to a case which stood so far down on the calendar and which would not be likely to be reached for argument during my term of office. Besides, your letter informed me of the employment of private counsel, and until Mr. Smith informed me today I was not aware he had left for the South.

Your case is undoubtedly an important one and I will urge as speedy a determination of it as the rules of the Supreme Court will permit. Shrock, you are doubtless aware, is convicted, but that does not touch the case. He *was* treasurer *de facto;* the question of Mr. Tool is far different; is he treasurer *de jure?*

The payment of taxes to him is unquestionably a discharge to the tax payer, and my examination of the authorities since your first presentation of the points involved incline me very strongly to the conviction that his sureties are held for the money as he personally undoubtedly is.

I will write as soon as any step is taken in the court; will be in attendance on the court all the time except for five or six days, during which I must visit New York as one of the commissioners of the sinking fund.

Yours very respectfully, etc.,

GEO. W. McCOOK.

Henry R. Saunders, Esq., Hocking, Ohio.

THE OLD PENITENTIARY LOT; POSSESSION; TITLE.

Office of the Attorney General,
Columbus, January 19, 1856.

SIR:—In obedience to the resolution of inquiry of the House of Representatives, I have the honor to reply that the State is now in possession of the ten acres of ground in this city known as the "old penitentiary lot," and I am

Quo Warranto; Toole Case; Officer Sworn on Day Subsequent to That Required by Law.

informed by my predecessor, who tried the case, with an undoubted title. A full report of the litigation and its results has been communicated by Mr. McCook in his official report, now in the Senate and to which, for detailed information, I beg leave to refer the house.

The action of ejectment brought in the name of the State has been terminated in her favor by the judgment of the District Court. He also brought in the Supreme Court a writ of error to reverse the judgment of the Court of Common Pleas, under which the possession was lost to the State, and at the December term, 1854, succeeded in obtaining a judgment of reversal.

I am, sir,

Very respectfully, etc.,

F. D. KIMBALL,

Attorney General.

To the Speaker of the House of Representatives.

QUO WARRANTO; TOOLE CASE; OFFICER SWORN ON DAY SUBSEQUENT TO THAT REQUIRED BY LAW.

Attorney General's Office,
Columbus, January 29, 1856.

SIR:—In the case of *Ohio vs. Toole* the defendant has filed two pleas—the first setting forth the execution and acceptance, etc., of a bond, taking oath, etc., on the day required by law; the second one-setting forth that he presented a bond and offered to and was ready to take the proper oath on that day, but that the county commissioners prevented or postponed the acceptance of the same until the next day, for consideration of the same, when they accepted it, and he was sworn, etc.

Taxes Assessed on Mortgaged Property, Not to Operate as Prior Lien.

I shall file a replication to the first, and probably demur to the second, but I wish you would send just such a statement of facts as can be proven in the case. If an issue of fact is made up we will by agreement probably take depositions and submit it to the court.

An early reply will oblige,

Yours truly,

F. D. KIMBALL,

Attorney General.

P. S. If you have any authorities on the case please send them. F. D. K.

Henry B. Saunder, Esq., Attorney, etc.

TAXES ASSESSED ON MORTGAGED PROPERTY, NOT TO OPERATE AS PRIOR LIEN.

Office of the Attorney General,
Columbus, January 29, 1856.

SIR:—I am in receipt of yours of this date, inquiring:

1st. Whether taxes assessed in accordance with law are a lien on personal property, in preference to prior mortgage creditors; and

2d. Have county treasurers power to distrain the rolling stock, etc., of a railroad company thus mortgaged?

The question is not without difficulties, from the fact that the decisions of different States are conflicting, and the case has not to my knowledge been adjudicated in Ohio; and while I am of opinion that in ordinary cases the lien of the State for taxes might be preferred, as between it and ordinary creditors, I am of the opinion that such would not be the case as regards mortgage creditors, and that (if) under such circumstances a levy were made by the treasurer

Statistics of Prosecutions Under Liquor Law; What to Include.—Forfeited Recognizance; Procedure.

of a county it would be subject to the prior mortgage claims,

I am, Very respectfully yours,

F. D. KIMBALL,

Attorney General.

Hon. W. C. Gibson, Treasurer of State.

STATISTICS OF PROSECUTIONS UNDER LIQUOR LAW; WHAT TO INCLUDE.

Attorney General's Office,
Columbus, January 30, 1856.

DEAR SIR:—By examining the circular in regard to statistics of prosecutions under the liquor law, you will observe that it contemplates a report of all prosecutions since the enactment of the law; also of all cases reversed, as well as all costs made, whether in cases pending or otherwise, which are not all included in the report made to the attorney general under the general law regulating statistics, etc.

Yours very truly,

F. D. KIMBALL.

A. E. Riddle, Esq.

FORFEITED RECOGNIZANCE; PROCEDURE.

Attorney General's Office,
Columbus, January 31, 1856.

SIR:—In reply to yours of the 25th in regard to the method of proceeding upon forfeited recognizances, I beg leave to reply, that you should bring suit upon them as upon any ordinary bond. After defaulting the parties and sureties, and having the default entered on record, of course suit can be brought before a justice when within the juris-

diction of that officer. The information, in my opinion, may charge the selling with an *alias,* as you suggest. See *Goodeno vs. The State,* 3 Ohio, St. Rep.

Very truly,
F. D. KIMBALL,
Attorney General.

N. C. Fraizer, Esq., Prosecuting Attorney.

TOOLE CASE; QUO WARRANTO.

Attorney General's Office,
Columbus, February 2, 1856.

GENTS:—I am informed by the prosecuting attorney of Hocking County that you are expected to aid me with a brief in the case of *Ohio vs. Toole,* quo warranto, pending in the Supreme court. I have filed a demurrer to the second plea of defendant, which raises the question whether the qualification of Toole on the day after that prescribed by law is sufficient, and I have submitted it on my own brief, but shall be glad to receive yours.

Very truly yours,
F. D. KIMBALL,
Attorney General.

Case & Bumback, Newark, Ohio.

CAPIAS IN CRIMINAL CASE.

Attorney General's Office,
Columbus, February 8, 1856.

SIR:—I regret that I overlooked any part of your inquiry in your former communication, and hasten to reply to yours of the 6th instant. In case of a forfeited recognizance I have no doubt a capias may issue to arrest and bring in

the defendant, and that is the proper course in the cases to which you refer. Very truly,

F. D. KIMBALL,
Attorney General.

W. C. Frazier, Esq., Prosecuting Attorney, Noble County.

TAXING LEASEHOLDS.

Attorney General's Office,
Columbus, February 7, 1856.

SIR:—Yours of the 1st instant, inquiring as to whether ministerial and school lands, under lease and having more than 14 years to run, shall be listed for taxation as real or personal property and as to the proper mode of valuing such property has been duly considered.

The fifth section of the tax law provides that such property "shall be considered for all purposes of taxation as the property of the person holding the same, and shall be listed as such, by such person or his agent, as in other cases." This section undoubtedly contemplates listing such property as real estate. It is to be considered as the property of the person holding the lease, and if it were *in fee* it would be taxed in that character; besides, the ninth section requires the assessor to value it, which he is not required to do in case of personal property, except in certain contingencies.

As to how such leasehold property is to be valued, is not of so easy solution. The rule prescribed by the ninth section is, that it "shall be valued at such price as the assessor believes could be obtained at private sale for such leasehold estates." The law evidently contemplates no fixed mathematical rule for ascertaining what the leasehold is worth, but leaves it to the judgment of the assessor, in view (of) all the circumstances, to ascertain the market price of such estates in the neighborhood. In fact, it would be diffi-

cult to fix upon any other practicable one, which could be carried out under the circumstances. In their valuing the estate the assessor should undoubtedly deduct from the full value of the land whatever amount it is depreciated by the payment of the annual rent reserved. He is to assess the lessee's interest only—which, however, under decision of one Supreme Court in regard to leases renewable forever, may be assumed to be the whole interest subject to the annual rent. In this view, deducting such sum from the full value, as if put at interest would produce the amount of rent reserved, would seem to be very nearly correct, and I apprehend in the absence of any ruling market price, from which the assessor can determine the selling value, this might be safely adopted.

Respectfully yours,
F. D. KIMBALL,
Attorney General.

F. M. Wright, Esq., Auditor of State.

KIDNAPPING NEGROES.

Attorney General's Office,
Columbus, February 12, 1856.

SIR:—In reply to yours of the 7th, inquiring if the second section of the act of 1831 to prevent kidnapping is in force, I give it as my opinion that it is in full force and validity. I am aware that its execution involves the question which has been raised in other States, whether a State has the power to protect its inhabitants in the enjoyment of liberty, etc., even against the provisions of the fugitive slave law, but the principle involved is too important to be yielded without a contest, and I do not doubt the same decision would be given here as in Wisconsin. At any rate, there can be no doubt whatever in a case where the party kid-

napped is not a fugitive slave. I hope you will proceed at once to enforce it. Truly yours,

F. D. KIMBALL,
Attorney General.

H. S. Neal, Esq., Prosecuting Attorney, Lawrence County.

LUNATICS; PROBATE COURT; JURISDICTION.

Attorney General's Office,
Columbus, February 12, 1856.

SIR:—I am in receipt of yours of the 7th instant, exercising my opinion in regard to the jurisdiction of the Probate Court in case of lunatics, etc. The sixty-fifth section of the probate act rests exclusive jurisdiction of such cases in that court, and as a matter of course, it supersedes those provisions of the law then in force, vesting such power in the clerk of the Common Pleas, leaving the balance to stand as to the mode of procedure.

I see no reason to differ with my predecessor, Col. McCook, in regard to this matter.

Truly yours,
F. D. KIMBALL,
Attorney General.

Geo. F. Kennedy, Esq., Clerk Carroll County.

LOCAL LAW; COLLECTION OF COSTS.

Attorney General's Office,
Columbus, February 12, 1856.

SIR:—I am of opinion that the local law referred to in yours of the 7th instant, regulating the collection of costs in

the counties therein named, is superseded by the twenty-sixth section of act two of the constitution, which requires that all laws of a general nature shall have a uniform operation throughout the State. This law is in its nature general, and not special, and not being of uniform operation throughout the State, it is clearly inconsistent with the constitution.

Truly yours,

F. D. KIMBALL,
Attorney General.

A. S. Hall, Esq., Prosecuting Attorney, Ashtabula County.

COUNTY COMMISSIONERS; POWER TO BORROW MONEY.

Attorney General's Office,
Columbus, February 14, 1856.

SIR:—Yours of the 11th instant is received.

I am of opinion that in the absence of any law specially authorizing the same, county commissioners cannot borrow money and bind the county for the payment of the same. It will require a special act of the legislature for your particular case, or a general law upon the subject conferring such power upon them.

Very truly yours,

F. D. KIMBALL,
Attorney General.

A. W. Doan, Esq., Prosecuting Attorney, Clinton County.

STATISTICS; PROSECUTION UNDER LIQUOR LAW.

Attorney General's Office,
Columbus, February 18, 1856.

SIR:—In accordance with a resolution of the House passed on the 17th day of January ult., requiring one to ascertain and report certain statistics in regard to prosecutions under the act "to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio." passed May 1, 1854, I have the honor herewith to transmit a tabular statement of the items called for by said resolution made up from returns of the prosecuting attorneys of fifty counties in reply to an official circular addressed to them from this office on the 2d of January. No reports have been received from the remaining counties. The cases dismissed for any cause are included under the head of acquittals, and the reports show in addition to the facts called for that a large majority of the cases commenced have been *nollied* by the prosecuting attorneys, either under an agreement on the part of the accused to abandon the traffic, or on account of defects in the proceedings before the justices. This last class is very numerous, and a failure to convict is attributable in a majority of cases to such defects. An amendment to the law which would allow an information to charge the offence under all or any of the different causes of prosecution defined by the statute, restricting it to the same transaction for which the accused has been recognized by the justice, and precluding any objection being taken thereto on account of informalities or defects in the transcript, so long as it shows substantially an offense to have been committed, would, I doubt not, add much to the efficiency of the law. Respectfully submitted,

F. D. KIMBALL,
Attorney General.

To the Speaker of the House of Representatives.

TRANSFERRING RECOGNIZANCES.

Attorney General's Office,
Columbus, March 14, 1856.

SIR:—Yours of April 8th inquiring as to the effect of the new law transferring criminal jurisdiction to the Court of Common Pleas from the Probate Court has been examined. The law makes it the duty of the probate judge to transmit all recognizances and informations pending to the *Probate Court?* The effect of this is to require the appearance in that court, and a default can be taken then the same as in the Probate Court, had the jurisdiction not been changed. Very truly,

F. D. KIMBALL,
Attorney General.

J. S. Heuckle, Esq., Prosecuting Attorney, Clark County.

LIEN UNDER THE LIQUOR LAW.

Attorney General's Office,
Columbus, April 23, 1856.

SIR:—Yours of the 26th February last, inquiring whether a building or premises held under a *sub-lease* and used for selling liquor contrary to law with the knowledge of the owner, is liable for a fine assessed under the liquor law of 1854, and if so how the lien is to be enforced, was by mistake by a gentleman in my office, sent to Medina, or I should have replied to it sooner.

I am clearly of the opinion, under such circumstances, the judgment is a valid *lien*. It can make no difference whether the premises are held by a direct *lessee* of the owner, (or) of a *sub-lessee*. If the premises are rented or leased and the owner knowingly suffers them to be used for

the sale of liquors contrary to the law, the case is within the law.

The method of enforcing the lien is the same as in any other case, I apprehend. A petition must be filed alleging the recovery of the judgment, that the premises were leased and occupied, etc., and praying that they be sold to satisfy the same. The proceeding is akin to that taken to foreclose a mortgage or other lien.

Very truly yours,
F. D. KIMBALL,
Attorney General.

James C. Anderson, Esq., Prosecuting Attorney Marion County, Ohio.

COSTS; NOT AFFECTED BY DEFECT IN PROCEEDINGS.

Attorney General's Office,
Columbus, ————, 1856.

DEAR SIR:—Yours of the 25th of February was received in my absence from Columbus, and has just fallen under my notice. The question proposed, whether mere defect in legal proceedings, papers, etc., will relieve the county from the payment of costs incurred in such proceedings, is one more properly referrable to the prosecuting attorney of your county than to this office, as it ought certainly to be very easily determined. An informality or defect of the kind will not affect the question of the payment of costs one way or the other. If the count is otherwise liable it can make no difference, and they should be paid from the county treasury.

Truly yours,
F. D. KIMBALL,
Attorney General.

Jackson Nuesdale, Esq., Auditor, Mahoning County.

TAXATION OF COLLEGE LANDS.

Attorney General's Office,
Columbus, April 23, 1856.

SIR:—I have at your request duly examined the questions submitted to me in regard to the liability of the property belonging to Kenyon College to taxation. I am satisfied that all the buildings, to-wit: the college buildings, president and professors' houses, etc., are clearly within the exception of the first clause of the first section of the amendatory act of March 12, 1853. The language there used is: "All colleges, academies, all endowments made for their support, all buildings connected with the same, and all lands connected with institutions of learning, not used with a view to profit." This clearly includes these buildings.

As to the land, I am of the opinion on an examination of the law, and the accompanying statement of the agent of the college, that so much of the "College Reserve" as is not under lease and used as a park and surrounding the buildings, etc., is also exempt from taxation. So far, then, it seems to me, there can be no doubt as to the rule that should govern this case, and I have but little doubt that the balance of the lands, being the "endowment" of the college, are within the exemption specified in the law aforesaid; but there is great doubt in my opinion, whether this exemption of the endowment of a college is within the provisions of the constitution governing the case, so that I am constrained to hold that the exception can only extend to property exclusively used for a public purpose, which is not the case with land, leased to third parties with a view to profit. From the above views you will have no difficulty in deducing a general rule applicable to all like cases, to-wit: that

'uildings or lands used exclusively for *public* institutes of rning are exempt, and only when so *used.*

Truly yours,

F. D. KIMBALL,
Attorney General.

F. M. Wright, Esq.

SUIT AGAINST JUSTICE OF THE PEACE.

Attorney General's Office,
Columbus, May 13, 1856.

DEAR SIR:—Yours of the 7th instant, inquiring as to the proper course to proceed to collect money paid to a justice of the peace to which he is not entitled—also as to the method of recovering an amount in his hands collected as fines—has been duly considered.

In the first instance, I have some doubt whether the sureties on his bond are liable for moneys wrongfully obtained from the county, as they do not, strictly speaking, come into his hands by virtue of his commission, but rather by a fraud. A suit against him for money paid by mistake will be the proper remedy. But as the second case is clearly within the condition of the bond, it can do no harm to join the two cases in one action, and test the question. Suit should be brought upon his bond against him and his sureties, and it will be necessary to allege generally that a given amount has been received by him as fines, which he has not paid over. It may be best to allege in what cases the fines were collected. In regard to the other matter a general allegation that at a certain time he received a given sum of money, from the county, to the use of the county, or by mistake, etc., will I think be sufficient.

In case of a justice failing to report fines he is liable

to a penalty, besides paying the amount received. See Swan's 543, Sec. 4; also Sec. 38, p. 502.

Very truly yours,
F. D. KIMBALL,
Attorney General.

John J. Manor, Prosecuting Attorney, Lucas County.

TAXING CREDITS DEPOSITED OUT OF THE STATE.

Attorney General's Office,
Columbus, May 13, 1856.

DEAR SIR:—I have examined the case submitted to you by the auditor of Meigs County, of a person who avoids taxation by keeping his credits, etc., in Virginia, and am satisfied that all such credits are legally taxable in Ohio. The assessor in returning him should return an amount equal to what he believes his credits to be, as provided by the twenty-third section of the tax law, along with the other items required to be listed, and to this the auditor should add fifty per cent. This amount should cover all the credits held by the individual, no matter where they may for the time being be deposited, as they are in contemplation of law held by the owner, in Ohio.

Respectfully yours,
F. D. KIMBALL,
Attorney General.

F. M. Wright, Esq., Auditor, etc.

County Treasurers; Refusal to Collect Taxes—Convict Labor on the State House.

COUNTY TREASURERS; REFUSAL TO COLLECT TAXES.

Attorney General's Office,
Columbus, May 13, 1856.

I am in receipt of your note of the 14th of April, asking my opinion what remedy exists in case a county treasurer refuses to collect delinquent taxes, as required by the act of May 1st, 1851, and covering the letter of the treasurer of Williams and also that of the treasurer of Columbiana County, upon the subject. Upon examination of the law I am unable to see any remedy in such case, except by application for a mandamus to compel the treasurer of Columbiana County to perform his duty in the premises. The law provides no penalty against such refusal to perform an official duty, neither is it within the official bond of the treasurer. I would suggest that you address the treasurer upon the subject, as his reusal may arise from ignorance of the law in the premises. Very truly,

F. D. KIMBALL,
Attorney General.

Hon. F. M. Wright, Auditor of State.

CONVICT LABOR ON THE STATE HOUSE.

Attorney General's Office,
Columbus, May 14, 1856.

SIR:—Your inquiries of the 13th have been duly considered, and I submit the following reply:

In regard to your first inquiry, as to whether the act of April 8, 1856, requires the commissioner to pay for convict labor expended on the state house from the appropriation therein made, I am clearly of the opinion that it does not.

The ninth section of that act makes it the duty of the warden and directors of the penitentiary to place at the disposal of the commissioners all the convict labor that can be spared from the ordinary work of the prison, etc., which labor shall be appropriated as the commissioners shall order, under the direction of the warden of the penitentiary. This appropriation of convict labor is unrestricted, without any condition whatever, and no requirement whatever is embodied in the act, requiring the work to be paid for from the money also appropriated by the act in question.

The twelfth section appropriates the sum of ninety thousand dollars to pay for the work and material necessary to complete the work directed to be executed by said act, but I do not think this provision refers to the convict labor appropriated by section nine. The appropriation act of 1853 expressly appropriates a sum applicable to this work of convicts in payment therefor, which referred to a joint resolution passed March 8, 1850, directing such labor to be paid for, and I cannot suppose that, had the General Assembly intended the same effect to have been given to this law, they would in appropriating convict labor have incorporated a like provision.

2d. I am of opinion that section six of the act of 1856 is prospective only, and does not apply to contracts previously made.

3d. I am of opinion that contracts made by the state board of commissioners are binding upon the State. The board had authority to make contracts, and I do not see how they can be avoided. No limit is fixed to their power in this respect by the law of March, 1853, and by the ninth section of that law they are clothed with "full power to contract and be contracted with." I think, then, a contract made in pursuance of the object for which said board was created, *untainted with fraud,* is legally binding upon the State. Of course the board could not bind the State to pay faster than appropriations should be made by the General Assembly, and the contractor would have to await the

action of the legislative body for compensation, but the contracts in other respects would be binding. Of course the board may refuse to recognize these contracts, if they appear to be unfairly made or to be fraudulent, leaving the contractors to prosecute their claims for damage before the General Assembly; or the board may annul them by agreement with the parties interested.

4th. I am of opinion that if the contracts are *fairly* and *legally* made, the contractors are entitled to the amount specified in the contracts, without reference to what the same material or work *might* have been obtained for of other parties. If the contract was valid it is valid as a whole, in all its parts and details.

Respectfully submitted,
F. D. KIMBALL,
Attorney General.

Wm. A. Platt, Esq., Acting State House Commissioner.

COLLECTORS; EXTENSION OF TERM.

Attorney General's Office,
Columbus, May 15, 1856.

SIR:—A statement of your account as collector of tolls at McConnelsville showing a balance due the State of $586.67, together with your official bond, has been delivered to me by the auditor of state, and suit will be commenced on the bond in the Court of Common Pleas of Franklin County immediately, unless the said balance is adjusted with the office. The action of the auditor in regard to this case is in accordance with the practice of that office in all like cases, and in accordance with an opinion of Attorney General McCook upon the subject with which opinion I must fully concur. The law of 18—, prescribing the duties of the board of public works, etc., continued certain collectors in

office on the filing new bonds. The constitution, article two, section 211, provides that no change shall be made in the salary of any office during his existing term. You have been holding office by virtue of your original appointment, prolonged, to be sure, by an act of the legislature, but still the same term of office; and as no change could constitutionally be made in your compenastion, you should be required to settle upon the basis of compensation fixed by the old law.

Very truly,
F. D. KIMBALL,
Attorney General.

Samuel S. Hanna, Esq.

DISTRIBUTION OF SCHOOL FUND; HOUSES OF REFUGE.

Attorney General's Office,
Columbus, May 16, 1856.

SIR:—In reply to your inquiry whether a portion of the school fund can be now distributed to the children in the house of refuge, of Hamilton County, who were omitted from the enumeration of youth for that county, as appears by the communication of the auditor of that county covered by your letter of this date, for the years 1851, 1852, 1853 and 1854, I am constrained to hold, on an examination of the law that it cannot be done. The school law, section eight, provides that an enumeration shall be taken annually of the youth between 5 and 21 years, which enumeration is required by section forty-four to be returned to the state superintendent of schools, and by him to the auditor of state, who is required to annually apportion the school fund among the different coutnies according to the said enumeration, and certify the amount to the auditor of each county. For the years in question this distribution has been made. It is an act performed, which cannot, in my opinion, be

now corrected or changed. If it can be done in this case, it can be done in any case where it can be shown that a single youth has been omitted in the enumeration. The fund has been distributed, and probably expended. There is nothing to distribute to these youths omitted in the enumeration, and I know of no money, appropriation or otherwise, which can be applied to supply the claimed deficiency. If the board of education have omitted to perform their duty in the premises, it cannot now be remedied in any way that I can see, as the law makes no provision for correcting such mistakes, nor could it well do so in any practical manner after the distribution of the fund, without producting great and inexplicable(?) confucion.

Respectfully submitted,
F. D. KIMBALL,
Attorney General.

RESPONSIBILITY OF THE WARDEN OF THE PENITENTIARY.

Office of the Attorney General,
Columbus, May 17, 1856.

GENTS:—I have examined the question submitted to me in a verbal communication of yesterday—whether the warden of the penitentiary, Judge Buttles, is liable in his official capacity for the amount of the defalaction of the late clerk of that institution, R. S. McEwen—and while I do not find the question free from doubt, yet I have come to the conclusion that he is not so liable. The clerk is an officer appointed in accordance with the law, of whom a bond is required. By the rules of the prison, made in accordance with the statute, he is made the financial assistant of the warden, and while there could be no doubt of the responsibility of the warden for the act of a private assistant

employed by himself, I think it is clear he cannot be held liable for the acts of a public officer, who is made his assistant in a legal manner. To so hold would be to hold the head of every governmental department liable for the act of every subordinate officer or clerk under him, a practice contrary to all precedent. No man could consent to hold an office wherein he was held to be the insurer of every subordinate officer the law making power might see fit to attach to his office. I conclude from these considerations that the clerk of the penitentiary is, within the scope of his legal duties, responsible for his own acts, and that within that limit the warden is not responsible therefor, except perhaps in gross neglect of duty in his general supervision of the affairs of the prison and its offices.

Respectfully,
F. D. KIMBALL,
Attorney General.

Messrs. A. P. Stone and others, Directors Ohio Penitentiary.

NOTARIES PUBLIC.

Attorney General's Office,
Columbus, May 31, 1856.

SIR:—In answer to your verbal inquiry as to the proper construction to be put upon that clause of the law regulating the appointment and duties of notaries public, which prohibits the appointment of attorneys of banks, I beg leave to say that in my opinion it should only be held to refer to an attorney who is regularly and permanently retained as such bank attorney, one who is understood to be its ordinary and retained legal adviser, without regard to the manner of payment for his services, whether by salary or otherwise; and I would not be of opinion that one who is simply en-

gaged in the prosecution of a single suit for a bank would be within the prohibition of the statute.

Respectfully yours,
F. D. KIMBALL,
Attorney General.

To the Governor.

TAXATION; PENALTIES.

Attorney General's Office,
Columbus, May 31, 1856.

DEAR SIR:— Want of time will prevent my doing more in reply to your inquiries of the 26th instant, than to give the conclusions at which I have arrived without entering into details:

1st. I am of the opinion that the auditor cannot add 50 per cent. to the amount he may assess under the thirty-third section of the tax law. It is only in cases where the owner of property refuses to *swear* and where such refusal is *returned,* that 50 per cent. penalty can be added. The fortieth section provides for this case, the forty-third for a different one.

2d. This being the case, no penalty can be added to an amount added by the board of equalization, to an assessment previously returned by the assessor. It is only on the amount so *returned* that a penalty is allowed.

Respectfully,
F. D. KIMBALL,
Attorney General.

COSTS IN PENITENTIARY CASE; SERVICE OF SUBPOENA.

Attorney General's Office,
Columbus, July 18, 1856.

SIR:—I regret that on account of my absence from Columbus your inquiries, made at various dates, in regard to costs allowable in penitentiary cases, have remained so long unanswered. I now proceed to answer them in order.

1st. Are costs made before a grand jury taxable, in the act of January 4, 1838 (Swan 727). The statute evidently covers all the costs of prosecution incurred in accordance with the statute directing the mode of criminal prosecutions, and might in that view be made to cover those before a grand jury; but I think it only intends to cover costs *taxable* in the case, and as it is inadvisable any new rule should be now introduced upon this subject, I would recommend that by reference to bills allowed by your predecessor you ascertain if such have been certified and paid, and be governed accordingly. In case they are allowable, I am of opinion only witness fees and expense of subpoenaing them could be allowed.

2d. Constables, under the act of April 25, 1854, may be allowed for assistants and sustenance of prisoner, etc., but such fees must be specifically *allowed and certified* by the justice to have been necessary, and if not so certified should be rejected. It would seem also that under that act assistants may be charged for at the rate of one dollar per day.

3d. As to copies of subpoenas. I see no reason to change my opinion heretofore expressed on that point. The law allowing subpoenas to be served by copy only relates to *civil* cases. It is a part of the "Code of Civil Procedure," and has no relation whatever in my opinion to criminal cases. Subpoenas in criminal cases must still be served in the old common law manner, by reading, and the law allows a fee for such *service* only. But if the law referred to covered criminal cases, I would still have doubt as to a charge for a

copy being allowable, except in cases where a personal service could not be made. The law as it stood before the enactment of the code only allowed fees for *service.* The code gives the manner of service only, leaving it with the officer which to adopt, and I cannot believe it was contemplated that a copy should be charged for, under the general provision of a former statute, allowing fees for copies *necessary* to complete the service of any writ or process; but, be that as it may, the statute only applies to civil cases, as I construe it.

A general rule governing all these cases which may be very safely adopted, is to allow only such costs as by reference to the fee bill established by the statute would be taxable in the case. Everything like constructive charges are to be rejected, and the law is to be construed strictly.

Very respectfully yours,
F. D. KIMBALL,
Attorney General.

John Ewing, Esq., Warden Ohio Penitentiary.

CONVICTS; FRACTIONAL TIME.

Attorney General's Office,
Columbus, July 18, 1856.

SIR:—In reply to your verbal inquiry, whether in my opinion a convict is entitled to a diminution of the time of his sentence for a half month where the time expires before the last full month has expired from the passage of the act allowing such deduction for good behavior, I have the honor to reply that in my opinion a fair and liberal construction of the law (which should be so liberally construed in favor of liberty) would give the prisoner the benefit of such fractional time. Truly yours, etc.,

F. D. KIMBALL,
Attorney General.

John Ewing, Esq., Warden Ohio Penitentiary.

COUNTY TREASURER; PER CENT. ON SCHOOL FUND.

Attorney General's Office,
Columbus, July 18, 1856.

SIR:—An answer to your inquiry as to the rate of percentage allowable to county treasurers upon proceeds of sale of section sixteen collected by them, has been delayed by my absence at New York on business as commissioner of the sinking fund.

I have examined the question presented, and briefly give you the result of my examination. The law, section thirty, 1012 Swan, gives county treasurers 5 per cent. on all moneys received and paid out during the year, except that collected on the tax duplicate, or that on which some other rate is fixed by law. The rate for that collected on the tax duplicate is fixed by section thirty-four. The proceeds of section sixteen do not go upon the duplicate; then unless *some other rate is fixed* by law, five per cent. is chargeable thereon. By the thirty-third section county treasurers are allowed one per cent. for receiving and paying out the money arising from the common school fund. Do the proceeds of sales of section sixteen fall within this rate?

The act passed March 2, 1831, established a school fund, and the proceeds of lands, among (other) things, go to make up this fund, upon which the State shall forever pay interest to the proper township or other locality. This interest it seems to me is the "money arising from the school fund" contemplated by section thirty-three above referred to, The proceeds of sales of section sixteen are not part of the school fund until paid into the State treasury. They are not moneys arising from the school fund, unless that term is applicable to the fund itself. I conclude, then, that the money arising from sales of section sixteen do not fall within the purview of section thirty-three of the treasurer's act. That not being money collected upon the county duplicate,

and no other rate being fixed, such moneys are chargeable with 5 per cent. as a compensation to the treasurer for collecting and paying over the same. The same rate will also doubtless apply to peddlers, licenses, etc., etc., and all other sums which go to support schools, but which are not collected on the duplicate, or derived as interest from the school fund in the hands of the State. The rate of *one per cent.* will be chargeable on all that amount received from the State, which is such interest as arises from that fund, without diminishing the principal after it is.

Very truly yours,
F. D. KIMBALL,
Attorney General.

COUNTY TREASURERS; SEC. 61 OF LAW.

Office of the Attorney General,
Columbus, July 18, 1856.

SIR:—It is difficult to determine what could have been the intention of the legislature in enacting the absurd law to which you call my attention in yours of the 14th. The general rule is, that if the proviso to a statute is directly contrary to its purview, the proviso operates as a repeal of what goes before it. The proviso in this case is *not contrary* to the preceding part of the section, which absolutely requires you to post notices of the time, and attend one day in each township to collect taxes. I am of opinion then that this will be binding on the treasurers, and that the attempt to qualify it by proviso fails for want of being clearly expressed, and that you must attend one day in each township.

I am, sir, Very truly,
F. D. KIMBALL,
Attorney General.

Wm. Booker, Esq., Treasurer Belmont County.

Reports of Fees—State House Commissioner; Contract for Iron Work.

REPORTS OF FEES.

Office of the Attorney General,
Columbus, July 19, 1856.

SIR:—On an examination of the act fixing the compensation of county officers, etc., referred to in yours of 10th instant, I do not think, although it is very general in its provisions, that it could have been the intention of the legislature to require reports from other than those whose salary it affects. They are not, to be sure, exempted expressly from reporting the amount of their fees, yet as the only object of requiring such reports seems to be to insure the payment into the county treasury of the overplus above the salaries of those limited by the act, a fair construction leads one to the above conclusion.

The case of *Clark vs. Ohio* will be attended to.

Respectfully,
F. D. KIMBALL,
Attorney General.

J. M. Shane, Esq., Prosecuting Attorney, Jefferson County, Ohio.

STATE HOUSE COMMISSIONER; CONTRACT FOR IRON WORK.

Office of Attorney General.
Columbus, September 23, 1856.

SIR:—I have carefully examined the contract with the "Columbus Machine Manufacturing Company," enclosed in your letter of the 15th instant, and the question you thereon submit for my opinion.

The question is not free from difficulty, yet, on the whole, I am of the opinion that the Columbus Machine

Manufacturing Company is not, by virtue of that contract, "entitled to the privilege of furnishing all the iron-work that may be required in the construction of the new state house."

The provisions of the contract are such, however, that a concession of the right claimed by that company would not, in my judgment, injuriously affect the interests of the State.

Power is expressly given to the commissioners and the architect to "fix" the "price" at which all the iron-work contemplated in the contract, and not embraced in the "ceilings" shall be furnished.

In view of this consideration, and of the difficulty of determining the precise rights of the respective parties under the contract, it would seem to me to be the most prudent course for the commissioners and the architect, in the first instance, to require the company to furnish, within a reasonable time, the yet "needed" iron-work (excluding that required for the "ceilings") at a named price, which shall be a fair compensation therefor, and yet shall not exceed the rate at which it can be elsewhere obtained. If the company shall not comply with this requirement, then clearly the commissioners may contract therefor with whomsoever they shall see fit. This course will obviate all cause of complaint on the part of the company, and at the same time presume the interests of the State.

C. P. WOLCOTT,
Attorney General.

Wm. A. Platt, Esq., Acting Commissioner.

Chief Clerk of Department of Public Works Authorizing to Sign Certificates—Central Ohio Lunatic Asylum; Discharge of Patients.

CHIEF CLERK OF DEPARTMENT OF PUBLIC WORKS AUTHORIZING TO SIGN CERTIFICATES.

Office of Attorney General,
Columbus, September 26, 1856.

SIR:—I have examined the question stated in your letter of 22d instant, and am of the opinion that the "chief clerk" of the "department of public works" is authorized to sign certificates for the payment, to the state treasurer, of tolls accruing from the public works of the State.

Very respectfully yours,
C. P. WOLCOTT,
Attorney General.

H. Baldwin, Esq., Chief Clerk Department Public Works, Columbus, Ohio.

CENTRAL OHIO LUNATIC ASYLUM; DISCHARGE OF PATIENTS.

Attorney General's Office,
Columbus, October 3, 1856.

GENTLEMEN:—I have carefully examined the statement of facts relative to the attemtped discharge of certain patients from the Central Ohio Lunatic Asylum, under a resolution of the board of trustees thereof, passed August 6, 1856, and also the questions arising thereon, which you have submitted for my opinion.

Upon mature deliberation, I am of opinion:

1. That the act "to provide for the uniform government and better regulation of the lunatic asylums of the State," etc., passed April 7, 1856, gives to a single trustee

of either asylum on the application of its superintendent, and also to the board of trustees thereof without such application, plenary and final power to discharge therefrom any patient, or number of patients, whenever he or they shall deem it expedient.

The power thus given is purely discretionary, and the exercise of that discretion cannot be questioned, controlled, or reviewed by any other tribunal.

2. That whenever an order for the discharge of a patient has been made, either by a single trustee on the application of the superintendent, or by the board of trustees, the probate judge of the county "from which such patient was sent," on being notified of the order by the superintendent, "under the seal of the asylum" is imperatively bound by the express language of the act before mentioned, to issue "forthwith, to some suitable person," or to the sheriff of his county, his warrant for the removal of such patient, and his return to the township of which he is an inhabitant. Section twenty-seven.

The duties of a probate judge, in this respect, are entirely ministerial. No judicial function is called into exercise, and he has no more power to question the validity and efficacy of an order so made and so notified to him, than has a sheriff to review the regular judgment of a judicial tribunal, which, by proper writ, he had been directed to enforce. And if any probate judge, on being duly notified of such an order of removal, shall neglect or refuse to perform the obvious and imperative duty of issuing the removal warrant, required by the twenty-seventh section of the act already referred to, he will, in my judgment, be liable to the infliction of either of the penalties with which the sixtieth section of the same act visits any violation, by that officer, of the duties imposed on him thereby.

3. That the resolution of the board of trustees, and the action of the superintendent thereunder, as set forth in the "statement of facts," are open to criticism in the following particulars.

Central Ohio Lunatic Asylum; Discharge of Patients.

a. The resolution does not, in terms, discharge the patients indicated, but only directs the superintendent "to take the proper measures" to remove or "discharge" them. Very clearly, the superintendent cannot discharge a patient. His power is limited to applying for a discharge, and to giving notice to the probate judge of the proper county that an order of discharge has been made. The order of discharge must be made by the board or a trustee.

b. It does not appear that the notice given by the superintendent to the probate judge of Hamilton County was under the "seal of the asylum." This is expressly required by the act, and, in my opinion, the probate judge cannot be compelled to issue a removal warrant in the absence of this prerequisite.

These objections are somewhat hypercritical, but they can be readily obviated, and it would therefore seem hardly prudent to press the matter on the proceedings of the board and the superintendent, in their present form.

If further action is had, would it not be advisable to name the patients in the "order of removal," rather than to indicate them as a class?

The law does not permit me, any more than it does the probate judge, to consider the purposes of the board in exercising its discretionary powers, and I, therefore, withhold the expression of any opinion as to the "ultimate object" the board had in view.

C. P. WOLCOTT,
Attorney General.

To the Board of Trustees of C. O. Lunatic Asylum.

REGISTER OF LAND OFFICE; DUTIES AND LIABILITIES.

Attorney General's Office,
Columbus, October 20, 1856.

SIR:—I have examined the questions stated in the communication of C. McCoy, "Register at Mansfield," which accompanies your letter of the 15th ult., and am of opinion:

1. Neither the lessees of school lands in the Virginia military district or their assignees are entitled to certificates of purchase for the lands covered by their respective leases, until all rent in arrear thereon shall be paid, even though such rent accrued at a period so remote as that, if the case arose between individuals, all right of action therefore would be barred by the statute of limitations.

2. Where, through the negligence or fraud of a former register, part of a leased quarter section has been conveyed without payment of the rent therein arrear on such quarter section, the whole amount of such arrearage must be paid, with interest, before a certificate of purchase can be issued for the yet unconveyed portion.

3. Simple, and not annual or compound interest shall be computed on all rent in arrear, from the day it became due.

4. As a general rule the original lessees are personally liable for rents accruing after an assignment by them of the lease. Whether the assignees are personally liable for rents so accruing, depends so much on the circumstances of each case, that no universal rule can be conveniently given.

5. The last inquiry is too vague to admit of any more definite answer than a statement of the general rule that all officers of the State are liable to it for any nonfeasance or misfeasance in office. The auditor of state has no dispensing power, and his instructions, therefore, would be no de-

fense to the register at Mansfield, if he shall fail to discharge any official duty.

C. P. WOLCOTT,
Attorney General.

Hon. F. M. Wright, Auditor of State.

CLAIM OF JUDGE HART; JUDICIAL SALARIES.

Attorney General's Office,
Columbus, October 22, 1856.

SIR:—The claim made by Judge Hart in his note to you which accompanies your letter of the 15th ult., is simply this: He was president judge of the Court of Common Pleas of the 20th judicial circuit, serving an unexpired term, when the office was abrogated by the operation of the new constitution. This event happened a short time before the termination of his first official year. He had, however, held all the terms of court assigned by law for that year, and now insists that he is therefore entitled to the full annual salary.

I have considered the question presented by this state of fact, and am of opinion that the claim so made has no foundation in law.

If his official duties had been limited to the mere holding of the regular terms of court prescribed by law, then the claim of Judge Hart would be within one branch of the rule laid down in the case of Lawrence, ex parte, 21 Ohio 431, (cited by him), and he would consequently be entitled to the full annual compenastion. But, in fact, his duties were not thus limited, though the holding of courts constituted the largest and by far the most laborious portion of his judicial functions, yet the law imposed on him other duties not less delicate or important, continuing through the entire year and liable at any moment to be called into

exercise. Among the duties which he might thus at all times have been required to discharge, may be enumerated the hearing and decision of applications for writs of certiorari, ne exeat, and of against the person of a debtor, of motives for the allowance or dissolution of injunctions, for the punishment of a breach thereof, or for the appointment of receivers, the issuing of writs of habeas corpus, and the determination thereupon of the rights of personal liberty.

Whether, in this instance, Judge Hart would have been called on to discharge these or any other duties if the office had continued through the whole year cannot now be determined. It is difficult, however, to imagine that even so short a period as a month could have passed in the 20th judicial circuit, without frequent applications for the exercise of some of these duties.

But, be this as it may, it is sufficient to say that the salary given by law, is to be paid quarterly, without any reference to the terms of courts, and not for any specific class of duties falling within a limited period, but generally for all duties which he might be required to discharge within the year. In other words, the compensation is not only for the labor actually performed by the judge, but for the perpetual obligation he is under of holding himself in constant readiness to discharge that class of functions which, though not always active, always pertain to him, and the exercise of which may at any instant be invoked.

From this view of the continuous nature of duties, it would seem necessarily to result that the compensation must be apportioned to the length of time the incumbent fills the office, and not to the amount of duties discharged. In practice the latter rule could not be applied; for, as the judge was liable to be called on to discharge some of these duties, at irregular intervals, and whenever applied to in that behalf, it could never be said until the end of the year that he had performed all the duties of that year, and unless that could be said, he would clearly not be entitled to the full annual salary.

Again, the uniform practice of the State, acquiesced in for half a century, has settled the question that in case of the resignation of the judicial office the salary ceases therewith. I am wholly unable to distinguish in principle between that case and the one presented by Judge Hart's note. The same scale of compensation to all cases when the incumbent ceases to fill the office and to discharge its duties before the end of the official year, whether the cessation result from death, resignation, or the abrogation of the office. The mere agency by which the termiantion has been wrought cannot affect the principle in which the compensation must be apportioned. In short, every view which I have been able to take of the claim made by Judge Hart, has led me irresistibly to the conclusion that it has no warrant in law.

I have carefully examined Lawrence, ex parte, 1 Ohio State, 431, on which he relies, but instead of sustaining his claim, it is in my opinion, decisively against it.

Very respectfully,
C. P. WOLCOTT,
Attorney General.

Hon. F. M. Wright, Auditor of State.

TAX LAW OF 1852: EXEMPTION OF CHURCHES.

Attorney General's Office,
Columbus, October 24, 1856.

SIR:—The case presented by the "trustees of the Fifth Street Baptist Church of Cincinnati" in their letter, of which a copy is attached to your note of 13th ult., is this:

The church, "a plain brick meeting house," in the city of Cincinnati, the basement of which is subdivided into several rooms, all necessary for church purposes. "No part of the building is rented or leased," but "two of the rooms in the basement are occupied by the sexton having care of

the house." It is fairly to be inferred, though not distinctly stated, that these two rooms are occupied by the sexton as a dwelling, and that the rest of the building is used only for public worship.

It is insisted by the trustees that, on this state of fact, the whole meeting house is exempt from taxation, or, if not wholly exempt, that only the two rooms occupied by the sexton are subject to taxation.

I have carefully examined the question thus presented, and am of the opinion that, under the circumstances, the whole meeting house is liable to be taxed.

The constitution of 1851 requires all property in the State, by whomsoever held, or for whatever purpose used, to bear its equal proportion of taxation, with certain very limited exceptions, which are specified therein, and which excepted property, "may, by general laws, be exempted from taxation." Among the descriptions of property thus specifically excepted, and which may therefore, at the option of the legislature, be exempted, are "houses used exclusively for public worship."

In obedience to this constitutional requirement, the act of April 13, 1852, was passed, the first section of which provides that all property in the State, except such as is thereinafter "expressly exempted," "shall be subject to taxation." The third section of this act constitutes its sole exempting clause, and provides that "all property described in this section, to the extent herein limited, shall be exempt from taxation, that is to say, all public school houses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit." Other property is also exempted by this section, but this is the only portion relating to meeting houses. This section has since been partially amended (Cur. Rev. Stat. Vol. 3, p. 2187), but in the above particular it remains unchanged. There are no other constitutional or statutory enactments

bearing on the case, so that the question manifestly depends on the effect of that clause of the third section of the act of 1852, which has been quoted.

The language of this clause is singularly clear and explicit. There is no ambiguity in its words, or arising from the method of their collection. There is nothing to be construed. It must be taken to mean precisely what it says, nothing more, nothing less, nothing else. But if its language was of doubtful import, it must, on settled principles, be strictly construed, and the doubt is against the claim for exemption. It is the established policy of the State, founded on the principle of justice and equality of rights, that all property within its limits shall contribute by way of taxation, in the ratio of its value, towards the burdens of the common government from which it all derives equal protection and equal benefit. Every law exempting particular property from this general burden, being thus in derogation of common right, must be rigorously interpreted, and every claim to the special privilege granted by such law must be brought fully and exactly within its terms, as thus sternly construed.

The application of these familiar principles to the case in hand, renders it easy of solution. Part of the rooms of the building in question are occupied as a dwelling. The rooms so occupied are clearly not used for worship public or private. It is of the very essence of an exclusive use to debar all other possible ones, so that a building appropriated in part to me, and in part to another, can have no exclusive use. This proposition is so elemental in its character that it can derive no aid from argument or illustration. Plainly it is flagrant violation, not only of the mere proprieties of language, but of the truth itself, to assert that a building of which a greater or lesser part is used for a dwelling, or any other secular purpose, is a "house used exclusively for public worship." The fact that the occupant of the rooms is a sexton "who has care of the church," does not affect the question. The use of such rooms as a habitation is

purely secular, whatever may be the trade or profession of the occupant. It is not easy to see how the relation in which the habitant stands towards the church, gives to his dwelling any characteristic of public worship, which would not equally pertain to it if occupied by a day laborer, or used for mercantile or manufacturing purposes. Now, in my opinion, is it at all material that no rent, or other compensation, is charged for the occupation of these rooms. Whether the limitation created by the last quoted clause of the third section "and not leased or otherwise used with a view to profit," applies to the "houses" or only to the "grounds" attached to them, and if to the latter, whether the same limitation be not necessarily implied as to the "houses" from the language, "used exclusively for public worship," are inquiries not germane to the point under consideration. Whatever answer may be given to these questions, the fact remains that the "house" is not "used exclusively for public worship," and does not, therefore, fall within the conditions of exemption required alike by the law and the constitution.

It is urged, however, that at least so much of the house as is used for public worship exclusively is not liable to taxation. The statute makes no such distinction. The "house," in its entirety and in all its parts, must come within the prescribed conditions. The law deals with it as a whole only. If any part be appropriated to secular purposes, t cannoti be said that the "house" is used exclusively for public worship. Nothing less than the use of all solely for public worship can withdraw it from the general law. What shall be the rule when a building consists of distinct tenements, owned by different proprietors, but under a common roof, and one of such distinct tenements is within the requisite conditions, it is useless now to inquire. However, that case may be determined, it seems clear that where the whole building is owned by one proprietor, every part of it must come within the law, or no part is entitled to its benefits.

Relative to Contracts With James Lennox and Columbus Machine Company.

Though such a consideration has no legitimate bearing on the question, there is not, as the trustees seem to suppose, any hardship in exacting a rigorous compliance with the conditions of exemption. In the worst event, there is no injustice, for their property will only be subject to its due proportion of the general burden. Besides, the hardship, if there be one, is self inflicted. The church has the remedy in its own hands. Whenever it shall comply with the prescribed conditions, by using its house solely for public worship, it may escape taxation thereon. Refusing or neglecting to do this, it cannot complain if its property shall share the common lot.

Very respectfully yours,
C. P. WOLCOTT,
Attorney General.

Hon. F. M. Wright, Auditor of State.

RELATIVE TO CONTRACTS WITH JAMES LENNOX AND COLUMBUS MACHINE COMPANY.

Attorney General's Office,
Columbus, November 7, 1856.

SIR:—The case presented by your note of the 29th ult., is briefly as follows:

The new state house commissioners, under the act of March 18, 1852 (3 Cur. Statutes, 1753), contracted with James Lennox to furnish and put up "the apparatus for warming the state house," of which apparatus certain steam boilers were an essential part. "Lennox ordered the boilers from the Columbus Machine Co.," and they were accordingly made by it, but the company refused to deliver them "without first having a guaranty of payment from the state house commissioners." The commissioners gave the required guaranty verbally, at a business meeting, but no entry of

the fact was made in their minutes, and the boilers were thereupon delivered by the company, and were used as a part of the "warming apparatus." Settlement was afterwards made with Lennox, "at which" an order was drawn on the treasury for $8,500 to cover the cost of the boilers, which was charged to the account of Lennox, and by him indorsed to the company. On receipt of this order the company released all claim against Lennox. Under the acts of March 15, 1856, and April 10, 1856, 153 Ohio Laws, 22, 219, making appropriations (among other things) to pay the indebtedness of the new state house, there has been paid to the company three-fourths of the amount of the order, and to Lennox three-fourths of the amount appearing to be due him for other work done and materials furnished under his contract, the remaining fourth, in each case, being withheld for investigation. Investigation has been had, and it seems that "there are errors in the bills of Lennox," which equal in amount the aggregate sum thus withheld.

The question submitted to me is, "Whether, under this state of facts, the order in the hands of the Machine Company can and should be made subject to a settlement of errors with Lennox?"

Reduced to its lowest terms, the question is simply, shall the Machine Company, to the extent of the balance due on the order held by it, bear the loss resulting from the over payment made by the State vs. Lennox?

In my opinion, clearly not. It was within the legal capacity of the commissioners to make the promise they did make, and to bind the State thereby. Upon the faith of that promise, the Columbus Machine Company parted with its property, and it went directly to the use and for the benefit of the State.

Eliminate the transaction of its non-essential features, and, as between the State and the company, it seems to me, in legal effect, to be nothing more or less than an ordinary sale of property, accompanied by delivery, the company be-

ing the vendor, and the State the purchaser. The fact that Lennox had agreed to furnish the boilers is not othrrwise material than that it entitled the State to charge over to and recover from him the sum, of which it was thus obliged to promise payment in consequence of his default. Whether the State shall, or shall not, succeed in saving itself from loss by a resort to Lennox, is a question which does not concern the company. At the outset, it expressly refused to accord him any credit. It was the State alone which trusted him, and if, by reason of such trust, loss shall happen, it must, on every principle of law and equity, fall on the State.

This conclusion is strengthened by the consideration that on a settlement made of this specific claim, the State, by its authorized agents, issued an order on the treasury for the stipulated price of the boilers, which went into the hands of the company, and which it is clear all the parties considered equivalent to a payment, as well they might, for it entitled the holder to immediate payment out of any moneys in the treasury appropriated to the construction of the state house, or, if there were no such moneys, bound the State, by precisely the same obligation which any of its acknowledeged liabilities impose, to provide means for its payment. So treating it, the State charged the order to Lennox, in its account with him, and the company, on its receipt, released him. The fact that it was delivered to the company through Lennox and endorsed by him, does not, in this view of it, affect the case; nor is it material in any other aspect, for the inference is irresistible, from the whole matter, that the order was originally drawn for the express purpose of paying the company, in fulfillment of the promise made by the State to that effect, and that it was transmitted through Lennox to the company, merely to enable the State to charge it to Lennox, in its general account with him under the contract. In this state of fact, the commissioners were not only authorized, but bound by their duty to the State, to apply

any moneys, then or afterwards becoming due to Lennox for other work done under his contract, to the payment of this charge. Other moneys were then, or afterwards became, due to Lennox, which might thus have been applied; but under some misapprehension as to the amount or value of the work done by him, he has been paid by the State more than was due to him under the contract. If any less, therefore, shall accrue to the State, it will be the direct result of this over payment. Under such circumstances, can there be any question as to where this loss should fall?

It seems, however, to be supposed that as the promise of the commissioners was only verbal, it did not bind the State. So far as my knowledge extends, the "statute of frauds," which requires all "promises to answer for the debt, default, or miscarriage of another," to be in writing, etc., is the only law which has any bearing on this point, and unless the promise in question is within that statute it has precisely the same vigor and efficacy as if it had been reduced to writing and signed by the parties. That promise, however, in my judgment, was not a collateral, but an original one, founded on a new consideration, moving directly from the company to the State, and giving to the latter a benefit which it did not before enjoy and would not otherwise have possessed. It is well settled that such a promise, when the promissor's main purpose is not to answer for the debt of another, but to subserve some object of his own, is not within the letter or spirit of the statute, although it may be in form a promise "to answer for the debt, default or miscarriage of another," and although the performance of it may have the effect of extinguishing the liability of another.

But this objection, if it ever had any force, comes too late. The claim made by the Columbus Machine Company is not in virtue of the original promise, but of the written order, issued by the State, in fulfillment of his promise, and for the express purpose of paying to the company the sum

stipulated by the State to be paid to it. Besides this, it would be no strained construction (if that view of the case was necessary to the maintenance of the company's claim) to hold that this order was, at least, a writen recognition of the liability of the State in this behalf, and legally equivalent to a promise in writing within the purview of the statute of frauds.

Now, in my opinion, is it at all material that no record or entry of this promise was made on the journal of the commissioners? The act of March 18, 1852 (3 Cur. Rev. Stat. 1753) required the secretary of the commissioners "to keep a full and true record of all their proceedings," and it was therefore clearly his duty to enter this promise on their journal, but it is nowhere provided that such entry shall be essential to the validity of contracts made by the commissioners. In the absence of such a provision, it is difficult to see how the omission of the secretary, over whom the company had no control, can affect or impair any right which would otherwise pertain to it.

Independent of this, however, the objection, like the preceding one, and for the same reason, comes too late. If the State intended to avail itself of whatever advantage this technical objection might afford, it should have made it before issuing its order for the payment of the claim.

It is also stated, and some importance seems to be attached to it, that the company, on receiving the order, released all claims against Lennox. This, however, did not, and could not, impair any claim which the State had against him. At the utmost, it signified nothing more than that the company, regarding the order as tantamount to payment, or rather as so much money, were content to rest on that alone.

Every view which I have been able to take of the case has led me irresistibly to the conclusion that the State cannot subject the balance due on this order to the payment of the claim against Lennox, or, in any other way, require the

company to sustain any part of the loss which may result from the over-payment to him.

It follows necessarily from this conclusion that the company is entitled to the payment of the balance yet due on the order, subject perhaps, but, at all events, subject only to the condition that the present commissioners and architect of the state house shall, according to the second and third section of the act of Apil 10, 1856 (53 Ohio Laws, 224), be first satisfied and so certify that the boilers were worth the sum agreed to be paid for them.

Very respectfully,

C. P. WOLCOTT,
Attorney General.

Wm. A. Platt, Esq., Acting Commissioner, Columbus, Ohio.

RELATIVE TO CLAIM OF ROBERT BOYD FOR DEED.

Attorney General's Office,
Columbus, November 8, 1856.

SIR:—The papers accompanying your note of reference to the claim of Robert Boyd for a conveyance of the "south half of the north-east quarter of section sixteen, township 14, range 14, in Perry County," disclose the following state of facts:

David L. Gilham, dead, in his lifetime, purchased, paid for, and received a final certificate of purchase in due form of the above mentioned quarter section, of which certificate, no conveyance having been made, he was the holder at the time of his death. On the 22d of January, 1853, Gilham made his last will and testament, in due form, of which Robert Boyd was one of the suscribing witnesses.

By this will, Gilham, among other things, devised "to Robert Boyd the south half of "the aforesaid quarter sec-

tion, by him complying with an article between myself and him, and it is my will that my wife, Sarah, will make the said Robert Boyd, his heirs, or assignors, a deed for the same whenever he complies with said article, said article being in the hands of John Boyd."

Gilham died shortly after making the will, and on the 27th of May, 1853, it was duly admitted to probate, by the Probate Court of Perry County, on the testimony of Robert Boyd and the other subscribing witness. Sarah Gilham, widow of the testator, the executrix, declined to act as such, and thereupon John Boyd was appointed administrator with the will annexed, and has since acted in that capacity.

On the 9th August, 1856, John Boyd, as such administrator, addressed a written communication to the governor of the State, requesting him to convey the premises in question to Robert Boyd, and sta ing that such conveyance would be "in accordance with the will of said Gilham."

Application is now made by Robert Boyd, to the State, for a conveyance to him of the premises, and the question presented is "whether it will be proper for the State to execute a deed to him, and if not to him, to whom shall the deed be made, and what further evidence should the auditor of state require before making a draft of the deed for the signature of the governor?"

A careful consideration of the state of fact thus presented has led me to the following conclusions:

1. That the State having sold and received full payment for the premises, holds the legal title (which is still vested in it) in trust for the owner of the equitable and beneficial interest in the same, who alone is entitled to a conveyance. The facts stated do not establish such an ownership in Robert Boyd. His claim, as now presented, is based solely on that clause of Gilham's will which is above recited. But the will itself gives him no right to, or interest in the premises, for the reason: *First*, that the devise is upon express condition that he shall first comply with the

terms of an agreement, the nature of which is not disclosed, then existing between himself and the testator.

No evidence is furnished that Robert Boyd has complied with this agreement, whatever it may be, and without compliance he takes nothing by the will, This defect is supplied by the direction of John Boyd, as administrator, executor, to make a deed to Robert Boyd, or by his heirs, that the making of such deed would be "in accordance with the will of said Gilham." Neither in virtue of his powers as administrator, nor under the will of Gilham, has John Boyd clothed with any authority to direct a conveyance to any person of the premises in question, or to determine what is or is not in accordance with the will of the testator. His action in this respect is a mere nullity. *Second,* in the absence of all proof to the contrary, it must be presumed that Robert Boyd, the attesting witness, and Robert Boyd, the devisee, are identically the same person. Upon this presumption the devise to him is void. His testimony was used to procure the admission of the will to probate, and there is nothing to show that it could otherwise have been proved." 3, Cur. Rev. Stat. 1901-2. Whether this objection can or cannot now be obviated, is a question for Boyd and his legal adviser.

2. The devise being void, it would follow, as a general rule, that the beneficial interest in the premises had descended to the heirs of Gilham, and therefore that the State should convey to them. That result, however, does not necessarily ensue in this case. Enough is shown to render it possible that Boyd may be entitled to a conveyance on grounds independent of and paramount to the will. The devise refers to some agreement subsisting between Boyd and the testator. Speaking conjecturally, it seems quite probable that this "article" is an agreement for the sale, and transfer by Gilham of his interest in the premises to Boyd, upon certain conditions therein named, with which Gilham may have fully complied, or in respect to which he may as

Power to Organize Another Branch of the State Bank of Ohio, at Cincinnati.

yet have made no default. If this be the fact, the State ought not to convey to the heirs of Gilham.

3. In this condition of affairs, the State ought r convey to either of the parties, or, at least, not until be more fully advised in the premises. If Boyd heirs of Gilham cannot agree the matter ought t mitted, not to the officers of State, but to the ju unals.

4. Under all the circumstances, it does no to state in advance, even if it were possible to do further evidence" the auditor of state ought "to requi fore making a draft of a deed for the signature of the gov ernor."

Very respectfully yours,
C. P. WOLCOTT,
Attorney General.

Hon. F. M. Wright, Auditor of State.

POWER TO ORGANIZE ANOTHER BRANCH OF THE STATE BANK OF OHIO, AT CINCINNATI.

Attorney General's Office,
Columbus, November 17, 1856.

DEAR SIR:—Inferring from some remark of yours at our last conversation, that you would return from Cincinnati on Saturday morning, I had hoped to see you then, and had designed to state verbally my views as to the power, under the act of February 24, 1845, to organize now, at Cincinnati, a branch of the State Bank of Ohio, to which you had called my attention. Disappointed in this hope, I now proceed to communicate in this way what I would have said to you personally if the opportunity of seeing you personally had been afforded to me.

The subject is a large one, involving questions not au-

thoritatively settled, and in respect to which there is great diversity of opinion and my attention, has been so engrossed by other pressing duties, that I have not yet been able to form any deliberate judgment thereupon. The present tendency of my opinion, however, is very decidedly toward these conclusions:

1. That the banking act of 1845, is inconsistent with the present constitution, and was therefore repealed by implication, on the first day of September, 1851, when that instrument took effect. The case of Cass vs. Dillon, though apparently on the other side, does not necessarily decide it. The decision there was that of a bare majority of a divided court, and (with due respect to the judges concurring therein) it proceeds on a mode of constitutional construction most pernicious in its consequences. While, however, it seems to me a deviation from clear principles, I do not question its authority, or doubt the duty of entire obedience to it; but I do think its doctrine ought not to be pushed a step beyond the case actually adjudicated, and that its application should be rigorously limited to the very circumstances under which the ruling was made.

2. That though the repeal of the act does not impair any of the rights which vested thereunder, while it remained in force, yet under that act, neiher the State bank of Ohio, or any of its branches, had the power, and consequently neither of them had the right, vested or otherwise, to form other banking companies. That authority was conferred solely in "natural individual persons," and whenever it had not been executed it remained a mere naked power which was revoked by the repeal of the act.

3. But, assuming the act to be unrepealed, the power to organize banks in the county of Hamilton has been exhausted. The fourth section declares that "the number of banking companies which shall be found and permitted to engage in the business of banking, under the provisions of this act, in the county of Hamilton, shall not exceed

Power to Organize Another Branch of the State Bank of Ohio, at Cincinnati.

four." Four such companies have been formed and permitted to engage in the business of banking, under that law, and though one has failed, and another withdrawn its capital, with the consent of the board of control, and ceased its operations, I have vainly looked for any authority to supply the vacancies which have so happened.

4. The question as to the repeal of the act of 1845, depends on the same principles, and involves the same considerations, as the question of the repeal of the banking act of 1851, or, if there be any difference, it is in favor of the latter act. The preceding administration assumed that the act of 1851 was repealed by the present constitution. The new auditor of state has taken the same ground, and in consequence of his official action in that behalf, the question has been submitted to and is now pending before the highest judicial tribunal of the State. Independent of all other considerations, the claim of a right to form a new branch of the State Bank of Ohio ought now to be recognized, because

First, it would reverse the action, quasi-judicial in its nature, of a previous administration, which, in my judgment, ought now to be done, unless such action was in manifest violation of some clear principle, which was not the case here.

Second, it would place the government in the attitude of adopting in its different departments directly opposite causes of action in regard to precisely the same question.

Third, it would have the appearance of an act of favoritism, for this recognized in one, has been sternly denied to others having apparently the same right, and who have been required to establish their claim to such right by judicial sanction.

Fourth, the question is now pending before the Supreme Court of the State, and its decision ought not to be forestalled or anticipated.

Such are the views which, after brief reflection, I en-

tertain on this subject, and I respectfully submit them, for what they are worth, to your consideration. I would have retained the matter for fuller examination, but that I understood you to desire my opinion at an early day of the present week.

I am, sir, Very respectfully,

C. P. WOLCOTT.

Hon. S. P. Chase, Governor.

CLAIM OF GREENWOOD.

Attorney General's Office.
Columbus, January 15, 1857.

DEAR SIR:—I have examined the claim made by Greenwood, as stated in your letter of 20th ult., and am of the opinion that, if the former board of commissioners did in fact authorize Mr. Kelly to give the guaranty as stated, the claim would be within the principle on which the Lennox claim was allowed and should therefore be paid. Herewith I return the papers which accompanied your letter.

Very respectfully.

C. P. WOLCOTT,
Attorney General.

W. A. Platt, Esq., Acting Commissioner.

RECOGNIZANCE AND INDICTMENT IN MIAMI COUNTY.

Attorney General's Office,
Columbus, December 22, 1856.

SIR:—Your letter of the 21st ult., after various mishaps has finally reached me, and I reply without delay.

Printing List of Delinquent Lands in German Newspapers.

The recognizance, of which you enclose a copy, bound Harrigan to appear only at the first term of the Court of Common Pleas next after it was entered into, and unless at that term some order was made in respect to him, his sureties are exonerated, and the recognizance is inoperative. Swank vs. State, 23 Ohio Rep. (Warden & Smith) 429. Independent of this, however, upon the facts set forth in your letter, a capias ought to have issued against him immediately on the finding of the indictment, and if not yet done, should be issued instantly. There is nothing in the circumstances under which you state the indictment was found to impair its validity.

Very respectfully,

C. P. WOLCOTT,
Attorney General.

Jas. H. Anderson, Esq., Marion, Ohio.

PRINTING LIST OF DELINQUENT LANDS IN GERMAN NEWSPAPERS.

Attorney General's Office,
Columbus, November 21, 1856.

DEAR SIR:—I have the honor to acknowledge the receipt of your letter of the 19th instant, and in reply thereto, I beg leave to say that, in my opinion, the list of delinquent lands and town lots in all counties wherein a German newspaper is printed, should be published in such paper, and that the expense thereof must be shared and paid according to the same rule which governs in this respect the ordinary publication of the delinquent list.

Very respectfully yours,

C. P. WOLCOTT,
Attorney General.

Hon. F. M. Wright, Auditor of State.

MEMORIAL OF THE LAFAYETTE BANK OF CINCINNATI.

To the President of the Senate:

In obedience to the resolution of the Senate, instructing the attorney general to examine "the memorial of the trustees of the Lafayette Bank, of Cincinnati, and the accompanying documents," and give his opinion to the Senate in regard to the legal liabilities and rights of the several parties concerned in the premises, I have the honor to state that I have made the required examination and am of opinion:

1. That the Lafayette Bank of Cincinnati, by express provision of its charter, was subject to taxation under the "act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this State," passed March 21, 1851, until the same was repealed; and after that time, under the "act for the assessment and taxation of all property in this State, and for levying taxes thereon according to its value in money," passed April 13, 1852, and the various acts amendatory thereto.

2. That the above mentioned act of 13th April, 1852, in the basis it provides for the taxation of banks, is not inconsistent with the constitution.

3. That if, however (as the memorialists allege), the before mentioned acts are inoperative as against the Lafayette Bank of Cincinnati, the law has provided ample means of redress, and the bank may, by action, recover back the taxes compulsorily exacted from it under the provisions of those acts. Indeed, the papers referred show that the bank did bring its action against the treasurer of Hamilton County for enforcing from it payment of the taxes of 1851, according to the act of that year, which action is still pending and undetermined in the district court of that county.

4. That, inasmuch as the State is not subject to suit, the bank cannot, in the present state of the law, recover back, by action or otherwise, the taxes voluntarily paid by

it on its dividends for the first half of the year 1851 (and which went directly into the state treasury) notwithstanding it was afterwards required to and did pay taxes for the whole of that same year according, to the provisions of the act of March 21, 1851. Whether the sum so paid by it in its dividends directly into the state treasury (and which, in my judgment, it was not legally bound to pay) shall be refunded or not, is a question solely for the consideration of the legislature, which alone is competent to direct restitution. The papers referred do not disclose facts sufficient to warrant the expression of any opinion upon the question whether the auditor of Hamilton County, in entering the taxables of the bank upon the duplicate of that county, for the years 1852 and 1853, exceeded the authority conferred on him by the act of 1852, or in any manner violated its provisions. It may not, however, be improper to add, that, in favor of the acts of public officers, the law will presume all to have been rightly done, unless the circumstances of the case overturn this presumption.

Respectfully submitted,
C. P. WOLCOTT,
Attorney General.

February 17, 1857.

CLAIM OF WORTHINGTON & CO.

Attorney General's Office,
Columbus, February 27, 1857.

DEAR SIR:—The facts disclosed by your note of the 19th instant, and in regard to which you ask my opinion, are briefly as follows:

John Green "had a large lot of plumbing at the Northern Ohio Lunatic Asylum." On the 21st January, 1856, he presented to one of the then trustees and the superintendent