF DIREC-
TOR.

Attorney General's Office,
Columbus, Ohio, September 24, 1889.

J. B. Worley, Esq., Hillsboro, Ohio:

DEAR SIR:—Yours of the 23d instant received yesterday afternoon on my return from St. Louis. I am unusually busy today in the preparation of an argument on a very important case for the State in the Circuit Court tomorrow morning, and have not had time to give the matter submitted in your letter as thorough an examination as I should desire. I have, however, read your letter carefully and made some examination of the statute in reference to the question, and am inclined to think that the first employment of the teacher, or rather the employment of the first teacher (which is the same thing) will stand. But I am not prepared to say that this opinion would be final if I could give the matter more consideration. It is, however, the conclusion which I have reached from the examination which I have been able to make, and give you my answer by the time you want it, to-wit, the 25th, tomorrow. I think there is no doubt but that two of the directors had the authority to employ the teacher. The question in the case seems to me to be, whether the one director had authority to vote for the employment of a teacher whose term of school would not commence until after his term of office had expired. I am inclined to think he can, and therefore think the first employment will hold

Very respectfully,

DAVID K. WATSON,
Attorney General.

County Commissioner; When Traveling About County Under Direction of Board; Both Mileage and Livery Hire.

COUNTY COMMISSIONER; WHEN TRAVELING
ABOUT COUNTY UNDER DIRECTION OF
BOARD; BOTH MILEAGE AND LIVERY HIRE.

Attorney General's Office,
Columbus, Ohio, September 26, 1899.

M. Slusser, Esq., Wauseon, Ohio:

DEAR SIR:—Your letter dated August 23d just received. A couple of blanks for your report were mailed you yesterday. The following is a copy of my opinion to Mr. Bailey, to which you refer:

“Upon a careful examination of said section (the act of April 8, 1886, Ohio Laws, Vol. 83, p. 71), I am of the opinion that county commissioners when performing such official work for the county (going about the county, under the direction of the board, upon official business), other than in attending regular or called sessions of the board, are entitled to their reasonable and necessary expense actually paid in the discharge of their official duties, in addition to their per diem and mileage. I think said act expressly so provides.”

It is my opinion, also, that the mileage allowed by the statute was meant to cover the expense of travel, and consequently the commissioners cannot charge both mileage and livery hire.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Constitutional Amendments; Not Necessary for Sheriff to Publish.

CONSTITUTIONAL AMENDMENTS; NOT NECESSARY FOR SHERIFF TO PUBLISH.

Attorney General's Office,
Columbus, Ohio, October 9, 1899.

D. R. Crissinger, Esq., Prosecuting Attorney, Marion, Ohio:

DEAR SIR:—Replying to your telegram of October 7th, asking my opinion whether your sheriff should publish the constitutional amendments in his forthcoming proclamation, will say, that section one, article 16, of the constitution, provides that:

“Any proposed amendment * * * shall be published in at least one newspaper in each county of the State * * * for six months preceding the election for Senators and Representatives, at which time the same shall be submitted to the electors for their approval or rejection.”

The act of April 15th, 1889, Ohio Laws, Vol. 86, p. 321, relative to submitting the proposed amendments to the electors of the State, provides that:

“The secretary of state shall cause the amendments to the constitution proposed at the present session of the General Assembly, to be published once each week in not less than one newspaper in each county of the State, wherein a newspaper is published, once each week for six months, and until the first Tuesday after the first Monday of November, 1889, etc.”

These provisions of the constitution and statute prescribe the only mode in which propositions to amend the constitution shall be published. They do not require the sheriff to publish the proposed amendments in his proclamation; nor is there any statutory provision requiring him to publish them. The electors of the State are fully advised by the publication in the mode prescribed by the constitutional

*County Commissioners; Power to Construct Bridge Over
Road Informally Dedicated to Public.*

and statutory provisions above referred to, of the exact amendments proposed and also of the election at which the vote upon them will be taken, and it follows that the sheriff is not required to publish them in his proclamation.

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

COUNTY COMMISSIONERS; POWER TO CON-
STRUCT BRIDGE OVER ROAD INFORMALLY
DEDICATED TO PUBLIC.

Attorney General's Office,
Columbus, Ohio, October 11, 1889.

W. H. Barnhard, Esq., Mt. Gilead, Ohio:

DEAR SIR:—Yours of the 8th instant duly received, and I have carefully read your statements therein made and examined the statutes in reference to it. I always feel, in such a matter, that it would be much more satisfactory if I could confer with the parties and get *all* the facts, but it is impracticable to do so, and in this instance I have no doubt that your statement embraces all the important features in the case, and I am inclined to the opinion, from such statement, that under the provisions of section 860, Revised Statutes, the commissioners would be authorized to order the road of record and build the bridge. I am somewhat induced to come to this opinion from the fact, as I am informed, that a similar question recently came before one of our Common Pleas judges, and he held, that, notwithstanding there was no record evidence of the dedication to the public of the road, parol evidence was admissible to show that the road had been dedicated, etc. The cases, it seems to me, are similar,

County Commissioners; Expenses When Going About County Under Direction of the Board.

and I think the court was correct in his ruling, and that it may be followed as a precedent in your case.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

COUNTY COMMISSIONERS; EXPENSES WHEN
GOING ABOUT COUNTY UNDER DIRECTION
OF THE BOARD.

Attorney General's Office,
Columbus, Ohio, October 11, 1889.

James G. Patrick, Esq., New Philadelphia, Ohio:

DEAR SIR:—Replying to yours of the 3d instant will say that under the act of 1886, 83 Ohio laws, p. 71, I am of the opinion that county commissioners, when traveling *in the county*, under the direction of said board, other than at regular and called sessions, are entitled to their reasonable and necessary expenses actually paid in the discharge of their official duties, in addition to their compensation and mileage, but I am inclined to think that a commissioner would not be allowed his livery hire or railroad fare *in addition* to his mileage. That is to say, the word "mileage" as used in the statute, is meant to cover the actual expense of travel, and consequently a commissioner could not charge both mileage and livery hire or railroad fare. But he may charge his hotel bill or any other reasonable and necessary expenses which he actually pays in the discharge of his official duty, or if his expenses for *actual traveling* exceeds his mileage, I think he may charge the excess; for example, if he travels fifty miles his mileage would be \$2.50. Now if his livery

*Constitutional Law; Not Necessary for Sheriff to Publish
Constitutional Amendments.*

bill was \$3.00, he might charge for the extra fifty cents, but not both the livery and mileage.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

CONSTITUTIONAL LAW; NOT NECESSARY FOR
SHERIFF TO PUBLISH CONSTITUTIONAL
AMENDMENTS.

Attorney General's Office,
Columbus, Ohio, October 11, 1889.

Hon. Daniel J. Ryan, Secretary of State, Columbus, Ohio:

DEAR SIR:—Replying to your communication of this date asking me “whether, under the law, it is necessary for sheriffs to publish the constitutional amendments in their proclamation in full, or whether it is necessary to make any reference to them whatever,” I will say that I have heretofore expressed the opinion that it is not necessary for sheriffs, in their forthcoming election proclamations, to publish the proposed constitutional amendments in full. The sheriffs might, however, refer in their proclamations to the proposed amendments substantially as follows:

CONSTITUTIONAL AMENDMENTS.

AMENDMENT NO. 1.

Said qualified electors at the same time and places will vote for or against an amendment of section two, of article 12, of the constitution of the State of Ohio.

At said election the voters desiring to vote in favor of such an amendment may have placed on their ballots the words: “Taxation amendment, yes;” and those opposed to such amendment may have placed on their ballots the words, “Taxation amendment, no.”

Board of Health; One of the Members Acting as Health Officer.

AMENDMENT NO. 2.

The said qualified voters at the same time and places, will vote for or against an amendment of sections I to II inclusive, of article 2 of the constitution of the State of Ohio.

At said election the electors desiring to vote in favor of such amendment may have placed on their ballots the words, "Legislative single districts, yes;" and those opposed to such amendment may have placed on their ballots the words, "Legislative single districts, no."

AMENDMENT NO. 4.

The said qualified voters at the same time and places will vote for or against an amendment of section 25, of article II, section 18, of article III, sections 2, 6, 7, 9, 10, 12, 13 and 16, and to create section 11, of article IV, section 12, of article VIII, sections 2 and 4 of article X, and section 3, of article XVI, of the constitution of the State of Ohio.

At said election, the electors desiring to vote in favor of such amendment, may have placed on their ballots the words, "Biennial elections, yes;" and those opposed to such amendment may have placed on their ballots the words, "Biennial elections, no."

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

BOARD OF HEALTH; ONE OF THE MEMBERS
ACTING AS HEALTH OFFICER.

Attorney General's Office,
Columbus, Ohio, October 12, 1889.

C. O. Probst, M. D., Columbus, Ohio:

DEAR SIR:—You recently submitted to me the following question and asked my opinion thereon: "Will you please

Probate Judges; Fees in Cases Where Youths are Sent to Reform School.

inform this board as to whether a member of a board of health may also act as health officer for said board, and receive compensation therefor?"

Section 2113, Revised Statutes, provides, among other things, that a board of health of a city or village shall be composed of the mayor * * * and six members, * * * *who shall serve without compensation.* Section 2115 provides, that, "the board (meaning the board of health) may appoint a health officer, a clerk, etc., * * * and defined their duties and fix their salaries; and all such appointees shall serve during the pleasure of the board."

I do not think it was within the contemplation of the General Assembly that the board should appoint one of its own members as health officer. If this was done, he would have the right, as a member of the board, to assist in fixing his own salary, his term of office, etc., which in my opinion would be inconsistent with his position as member of such board. I am of the opinion therefore that a board of health should not appoint one of its own members health officer who is to receive compensation.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

PROBATE JUDGES; FEES IN CASES WHERE
YOUTHS ARE SENT TO REFORM SCHOOL.

Attorney General's Office,
Columbus, Ohio, October 19, 1889.

George W. Keys, Esq., Ironton, Ohio:

DEAR SIR:—Yours of September 9th, and October 10th duly received. Absence from the city and an unusual press of public business have prevented an earlier reply.

Elections; Fees of Judges and Clerks.

After a careful examination of section 752 to 764, inclusive, of the Revised Statutes, as amended Ohio laws, Vol. 83, pp. 6, 7, 8, I am of the opinion that the proceeding by which youths are committed to the reform school is essentially criminal in its character, and therefore the fees of the probate judge are governed by section 6470, Revised Statutes.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

ELECTIONS; FEES OF JUDGES AND CLERKS.

Attorney General's Office,
Columbus, Ohio, November 11, 1889.

Alex. Hadden, Esq., Cleveland, Ohio:

MY DEAR SIR:—Yours of the 6th instant duly received, in which you ask for my opinion upon the question whether judges and clerks are entitled to four dollars each, for their services on election day, under section 2963, Revised Statutes, as amended Ohio laws, Vol. 84, page 217. That section reads as follows:

“Judges and clerks of election shall each receive two dollars per election for their services at every election, to be paid by the county, etc.; except, etc.”

By referring to the original section 2963 it will be seen that where an election for an assessor, or justice of the peace was held on the same day *as any other election*, judges and clerks each receive two dollars per day. The language of this section was changed by the amendment, so as to make the compensation \$2.00 per election for their services at every election. I think the change in the language of the

Prosecuting Attorney; Fees, Where Fine and Costs in Misdemeanor are Paid by Labor.

statute grew out of the fact that it frequently happened that judges and clerks did not get through with their work upon the same day as that on which the voting occurred, and then would claim extra compensation. The Legislature remedied this by striking out the word "day" in the original section and inserting the word "election." I think it was the intention of the Legislature that two dollars should be the full compensation to be paid each judge and clerk for performing all the duties required of them as such officers, and that within the meaning of section 2963, as amended, there was but one election held last Tuesday. It may be the compensation is inadequate for the labor performed, but you, of course, understand I have nothing to do with that.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

PROSECUTING ATTORNEY; FEES, WHERE FINE
AND COSTS IN MISDEMEANOR ARE PAID BY
LABOR.

Attorney General's Office,
Columbus, Ohio, November 20, 1889.

William S. Hudson, Esq., McArthur, Ohio:

DEAR SIR:—Yours of the 18th instant duly received. I also received yours of the 29th ult., in which you ask the following question:

"Under the provisions of section 1298, R. S., is the prosecuting attorney entitled to the per centum upon fine and costs in a misdemeanor where the defendant has discharged the amount of fine and costs assessed against him by labor under arrangements with the county commissioners, or when the fine and costs have been discharged by labor, under such arrangements, is the prosecuting attorney still entitled to his per centum?"

Prosecuting Attorney; Fees, Where Fine and Costs in Misdemeanor are Paid by Labor.

I am inclined to think that the language of the above section is not broad enough to cover the case stated by you. That section reads as follows:

“In addition to his salary, the prosecuting attorney is entitled to ten per cent., on all moneys collected on fines, forfeited recognizances and costs in criminal causes, etc.”

I think the word “collected” in this statute means money obtained by the prosecutor through some legal process on his part. I remember of reading a decision some time ago of a judge who construed an ordinance of a city, which allowed the mayor a certain percentum on all moneys collected, and fines paid, etc. A number of prisoners had worked out their fines by performing labor on the streets for the city at a given sum per day each. The mayor claimed that he was entitled to his per cent., on fines so worked out, but the court held differently, and I am inclined to think correctly. I do not, therefore, think that you would be entitled to ten per cent. under this section of the statute on fines paid in the way you mention.

You say in your letter of yesterday, that you “have written me several times for opinions, but never as yet received an answer.” I am astonished at this statement. It is an inflexible rule of this office that every letter which is received here is filed away in alphabetical order. My clerk informs me that he has carefully examined these files, and the only letter among them from you is your letter of the 29th ult., which was received by me, but under such circumstances as made it impossible to answer before this. I am led to conclude that your language in regard to writing me so often is entirely too strong, and that the facts in the case will fall short in bearing you out.

Very respectfully yours,

DAVID K. WATSON,
Attorney General.

Taxation; Cost of Publishing Notice of Delinquent Tax Sale in Two Papers.

TAXATION; COST OF PUBLISHING NOTICE OF DELINQUENT TAX SALE IN TWO PAPERS.

Attorney General's Office,
Columbus, Ohio, November 28th, 1889.

Hon. E. W. Poe, Auditor of State:

DEAR SIR:—You recently called my attention to section 2865, Revised Statutes, as amended Ohio laws, Vol. 86, p. 142, and asked for my construction of that portion of said section which reads:

“And there shall be added to the tax on each item so advertised, the sum of fifty cents to pay the cost of such advertising.”

You then say:

“Supposing that under section 2864, Revised Statutes, a county auditor should publish the delinquent list in a German paper, thereby causing said notice of sale to be published in two papers, then and in such cases should the fifty cents referred to above be added to each item of tax as published in each paper, or will the adding of fifty cents once only, be in compliance with the law?”

I have examined the question carefully and am of the opinion that in case the delinquent list is advertised in two papers, the fifty cents should be added to each item of tax in each paper, making the amount added one dollar, to cover the cost of advertising in both papers. The language of section 2865 is:

“There shall be added to the tax on each item so advertised, the sum of fifty cents to *pay the cost of such advertising.*”

Section 2864, R. S., directs the auditor to publish the delinquent list (in certain contingencies) in a German news-

*Intoxicating Liquors; Dow Law; Penalty of \$250.00 for
Misrepresentation.*

paper in addition to an English newspaper, and I see no reason why the language of section 2865, just quoted, should not apply to such an advertisement as well as the one made in the English paper. The evident intention of the Legislature was to provide for the cost of such advertisement, and I see no reason why the language of the statute should not apply to each paper alike, and in my opinion it does.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

INTOXICATING LIQUORS; DOW LAW; PENALTY
OF \$250.00 FOR MISREPRESENTATION.

Attorney General's Office,
Columbus, Ohio, December 2, 1889.

*Hon. F. K. Dissette, Assistant Prosecuting Attorney, Cleve-
land, Ohio:*

MY DEAR SIR:—Your inquiry of the 21st of October came while I was busily engaged in the campaign, and was unintentionally overlooked and neglected, for which I owe you an apology and am very free to make.

The question you submit in your inquiry of above date arises under section three of an act to be found in Vol. 80, Ohio laws, p. 165, and while you do not state why the additional assessment of \$250.00 was placed against the party by the auditor, I *infer* it was for a violation of that portion of section three of said act which reads as follows:

“And if any person having made return that his business is confined exclusively to malt or vinous liquors, or both, shall thereafter, during the assessment year, sell any other intoxicating liquors, the assessment upon his business shall thereby be increased by the sum of \$250.00.”

Coroners; Fees of, How Paid, Etc.; Witnesses and Constables.

If I am right in my inference, I think the auditor was justified in making the full assessment of \$250.00, and it would make no difference in my opinion what fraction of the year had already passed before the additional assessment was made. The assessment is in the nature of a penalty for a violation of the act, and it cannot be avoided upon the ground that but a small fraction of the year remains. I think the case of *Simpson vs. Service, auditor, et al.*, Weekly Law Bulletin of January 7th, 1889, p. 433, sustains this view.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

CORONERS; FEES OF, HOW PAID, ETC.; WITNESSES AND CONSTABLES.

Attorney General's Office,
Columbus, Ohio, December 4, 1889.

Isaac Cahill, Esq., Bucyrus, Ohio:

DEAR SIR:—Your letter of the 15th of October was received when it was impossible for me to give it that attention which it deserved, and I have of late been so pressed with official business of a very important character that I have been unable to give you an opinion on the questions you submit until now, and trust that the delay has not caused any great inconvenience.

Your first question is, in what manner are the fees of coroners mentioned in section 1239, Revised Statutes, as amended 86 Ohio laws, p. 269, to be paid? Section 1239 fixes the fees of coroners when acting under said provision, and I am of the opinion that they should be paid under section 1024, to-wit, upon warrants from the auditor.

Your second question asks what fees, if any, are constables (or any discreet persons) entitled to when serving

Sheriffs; Publication of Proclamation.

writs for corner's under section 1223, Revised Statutes. I am of the opinion that a constable or any discreet person, when serving writs on the order of the coroner under said section, is entitled to the same fees as the coroner would be, to be paid in like way.

Your third question is in regard to witnesses before a coroner under section 1301, as amended 81 Ohio laws, p. 59. This section fixes the fees of such witnesses, and it is my opinion that, under section 1024, above cited, they should receive their fees by voucher from the auditor, in the same way as do the coroners.

In many instances the coroner collects the fees for all the officers and witnesses appearing before him, when he collects his own, and in turn pays those entitled to receive such fees, but this is a mere matter of practice, for they, of course, could collect their own fees.

Very respectfully yours,
 DAVID K. WATSON,
 Attorney General.

SHERIFFS; PUBLICATION OF PROCLAMATION.

Attorney General's Office,
 Columbus, Ohio, December 5, 1889.

G. G. Jennings, Esq., Woodfield, Ohio:

DEAR SIR:—Yours of the 21st instant duly received, in which you submit the following questions for my opinion:

“First—Under section 2977, of the Revised Statutes, is the sheriff compelled to have his election proclamation inserted in the newspaper at least fifteen days prior to the election and it to remain in the paper until the time of the election, or is one insertion in the newspaper sufficient?”

Sheriff; Publication of Proclamation.

This section is not free from ambiguity, and it may be difficult to give it a construction which will meet with the general approval, but I think a careful reading of it shows that the publication can be made in a newspaper as long as the notice is given by proclamation, to-wit, for fifteen days for a general election and ten days for a special election. It would seem the better reasoning to construe the section in this way, for it is not apparent to me why the notice should be given by proclamation for a longer period than by the newspaper.

“Second—If the sheriff has the election proclamation inserted in the newspaper 4 or 5 weeks prior to the election and it remains until after the election, are the commissioners bound to allow the whole bill for publishing the same?”

The sheriff should not advertise the election by proclamation for a longer period than required by statute, and if he does, the commissioners should pay for only the statutory period.

3. The third question I will answer by saying it was not necessary for the sheriff to publish the full text of the amendments.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Sheriffs; Publication of Proclamation, Paper Publishing Without Authority; County Auditor; Extra Clerk Hire.

SHERIFFS; PUBLICATION OF PROCLAMATION,
PAPER PUBLISHING WITHOUT AUTHORITY;
COUNTY AUDITOR; EXTRA CLERK HIRE.

Attorney General's Office,
Columbus, Ohio, December, 6, 1889.

Robert E. McDonald, Esq., Prosecuting Attorney, Carrollton, Ohio:

DEAR SIR:—Yours of the 28th ult., was duly received, in which you submit the following questions for my opinion:

“First—The sheriff of our county ordered the proclamation for the election of the present year published in two papers, one Democratic and one Republican. A third paper (a Republican paper) published it for three weeks and now presents its bill to the county commissioners for allowance. The sheriff says that he never authorized it to be published in that paper, but that the publishers did it on their own motion. Should the bill be allowed or rejected?”

Under the above statement, the third paper cannot, in my opinion, recover for the publication made by it.

“Second—The two papers in which the sheriff ordered the proclamation printed, printed not only the proclamation but also included in the proclamation all of the constitutional amendments in full and have presented their bills for the publication thereof. Should they be allowed for publishing the amendments in full in the proclamation?”

I will answer this question by saying, it was unnecessary for the sheriff to print the amendments in full in his proclamation. Whether the editors are entitled to compensation for this publication depends entirely upon what passed between them and the sheriff, and I have no information

County Auditor; Extra Clerk Hire Every Tenth Year.

upon that subject, and can only say, as I do above, that it was unnecessary, to comply with the law, that the amendments should be published in full.

3. Your third question is as follows:

“I desire your construction of section 1076, R. S., and especially the latter clause, ‘in the years when the real property is required by law to be reappraised.’ ”

I do not understand just what you mean by this statement, or in what connection you desire me to give you a construction of this section. In the absence of more definite information from you I would say, that it authorizes the county commissioners to allow the county auditor a sum for clerk hire, in the years when real property is to be reappraised, but said allowance must not exceed 25 per cent. of the annual allowance made in the preceding sections. What that allowance is, the auditor and commissioners can determine.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

COUNTY AUDITOR; EXTRA CLERK HIRE EVERY
TENTH YEAR.

Attorney General's Office,
Columbus, Ohio, December 23, 1889.

*R. E. McDonald, Esq., Prosecuting Attorney, Carrollton,
Ohio:*

DEAR SIR:—Yours of the 6th instant duly received. I think that the language in section 1076, Revised Statutes, which reads as follows: “In the years when the real property is required by law to be reappraised,” means every

District Inspectors of Workshops and Factories; Terms of Office.

tenth year, and it is during these years that the county commissioners are required to make additional allowance to the county auditor. Absence from the city has prevented an earlier reply to your letter.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

DISTRICT INSPECTORS OF WORKSHOPS AND
FACTORIES; TERMS OF OFFICE.

Attorney General's Office,
Columbus, Ohio, December 24, 1889.

Hon. William Z. McDonald, Chief Inspector Workshops and Factories, Columbus, Ohio:

DEAR SIR:—You recently submitted to me a written communication in which you asked my opinion as to "what time the terms of office expire of John H. Ellis, inspector for the second district, and James A. Armstrong, inspector for the third district, appointed May 8th, 1888, according to the meaning of section second of the law creating district inspectors of workshops and factories, passed April 29th, 1885."

The statute to which you refer is found on page 179, Vol. 82, Ohio laws, and reads as follows:

"The district inspectors shall hold their office for the term of three years, from the first day of May after their respective appointments, and until their successors are appointed and qualified."

Your communication says they were appointed on the 8th day of May, 1888. It is my opinion that the terms of

*Sheriff's Fees; For Keeping Prisoner, Under Sections 1235
and 7379 Revised Statutes.*

their respective offices do not expire until three years from the first day of May, 1889, and not then, unless their successors are appointed and qualified at that time.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SHERIFF'S FEES; FOR KEEPING PRISONER, UNDER SECTIONS 1235 AND 7379 REVISED STATUTES.

Attorney General's Office,
Columbus, Ohio, December 27, 1889.

W. F. Trader, Esq., Prosecuting Attorney,, Xenia, Ohio:

DEAR SIR:—Replying to yours of the 15th inst. will say I have heretofore held, as one of my predecessors also held, that fifty cents per day for each prisoner is all that the sheriff is entitled to under sections 1235 and 7379, Revised Statutes. It is a question, however, about which there is a difference of opinion, and I believe that two Common Pleas judges have held differently upon it. That is, they disagreed about it.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

*County Auditor; Fees; For Indexing; While Acting as
Clerk For Commissioners.*

COUNTY AUDITOR; FEES; FOR INDEXING;
WHILE ACTING AS CLERK FOR COMMIS-
SIONERS.

Attorney General's Office,
Columbus, Ohio, December 27, 1889.

*M. A. Daugherty, Esq., Prosecuting Attorney, Lancaster,
Ohio:*

MY DEAR SIR:—In your communication of the 20th
inst. you submit to me the following:

“Section 850 of the Revised Statutes, as it now
appears in the new edition, provides that the clerk
of the board of commissioners shall keep a full and
complete record of the proceedings of the board, and
a general index thereof in a suitable book, etc.; and
it also provides that the commissioners are author-
ized to cause an index to be made of such past
records for any period subsequent to the first of
January, 1880, as the judgment of the county com-
missioners may determine, and that the clerk shall
receive for indexing provided for in this section
such compensation as is provided for in other cases.

“The question on which I wish your opinion is,
whether the clerk is to receive compensation for
keeping up the indexes of the present and future
proceedings of the board of commissioners, or
whether the compensation spoken of in this section
only applies to the indexing of past records.”

I have examined the above section as found in Ohio
Laws, Vol. 82, pp. 203, 204. The first thing that section
does is to require the clerk to keep a record of the proceed-
ings of the board, and it next requires him to keep a *general
index thereof* in a suitable book, etc. It then provides,
among other things, that in counties where no index has
been made the commissioners are authorized to have one
made, subject to their discretion, etc. The section then
continues, “And the clerk shall receive for indexing, pro-

Railroad Commissioner; Duty to Retain Fees Paid by Railroads Under Protest.

vided for in this section, such compensation, etc." I do not think the expression "provided for in this section," limits the indexing to those counties which had no index and in which the commissioners cause one to be made; but refers to the *general index* mentioned in the fore part of the section. I am, therefore, of the opinion that the clerk of the commissioners is entitled to compensation for keeping the indexes of the full and complete record of the proceedings of the board of commissioners.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

RAILROAD COMMISSIONER; DUTY TO RETAIN
FEES PAID BY RAILROADS UNDER PROTEST.

Attorney General's Office,
Columbus, Ohio, December 31, 1889.

Hon. W. S. Capper, Railroad Commissioner:

MY DEAR SIR:—You recently submitted to me a communication of which the following is a copy, and requested my official opinion thereon:

"I desire your opinion on the act of April 15, 1889, supplementary to section 251 of the Revised Statutes of Ohio, which requires railroads at the time of filing annual report to pay a fee of one dollar per mile for each mile of track, etc. A number of roads have paid this fee to me under protest. The act further requires, that the fees received under this section shall be paid into the State treasury. Query: Does such payment under protest, make it necessary for me to hold the same, subject to a judicial termination of the question, and further will such payment, into the State treasury or fees under

Intoxicating Liquors; Dow Law; Refunder Upon Discontinuing Business.

protest, absolve or relieve me personally and my bondsmen from personal liability to railroad companies?"

I have given the above questions as careful a consideration as was possible under the circumstances, and am of the opinion that the safer and better plan for you to pursue would be not to pay the money into the state treasury until the question of the right of the State to collect such fees is judicially determined.

I have recently brought an action against the Pittsburg, Cincinnati and St. Louis Railway Company in the Court of Common Pleas of Franklin County to recover the fees and penalty due, under the act to which you refer in your communication, the determination of which will fully settle the question whether or not the railroad companies are bound to pay the fee and penalty imposed on them by the section to which you refer. I suggest that until the determination of this question you retain the money in your possession which has been paid to you under protest.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

INTOXICATING LIQUORS; DOW LAW; RE-
FUNDER UPON DISCONTINUING BUSINESS.

Attorney General's Office,
Columbus, Ohio, January 3, 1890.

Oscar C. Buckler, Esq., Bryan, Ohio:

DEAR SIR:—Replying to yours of the 1st inst. will say I think the language of section 3, page 117, laws of 1888, very ambiguous, but I have heretofore decided that, "Where a person pays, or is charged, with the full amount of said