
Enlistment of Soldier; Arrangement With Recruiting Officer for His Release; Fraud.

Attorney General's Office,
Columbus, January 17, 1862.

Hon. D. W. Poe:

SIR:—Your letter of December 30th was duly received but owing to my absence from the city, I have not heretofore been able to answer it. You state that one James J. Thornton enlisted (I suppose you intend to say, signed the roll of a regular recruiting officer), under an arrangement with the recruiting officer, that he was duly to sign, for the purpose of inducing others to enlist; and was not to take the oath, that he has not yet done so, but desires to be discharged from his enlistment, on the ground of his understanding with the recruiting officer, as recited above. In answer to your inquiry, I would state, that James J. Thornton, is, without the slightest doubt, duly and regularly enlisted; and that he cannot be discharged upon any such ground. The simple signing of the enlistment roll, of a regular recruiting officer, constitutes a valid and binding enlistment, whether the person so signing takes the prescribed oath or not. He cannot be permitted to escape the consequences of his act, by reason of any arrangement with the recruiting officer, or any other officer, whereby he became a "stool pigeon" to induce others to enlist. The reason is obvious: to permit him thus to escape, would be a fraud upon those who were induced to enlist in consequence of his enlistment; such a fraud the law will neither sanction nor permit. If he was thus permitted to escape, others might, with equal justice, claim their discharge, on the ground of fraud in being led to believe that Thornton had enlisted, and was to accompany them as a fellow soldier, when in fact, he was only a decoy to draw them in, and thus the whole company might be broken up. Every principle of law, every consideration of public policy, concur in denying the right of James J. Thornton to be discharged and relieved from the consequences of his enlistment. I, therefore, hold that he is

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in the military service, and subject to its rules and usages. It is your duty to remand him to the custody of the officer from whom he was taken.

JAMES MURRAY,
Attorney General of Ohio.

AS TO AUTHORITY OF PROSECUTING ATTOR-
NEY TO ENTER NOLLE PROS IN VACATION
OF COURT.

Attorney General's Office,
Columbus, January 20, 1862.

*Wm. P. Johnston, Esq., Prosecuting Attorney, Ashland
County, Ohio:*

SIR:—Your letter of the 6th instant was duly received, but owing to my absence from the city, caused by my necessary attendance in New York as one of the commissioners of the sinking fund, I have been heretofore unable to answer it.

You have no power to enter a nolle during vacation; it can only be done during a session of the court in which the charge pending, at which criminal business can be transacted. You can, however, notify the prisoner, or his counsel, the clerk and the sheriff, in writing, of your intention to enter a nolle, upon the first day of the next term at which it can be done; and thereafter no additional costs can be made, or if made, they will be made at the risk of the party and of the officers making them. You had better, perhaps, in the same notice, warn them to make no more costs, and if any witnesses are subpoenaed, warn them not to attend.

I presume, in the case to which you refer, a "good cause" exists for permitting the Circuit Court of the United States to take jurisdiction of the case. Our own courts of

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course cannot be divested of the jurisdiction which they have acquired, without your consent; and under ordinary circumstances, I would not feel inclined to permit them to be so divested, and the State thus deprived of the right to the labor of the convict during the term of his imprisonment. You state, however, that in the case to which you refer "good cause" does exist, for permitting the transfer to the United States Circuit Court, and you are therefore justified in the action which you propose to take in the matter.

JAMES MURRAY,
Attorney General of Ohio.

RIGHT OF BOARD OF PUBLIC WORKS TO LEASE
CERTAIN WATER POWER ON SANDY AND
BEAVER CANAL.

Attorney General's Office,
Columbus, February 28, 1862.

Hon. John B. Gregory, President Board Public Works:

SIR:—I am inquired of as to the right of the "board" to execute a lease for certain water power on the Sandy and Beaver Canal.

It is claimed that one Nelson performed a very large amount of labor, and was at very considerable expense, in repairing the canal, and that, as part of the consideration thereof, the acting member of the board for that division agreed to grant him, for a term of years, say twenty or thirty, all the surplus water on that branch of the canal at a nominal rent. We have the testimony of three men, of undoubted reliability, as to a fact that a contract was made, but it seems that while they are positive as to the fact that an agreement was made, they are not positive as to its details. This (is) apparent from the fact that no two of them agree,

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either as to the length of time or the price to be paid. In connection with this, we have the testimony of Blickensderfer, the then member in charge of that division, who says that these men or some from that locality did meet with the board, and did urge a lease at that time, which the board after due consideration and examination refused to grant; but he also says that an agreement was subsequently made, between him and Nelson, for a lease on certain terms stated in his letter, and that he cannot be mistaken, because he made at the time and still has a memorandum in writing of the agreement. It is said that the deed of the land constituted part of the consideration, but, as this is to be paid for out of the rents, it could hardly constitute any part of the consideration, although, if the State has accepted and recorded the deed, it would go to show that they recognized and acknowledged an existing agreement to make a lease, for some time and upon some terms. What that time and those terms are the board will determine from the evidence. If these statements, as above recited, are sustained by the evidence, then I hold that the board has power to make a lease of this surplus water power, on such terms as will accord with the contract between these parties, as they may find it proved; but while I hold that they have power to make such lease, I also hold that they are not compelled to make it.

They are to keep the good faith of the State intact, so far as the agents of the State had power to and did contract, and so far only as the interest of the people of the State with (will) authorize.

If any agent of the State makes a contract, which, in the opinion of the board, is prejudicial to the best interests and welfare of the people of the State, this board, while it has power to ratify, is not bound in law or morals either to ratify or execute it.

JAMES MURRAY,
Attorney General.

New Seneca County Bank.

TERM OF OFFICE OF SUPERINTENDENT OF
LUNATIC ASYLUM.

Attorney General's Office,
Columbus, March 10, 1862.

O. C. Kendrick, M. D., Superintendent N. O. L. Asylum:

SIR:—The act to provide for the uniform government of lunatic asylums, etc., passed April 7, 1856, provides, in express terms, that the superintendent of each of said institutions shall hold his office for the term of six years, unless sooner removed by the board of trustees, for causes specified in the ninth section of said act. By the ninth section this board of trustees are authorized to remove at their own pleasure any officer except the superintendent. They may also remove him, but not at their own pleasure, nor for any, except certain given causes. No provision is made for the appointment of a superintendent for any unexpired portion of a term, or for any less period than six years; and in the absence of any such provision, any attempt on the part of any board of trustees, to make such an appointment for any less period, would be wholly nugatory, and the person appointed would hold, unless removed for cause, for the full term. The board of trustees of your institution, however, attempted to make no such appointment, but did appoint for the full term of six years, and in so doing, they did just what they were authorized to do by the express letter of the law.

The object of the law was not to have a superintendent appointed at the end of each six years, commencing with the date of the first appointment, but it was to make the term of each superintendent, six years from the date of *his* appointment. It was to avoid frequent changes, and the power to make frequent changes without good cause, of the person at the head of the institution, and thus give to that office a permanence, stability, etc., which would enure to the best interests of those under his charge.

It is, therefore, apparent, that under your appointment

New Seneca County Bank.

as well as from the express letter of the law, which the board of trustees could not avoid even if they desired, you are entitled to hold your office, for the period of six years from the date of your appointment, unless sooner removed for cause.

JAMES MURRAY,
Attorney General.

NEW SENECA COUNTY BANK.

Attorney General's Office,
Columbus, April 5, 1862.

To the Honorable the Committee on Claims of the Senate of Ohio:

GENTS:—You desire my official opinion as to the liability of the State upon certain alleged facts, which are in substance as follows:

The organization known as the "New Seneca County Bank" was incorporated shortly prior to, and went into operation on the 1st day of May, A. D., 1857, and only remained in existence until about the 1st day of July in the same year, during all of which time it issued no bills for circulation, but confined its operations to the discount of notes and the purchase and sale of exchange.

During the existence of this bank, one Henry Ebbert was its cashier, and was interested to a very considerable extent therein as a stockholder.

No claim is made that this bank ever had any money transactions with the State of Ohio, or with Gibson as treasurer of State.

It is also shown to have been the custom of Ebbert as cashier, to sign his name to blank drafts on New York City correspondents, leaving them to be filled in by his assistant, for the benefit of any person coming in on the cars after

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banking hours, who desired to purchase exchange, and leave again on the night train, as was frequently (the) case. Gibson resigned his office as treasurer of State on the 13th day of June, A. D., 1857. On the evening of the 15th he arrived in Tiffin, and in company with one Johnson, who was a large stockholder in the bank, went to the bank after business hours, and there induced the assistant cashier to fill up two drafts on New York, one at sixty days for \$10,000, and one at ninety days for \$12,000, both payable to the order of the teller in the bank, and by him endorsed and delivered to Gibson. These drafts were issued without consideration, and solely upon the representation and assurance of Gibson, that they would make it all right. Ebbert, the cashier, had no knowledge of this transaction at the time, nor until two or three days afterwards, when he for the first time discovered what had been done, without his knowledge or consent, or that of any of the directors of the bank, and upon his application to Johnson, he was by him (and subsequently by Gibson, in whom he still retained perfect confidence), quieted by the assurance that it would be all right, and that they would take care of the paper as it fell due. Nothing was heard of either of the drafts for over a year, and Ebbert rested in the full belief that both of them had been paid, or taken care of when due, as Gibson had agreed; but about the 1st of November, A. D., 1858, the \$12,000 draft turned up unpaid, and in the hands of a bona fide holder for value; then Ebbert went to Johnson and demanded security, and after repeated urging and solicitation, Johnson, on the 10th November, A. D., 1858, did assign and transfer to Ebbert as security against his liability on said draft, about \$43,000 of negotiable certificates of stock in the Miami Hydraulic and Manufacturing Company, formerly held by Gibson, and by him for some purpose assigned to Johnson; these certificates of stock Ebbert then received, and has ever since and yet continues to hold them, and they have ever constituted his sole and only security against his liability on said draft. On

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the 26th October, A. D., 1861, judgment was rendered in Seneca Common Pleas Court against the bank, upon said draft, for over \$15,000, the court refusing to permit the fraud by which the draft was obtained to be given in evidence against a bona fide holder thereof. The bank having no assets, suit was brought and is now pending, seeking to recover the amount of the judgment from the stockholders of the bank, who, in their individual capacity are liable for the payment of its debts, and of an ultimate recovery against them, there can under the provisions of the charter of the bank, be no doubt.

March 31, 1859 (56 Vol. O. L., 97, 8), an act was passed by the General Assembly of Ohio, appropriating the sum of \$95,000, to be paid to and for the use of the Miami H. & M. Co., in consideration of the cancellation of its contract and surrender of its work. By the fifth section it was declared that the stock held by Gibson, and by him transferred to Johnson, was purchased with money and was the property of the State; the liability of the company to pay them or any assignee was admitted, and the pro rata dividend due on said stock was ordered to be retained in the treasury of the State, as its money, until settlement with Gibson, etc.

This pro rata dividend amounts to over \$6,000, and is now retained in the treasury in pursuance of said section, and its provisions as above recited.

Ebbert, at the time he received this stock, received it in the utmost good faith, believing it to be the property of Johnson, and having no reason to believe otherwise. At that time Johnson was in good credit and standing, but he was very soon afterwards discovered to be wholly insolvent.

It is claimed that the money advanced by Gibson to Hamlin was in great part his own, and that the small part of it which was of the funds of the State, was afterwards repaid to the State, and if the testimony of Gibson is to be regarded as wholly credible, that claim is well founded.

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Upon that question I do not feel called upon to pass, as it is one peculiarly proper to be determined by your honorable committee and by them alone; nor is it in my judgment material to the decision of this claim. This stock being upon its face negotiable paper, and Ebbert at the time he received it, having acted in the utmost good faith, believing it to be the property of him from whom he received it, and having no reason to believe otherwise, there being nothing at the time to cast a cloud upon the right of Johnson to dispose of it, or to create suspicion in the mind of Ebbert as to that right. I am clearly of opinion, that he has a prior lien upon this stock to the extent of his liability upon the draft; and that before the State can, in any event, assert a claim to the stock or its value, it must assume to Ebbert the amount of that liability, to secure him, against which it was transferred.

As however, the ascertained value of the stock is but the amount retained in the treasury, which is but little over \$6,000, while the liability exceeds \$15,000, it is manifestly the interest of the State to allow Ebbert to assert his claim to the amount retained in the treasury, and abandon all right on the part of the State, even if such a right exists, to reclaim the stock by assuming the liability. How, then, shall Ebbert be permitted to assert his claim? If, by a direct payment to Ebbert, then an open question is left between Gibson, Johnson and the State, which may require to be again acted upon at some future time; yet if the committee are satisfied that the above recited allegations of the memorialist are true, and there seems to be no good reason to doubt their truth, then, as Ebbert is clearly and unquestionably entitled to relief, it would seem that he ought not to experience longer delay in obtaining that speedy and impartial justice which it should be the pride, as it most assuredly is the duty of the General Assembly to grant in every case.

JAMES MURRAY,
Attorney General of Ohio.

General Assembly May Authorize Trustees of Asylum for Deaf and Dumb to Sell Lands on Which Asylum is Located.

GENERAL ASSEMBLY MAY AUTHORIZE TRUSTEES OF ASYLUM FOR DEAF AND DUMB TO SELL LANDS ON WHICH ASYLUM IS LOCATED.

Attorney General's Office,
Columbus, April 10, 1862.

To the Honorable Speaker of the House of Representatives:

SIR:—In answer to the following resolution of the House of Representatives adopted April 3, 1862, namely:

“Resolved, that the attorney general be requested to report to this House, at his earliest convenience, the nature of the title of the State to the land on which the Asylum for the Deaf and Dumb is located, and whether in his opinion the same can be used for such other purpose as may be provided by law, or sold and a good title given by the State.”

I beg leave to reply that the first “act to establish an asylum for the education of deaf and dumb persons,” was passed on the 29th day of January, A. D., 1827, and that by the provisions thereof, certain persons were created a body corporate under the name and style of “trustees of the Ohio Asylum for Educating the Deaf and Dumb,” with right of perpetual succession, and power to receive by gift, grant, devise, legacy or otherwise, any moneys, land or other property, and the same to hold, use and apply to and for the education of the deaf and dumb within this State.

This act was by its terms subject to modification, limitation and repeal, by the General Assembly.

Vide 3d Vol. Chase's Statutes, 1570.

An amendatory act passed March 3, 1831, gave the “trustees” power to receive and hold any property, real, personal or mixed; with a proviso, that the “same should

General Assembly May Authorize Trustees of Asylum for Deaf and Dumb to Sell Lands on Which Asylum is Located.

only be used in and about the preparation for, and in the education of the deaf and dumb." It was also therein provided, that the funds, etc., should be under the direction and management of the "trustees," subject always to the control of the General Assembly.

These are all the laws which I have been able to find bearing upon the subject under consideration.

The land occupied for the purposes of the Deaf and Dumb Asylum, consists of out lots in the City of Columbus, numbered fifty-four, fifty-five and fifty-six (54, 55, 56). All these lots were conveyed, the first by James Hoge and wife, the second by Lyne Starling as executor of John A. McDowell, and the third by Peter Sells and wife to the "trustees of the Ohio Asylum for the Education of the Deaf and Dumb," in consideration, as appears by the respective deeds, of the payment of the sum of one hundred dollars for each lot. The deeds were each executed on the 14th February, A. D., 1829, and by virtue thereof, these trustees forthwith entered into possession of the premises, and they and their successors have ever since continued to, and still do occupy the same for the purposes of the education of the deaf and dumb.

Under such circumstances, the right of the General Assembly to authorize the trustees to exchange, sell or otherwise dispose of these premises seems to me unquestionable.

The General Assembly may direct the trustees to dispose of this property in any mode, which will more fully subserve the great purpose for which it was purchased, viz., the education of the deaf and dumb; and if, in their opinion, that purpose will be the better accomplished by disposing of these premises, and investing the proceeds either in the construction of a new asylum upon another ground, or in any other mode or manner, they have an unquestionable legal right to so order, and a sale of these premises by the trustees under the authority of the General Assembly will be without doubt valid, and will convey to the purchaser thereof

Claim of Luther Donaldson; Tax Title on State Canal Lands.

a good title. That the trustees were never under any legal obligation to use these specific premises for the purpose of erecting an asylum thereon seems too clear to admit of argument. The money, land, etc., acquired by them, is under their exclusive management, provided only that they use the proceeds thereof for the purposes of the education of the deaf and dumb, subject at all times, however, to the control of the General Assembly. That control may, therefore, be exercised in directing the use or disposal of any of the property, land, etc., acquired by the trustees, in any mode which may seem best adapted to the education of this class of persons.

JAMES MURRAY,
Attorney General of Ohio.

CLAIM OF LUTHER DONALDSON; TAX TITLE ON
STATE CANAL LANDS.

Attorney General's Office,
Columbus, April 10, 1862.

Hon. John B. Gregory, President Board of Public Works:

SIR:—In answer to your inquiry as to the right acquired by Luther Donaldson in certain property purchased by him at tax sale, I beg leave to state:

That the property in controversy was conveyed to the State of Ohio on the 25th day of June, A. D., 1833, by George Fisher and wife, and was, together with certain water power thereon arising from the canal leased by Alfred Kelley as acting commissioner, to one William S. Sullivan, on the 1st day of November, A. D., 1833, for the period of thirty years from the 1st day of May, A. D., 1835, at an annual rent of two hundred and fifty dollars, to be paid semi-annually, on the first days of November and May.

No assignment of this lease appears of record.

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The lease contains a clause authorizing the agents of the State to forfeit it, and re-enter for non-payment of rent.

The mill erected upon this property having been burned down, the rent specified in the lease has remained unpaid for several years; and the taxes assessed upon the premises not having been paid, they were offered for sale at a sale of lands delinquent to the State for the non-payment of taxes, and were bid off and purchased by Donaldson, who now demands from the State the taxes paid by him, with interest and penalty thereon. Is he entitled thereto? I answer without hesitation that he is not.

The principles upon which this decision depends are so well settled that it is unnecessary to do more than state them.

The property of the State is not subject to taxation; any tax assessed against it would be wholly void. Consequently a sale thereof for the non-payment of such taxes would be clearly invalid, and could convey no title to, and no lien in favor of any person who should purchase.

It is true that these leased premises are placed upon the duplicate for taxation, but it is equally true that the interest of the State in these premises is not thereby taxed, neither is it taxable, but it is alone the interest of the lessee; so long as he complies with the requirements of the lease, he has an exclusive right to the use, occupation and enjoyment of the leased premises, and that interest is a proper subject of taxation. If we were to adopt any other rule, there would be no safety for the State in leasing surplus water power, for the lessee might permit the taxes to remain unpaid, until they would far exceed the value of the premises, and if a purchaser at tax sale can hold the premises against the right of the State to forfeit the lease and re-enter, until they shall have paid to the purchaser the taxes paid by him, with interest and penalty thereon, then the State is liable at any time to be divested of its entire rental arising from lease of surplus water, unless it will consent to redeem it at a ruinous sacrifice. Such a

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result shows the unsoundness of the proposition from which it is deduced. By his purchase at tax sale Donaldson obtained the interest of the lessee in the leased premises, and that interest alone, so that he stands in the exact position toward the State previously occupied by the lessee. He may, therefore, take possession of the leased premises, and use, occupy and enjoy them, so long as he continues to comply with the requirements of the lease, or he may sell the interest of the lessee to a third party, and thus reimburse himself for the taxes by him paid; or he may perhaps make them a personal debt of the lessee, and recover judgment against him for the amount thereof, but he can in no case and under no circumstances, have any claim against the State for the taxes thus paid.

I am, therefore, clear in the opinion, that the claim of Mr. Donaldson as against the State, has no foundation either in law or equity.

JAMES MURRAY,
Attorney General of Ohio.

RELIEF OF FAMILIES OF VOLUNTEERS.

Attorney General's Office,
Columbus, April 15, 1862.

S. W. Pickering, Esq., Auditor of Athens County, Ohio:

SIR:—Your letter of the 9th instant, inquiring in substance "whether, under the 'act for the relief of the families of volunteers in the State or United States service,' passed February 13, 1862 (59 Vol. Ohio Laws, page 9), the family of a volunteer should apply for relief to the commissioners of that county in which such volunteer resided at the time of his enlistment or to the commissioners of that county in which the family may reside at the time of its application for aid," was duly received and considered.

Relief of Families of Volunteers.

The terms of the law as it finally passed are somewhat vague, but from a careful examination of the whole act, I am satisfied that it was intention of the legislature to require the families of volunteers to apply to and receive aid from the commissioners of that county in which the volunteer resided at the time of his enlistment.

The law requires the tax for the relief of these families to be collected as a part of the levy for State purposes, and to enable the auditor of state to distribute to each county its proper proportion of the amount thus raised, it is made the duty of the assessors of the several wards and townships in the State, when they are making the assessment for 1862, to take an examination by name of all the volunteers who have enlisted from their several wards and townships, being residents therein when enlisted, etc. This enumeration is made the basis for the distribution of this fund to the several counties, and at the same time constitutes the evidence upon which the commissioners may grant relief.

To require a county to afford relief from this fund to the family of a volunteer who did not reside in the county when he enlisted, and for whom another county had drawn a ratable proportion of this fund, would be manifestly unjust; the only true rule is to require each county to furnish relief when needed to the family of each volunteer for whom it has drawn a ratable proportion of this fund.

Inasmuch then as the distributive share of this fund to each county depends upon its number of volunteers, who resided therein at the time of their enlistment, each county must afford relief, when needed, to the family of each of such volunteers, whether that family shall continue to reside in that county or shall have removed elsewhere.

The right to relief depends upon the residence at the time of enlistment; and while the term of service under that enlistment shall continue, no change of residence of the family of the volunteer can affect that right.

Nor is the question as to *where* the volunteer enlisted

Relief of Families of Volunteers.

of any importance; if he enlisted *anywhere* it is sufficient, if he had at that time a residence in any county in the State, to entitle his family to relief in that county, and it is the duty of the assessor to return the names not of those who enlisted *in* his ward or township, but of those who, being residents of such ward or township, enlisted *anywhere*, and are then in the service of the State or United States.

The assessor cannot refuse to return the name of a volunteer merely because he did not enlist in his ward or township, but enlisted elsewhere; if he did enlist anywhere, being at the time of his enlistment a resident of such ward or township, the assessor is bound "to enumerate him by name," etc., and from the county in which such ward or township is situated the family of such volunteer will thereafter be entitled to relief, whether they shall continue to reside there or shall go elsewhere.

JAMES MURRAY,
Attorney General of Ohio.

INCONSISTENT ACTS.

Attorney General's Office,
Columbus, May 21, 1862.

Geo. R. Sage, Esq.:

DEAR SIR:—After a careful examination of the question submitted in yours of the 18th instant, I am of opinion that there is such clear and manifest inconsistency between the twenty-second section of the act passed March 14, 1853 (S. & C. Rev. Stat., 1353-4), and the act passed April 30, 1862 (59 Vol. O. Laws, 71), as is necessary to cause a repeal of the former by implication.

The levy which under the provisions of said twenty-second section is authorized to be made, is only for extraordinary purposes, in case of the assent of a majority of the qualified voters of the district, and that authority is neither superseded nor repealed by any of the provisions of the

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act of April 30, 1862. I, therefore, hold that the twenty-second section of the act of March 14, 1853, to the extent above specified is yet in force.

JAMES MURRAY,
Attorney General of Ohio.

VILLAGE; POWER TO LEVY TAX FOR BUILD-
ING PRISON.

Attorney General's Office,
Columbus, May 21, 1862.

J. W. Frazier, Esq.:

DEAR SIR:—In my opinion an incorporated village has no power by law to levy a tax for the purchase or erection of a building to be used as a lock-up or jail.

Yours,

JAMES MURRAY,
Attorney General.

COUNTY COMMISSIONERS MAY SET ASIDE
THEIR FORMER ORDER OF VACATION, ETC.

Attorney General's Office,
Columbus, June 12, 1862.

Thos. J. Larsh, Esq., Auditor Preble County, Ohio:

SIR:—Yours of the 6th instant was this day received, and after a thorough examination of the question therein submitted, I beg leave to reply to your last inquiry, whether, under the circumstances stated in your communication, the commissioners will render themselves liable individually, or the county which they represent; for the costs or damages that might accrue in case they should set aside their former order of vacation, and such action should be held illegal.

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1. That the county is not liable under any circumstances for such an act of its commissioners, even if it be illegal, is too well settled to require or admit of argument.

2. In these matters the commissioners act as a judicial body; and that, acting in that capacity, they are not liable individually for any of their acts, however erroneous they may prove to be (unless done maliciously), is as clearly established as the former proposition.

In answer to your first inquiry I have to state that in my opinion the commissioners are justified in setting aside their former order of vacation, and rehearing the whole matter. The case stands in precisely the same situation as if in a suit pending before a court, to which the defendant had averred that he had a good defence and had employed counsel, the plaintiff should, for a stipulated sum of money, procure the defendant's counsel to abandon the case, suppress the defence and permit a judgment to be rendered against the defendant by default. Can it be claimed that because the defendant knew nothing about the fraud until after the close of the court, he would therefore be debarred from all right to set aside the judgment and make defence to the action? Certainly not; no court would hesitate to vacate such a judgment so procured and allow the defendant to offer his defence.

In the present case I have no hesitation in saying that the commissioners should notify all the parties (certainly the original petitioners) and hear the application to set aside the order of vacation, permit the remonstrants to be heard and proceed in the case as if no such order had been made; at the same time taking care to preserve a full record of all their proceedings, notice, proof and findings on the application to set aside the former order.

Should any party in interest be aggrieved the law affords an ample remedy.

Yours respectfully,
JAMES MURRAY,
Attorney General of Ohio.

*Member of Ohio Legislature May Hold Commission in O.
V. Militia, Etc.*

MEMBER OF OHIO LEGISLATURE MAY HOLD
COMMISSION IN O. V. MILITIA, ETC.

Attorney General's Office,
Columbus, July 28, 1862.

His Excellency, David Tod, Governor of Ohio:

SIR:—You inquire whether in my opinion “a member of the Ohio legislature, who accepts a commission as an officer of the Ohio militia force, called out to aid in suppressing the rebellion now pending against the government of the United States, will thereby vacate his seat as such member.”

The constitution of the United States, in section seven of article one, provides

“That Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. To provide for arming, organizing and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; *reserving to the States respectively, the appointment of the officers*, and the authority of training the militia according to the discipline prescribed by Congress.”

It is farther provided by section two of article two:

“That the president of the United States, by and with the advice and consent of the Senate, shall appoint ambassadors, . . . and *all other officers* of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but Congress *may*, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law or in the heads of departments.”

By section three of the same article, it is provided:

*Member of Ohio Legislature May Hold Commission in O.
V. Militia, Etc.*

"That the president shall commission all the officers of the United States."

The constitution of Ohio, adopted as it was long after that of the United States, is to be presumed to have been formed with reference to the provisions of the latter, the construction given to it, and the long settled practice of the government under it.

It is therein provided by section four of article two, that

"No person holding office under the authority of the United States, or any lucrative office under the authority of this State shall be eligible to or have a seat in the General Assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

The laws of the United States provide that the *militia* shall consist of all able bodied white male citizens, between the ages of eighteen and forty-five.

The constitution of Ohio, in section one, of article nine, provides that

"The militia of the State shall consist of the same class of persons, who shall be enrolled and perform military duty in such manner not incompatible with the constitution and laws of the United States, as may be prescribed by law."

The act of Congress under which the militia of the several States are called into service, for the purpose of suppressing the pending rebellion against the authority of the government of the United States, provides:

"That the governors of the States furnishing volunteers under this act, shall commission the field, staff and company officers, requisite for the said volunteers."

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Vide section four of the act approved July 22, 1861, et seq.

It is admitted that all the officers of these volunteer forces, under the rank of brigadier general, derive both their appointment and commission, not only originally, but also in case of promotion, from the governors of the respective States; and the president of the United States has nothing whatever to do with the appointment or commission of such officers, neither can he interfere therewith in any manner whatever, except in case of wilful neglect or refusal to perform the duty by the governor of the State.

As to the meaning of the word "office" as used in the constitution, there is a very great diversity of opinion, particularly in regard to the extent of its import. Blackstone in his Commentaries, Vol. 2, page 36, defines it to be "a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, whether public as those of a magistrate, or private as those of bailiff, and the like." So in the opinion of the chief justices of the Supreme Judicial Court of Maine, 3 Greenleaf's Rep., 481, where the subject is discussed with masterly ability, it is said that

"A manifest difference exists between an officer and an employment under the government. We apprehend that the term office implies a delegation of a portion of the sovereign to and possession of it by the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of his office. The power thus delegated and possessed may be a portion belonging sometimes to one of the great departments of government, legislative, judicial or executive, and sometimes to another. Still it is a legal power which may be rightfully exercised, and in its effects it will bind the rights of others, and is subject to revision and correction only according to the laws of the State. An employment merely has none of these distinguishing features."

In *Lindsay vs. The Attorney General* (33 Miss. Rep.,

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508) it is said in reference to this same subject matter, as follows:

“It appears then that every office in the constitutional meaning of the term implies an authority to exercise some portion of the sovereign power; either in the making, executing or administering the laws.”

In *Comth vs. Binns* (17 Serg. & Rawle Rep., 219) it is said that

“If the term ‘holding office under the authority of the constitution of the United States,’ is to be construed in its general sense, so as to include every employment under that government to which fees and emoluments are attached, then every justice of the peace, or alderman who is employed on behalf of the United States to issue a warrant for felony committed on the seas, robberies or thefts upon the mails, or other crime against the United States, will come directly within the capacity of agent or person employed, under the penalty of the act. Every constable who ventures to execute such warrants will incur the same forfeiture. Every juror who serves in the United States courts is employed under the judiciary department. Every militia man who is called into the public service, is directly employed under the executive. Was it ever heard of that a justice, constable, etc., was exempt from the muster roll because service under the United States was incompatible with his State office?”

To the same effect are the cases of the *State vs. Wilmington* (3 Harrison Rep., 294), *Dickson vs. The People* (17 Ills. Rep., 19), *Republic vs. Dallas* (3 Yeates Rep., 300). The result of the authorities cited above is that no person is an officer within the meaning of that term as used in a constitutional sense, unless there is delegated to him some part or portion of the sovereign power, legislative, executive or judicial.

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Now it is very clear that no part or portion of the sovereign power is delegated to a militia officer. Every militia man, from the lowest private to the highest officer, is directly employed under the executive; no discretion is given to either of them; no part or portion of the sovereign power is delegated to either; the highest officer alike with the private soldier is bound in all things to obey the order of his superior; that order is imperative upon each alike; it is

“His not to reason why!
His but to do or die.”

Every one of them, whatever may be his rank or station, is directly employed under the executive—the president of the United States, who is the commander-in-chief of the militia when called into active service—so that it is in every case at best merely an employment under such commander-in-chief.

It is very clear that an officer in the volunteer service under the rank of brigadier general does not hold an office under the authority of the United States, inasmuch as he is not commissioned by the president, *as*, under the provisions of the constitution as cited above, *he must be, in every case in which he holds such office.*

The exception “officers of the militia,” as used in the constitution of Ohio, is of itself strong evidence in support of the proposition which we have heretofore advanced. It is true that there is prescribed, by that constitution, a certain mode and manner in which the officers of the militia shall be chosen; but at the same time it must be borne in remembrance that the constitution of Ohio, and the laws enacted in pursuance thereof, are subject to the constitution and laws of the United States, and that whenever the latter conflict with the former, the constitution and laws of the State of Ohio must succumb to those of the United States.

The militia belong to the States respectively and are subject in both their civil and military capacities to the

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jurisdiction and laws of the State, except in so far as that jurisdiction and those laws are controlled by congressional enactments. Whenever, therefore, the militia are called into active service for the purpose of executing the laws of the Union, suppressing insurrections, or, repelling invasions (and it is only in these emergencies they can be called into active service at all) though they remain militia of their respective States, yet their mode of organization, discipline, etc., are controlled and regulated exclusively by the acts of Congress; and the laws of the State on those subjects become for the time being inoperative.

The term "militia" is defined to be:

"The body of soldiers in a State, enrolled for discipline, but not engaged in actual service, except in emergencies; as distinguished from regular troops, whose sole occupation is war (or military service)."

Consequently, between officers who are not only appointed, but are also commissioned by the governors of the respective States, and whose term of service lasts only during the continuance of the emergency which calls them into being, and the officers of the regular army who are appointed by the president, with the consent of the Senate, commissioned under the provisions of the constitution by the president, as officers of the army of the United States, and whose term of service is for life; it must be apparent that a very material distinction exists. Were we to admit the latter class as coming within the terms of exclusion contained in section four, article two, of the constitution of Ohio, reasons will readily suggest themselves why the same result would by no means follow as to the former class. The president may at any time call upon the governor of any of the States for a regiment of State troops, enrolled, organized and officered under State laws, to aid in executing the laws of the Union. Would an officer of such a regiment, being at the same time

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Commission in O. V. M.*

a member of the Ohio legislature, vacate his seat as such member by obeying such a call? Certainly not; and yet the difference between that case and the present one is not in principle, but in degree merely.

It is said, however, that the number of members of the legislature holding offices in the volunteer service, might be so great as seriously to embarrass the operations of the General Assembly. I answer that should such an event occur a summary remedy is at hand. The General Assembly may refuse to excuse the absence of any of their members for any cause whatever; they may require the regular, daily attendance of all their members and thus compel each one to choose what master he will serve; if he continue absent, expel him, and cause his place to be supplied by a new election.

In answer therefore to your excellency's inquiry, as to whether a member of the legislature, who accepts a commission as an officer in the Ohio volunteer forces, called out to aid in suppressing the pending rebellion against the authority of the government of the United States, thereby vacates his seat as such member, I submit that in my opinion he does not.

JAMES MURRAY,
Attorney General of Ohio.

CLERK OF COURT DOES NOT VACATE HIS OFFICE BY ACCEPTING COMMISSION IN O. V. M.

Attorney General's Office,
Columbus, September 18, 1862.

*L. F. Hunt, Esq., Prosecuting Attorney, Hardin County,
Kenton, Ohio:*

SIR:—In answer to your inquiry of 28th ult., which was not received by me until yesterday, I beg leave to state that in my opinion the acceptance by your clerk of the Court of

Salaries of Prosecuting Attorneys.

Common Pleas of a commission as captain in the Ohio volunteer militia raised for the suppression of the pending rebellion against the authority of the government of the United States *does not* thereby vacate his office as such clerk.

My reasons are fully detailed in a lengthy opinion given some time since to the Governor and which will probably be published in connection with his message to the General Assembly.

Yours respectfully,
JAMES MURRAY,
Attorney General of Ohio.

SALARIES OF PROSECUTING ATTORNEYS.

Attorney General's Office,
Columbus, September 18, 1862.

W. L. Perkins, Esq., Prosecuting Attorney, Painesville, Ohio:

SIR:—In answer to your letter of the 1st instant, this day received, I beg leave to state that I am inclined to the opinion that the salaries of prosecuting attorneys are to be regulated by the act passed April 30, 1862, notwithstanding such salaries for the current year may have been previously fixed by action of the proper courts. These salaries appear to me to be allowed in accordance with the amount of services performed or to be performed by the officer to whom it is allowed, and not as a stipulated sum paid for a stipulated period of time, be the labor more or less, and this it seems to me is the distinction taken by the Supreme Court in the case of *Thompson vs. Phillips*, 12 O. S. Rep.

To settle the matter, however, I would suggest that you apply for a mandamus to compel the auditor of your county to pay your salary as allowed by the court. I will then enter an appearance and have the case disposed of immediately

Election of Justice of the Peace.

after the meeting of the court on the first Monday of December next. If you conclude to do this, send me your relation or petition at an early day and I will see to it. I would like to have this question settled, as I have had numerous inquiries similar to yours.

Respectfully yours,

JAMES MURRAY,
Attorney General of Ohio.

ELECTION OF JUSTICE OF THE PEACE.

Attorney General's Office,
Columbus, September 19, 1862.

Wm. M. Dillon, Esq., Fairview:

SIR:—Yours of the 7th instant is this day received. After mature consideration I beg leave to state that in my opinion your office was not vacated by reason of any of the facts stated in your letter, consequently you are as yet legally a justice of the peace within your township.

The action of your township trustees in ordering an election to fill a vacancy which did not exist and was not about to happen, was without warrant of law.

It necessarily follows that "*Ault*," who was thus elected, cannot by such an election legally and rightfully supersede you in the discharge of the duties of your office. That he has received a commission as such justice will not aid him in the least, as it is at best merely evidence of a legal election.

There being no vacancy in your office, and none about to happen, the whole predicate for the authority of the trustees to order an election is wanting, and an election held without such predicate is no more valid against you than if they should attempt to supersede any other legally acting justice of the peace in the same manner. You are, therefore, the legal justice of the peace and you are not superseded in any

*In Regard to Laws Regulating Sale of Intoxicating Liquors;
Suppression of Sale of Liquors in Vicinity of Military
Camps.*

manner by Daniel Ault, who has been elected and commissioned under such circumstances as I have heretofore stated.

In what manner the official acts of Ault as a justice *de facto* may be affected by this result I am not now prepared to say, nor is it necessary now to decide.

Very respectfully,

JAMES MURRAY,
Attorney General of Ohio.

IN REGARD TO LAWS REGULATING SALE OF IN-
TOXICATING LIQUORS; SUPPRESSION OF
SALE OF LIQUORS IN VICINITY OF MILITARY
CAMPS.

Attorney General's Office,
Columbus, October 4, 1862.

*Major Peter Zinn, Governor's Guards, Comdt. of Camp
Chase, Columbus, Ohio:*

SIR:—In answer to your letter of inquiry of the 2d instant, this day received, I beg leave to state that so far as the sale or giving away of liquor to soldiers in the vicinity of military camps or posts is concerned, the legislation of this State presents a complete *casus omissus*.

The evils resulting from the sale of intoxicating liquors in the vicinity of military camps was fully understood by the members of the last General Assembly—its effects upon the soldiers in camps "*Chase*" and "*Thomas*" were daily exhibited before them—they knew that during the previous summer an attempt had been made to suppress such places of resort in the vicinity of these camps which proved ineffectual for want of proper legislation, and yet so far as I am informed no bill was even introduced in either house

*In Regard to Laws Regulating Sale of Intoxicating Liquors;
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Camps.*

seeking to remedy the evil. Under these circumstances it would be manifestly improper to enlarge the law beyond its appropriate limits, much more to *make* law, where none exists, even for the purpose of correcting an evil as manifest as that of which you complain.

The only existing laws against the sale of intoxicating liquors are:

1st. An act punishing such sale to an Indian (Sw. Rev. Stat., 304).

2d. An act punishing such sale within the distance of two miles of the place where any religious society or people are collected or collecting together for religious worship in any field or woodland. (Swan's Rev. Stat., 306).

3d. The general act regulating the sale of intoxicating liquors. (Swan's Rev. Stat., 898.) This act makes it unlawful to sell intoxicating liquors in any quantity to be drunk upon or about the building or premises where sold, or in any adjoining room, building, etc., to sell to minors, unless, etc., to persons intoxicated or in the habit of getting intoxicated.

It also provides that all places where such liquors are sold in violation of the act shall be held and declared common nuisances, and *shall be abated, upon the conviction of the keeper thereof.*

It is true that all places where liquors are sold in violation of law are common nuisances, but it is equally true that to establish their character as such the sale of liquor in violation of law must have been proved and the keeper of such place have been convicted of such selling in a court of competent jurisdiction. Until such proof is made and such conviction had, the place of sale cannot be taken or held to be a common nuisance, and even after it is so taken and declared in a legal point of view, even then, under the decision of the Supreme Court of Ohio in the case of "Aultfather vs. The State," 40 S. Rep., 467, the place of sale can-

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not be permanently abated in the first instance. The order of abatement is directed, not to the officer of the Court making it, but to the defendant, who may avoid its effects, by giving bonds conditioned to make no more sales in violation of law.

The right of the commanding officer of a military camp or post to prohibit the sale of intoxicating liquors within its limits is unquestionable, and is based, not upon the positive provisions of any statute, but upon that rule of military subordination which permits him to prescribe the rules and regulations for its government and that of the soldiers under his command; beyond those limits, however, his power is at an end. For all acts committed outside of those limits, which injuriously affect soldiers within them, recourse can be had alone to the laws of the land. A distillery may be located just outside the limits of a military camp or post—the noxious smell arising therefrom may be such as seriously to affect the health of the soldiers; it may thereby become a common nuisance; yet the commanding officer or the military authorities would have no right to abate it; that could only be done by an officer of the law after the finding and judgment of a proper court.

I believe these views fully meet your inquiries.

I need only add that it may be competent for the proper military authority to proclaim the existence of martial law over a sufficient tract of country adjoining your camp, to enable you to a very considerable extent at least, to guard against the recurrence of the evil of which you complain.

Very respectfully,

JAMES MURRAY,
Attorney General of Ohio.

*Families of Drafted Soldiers Not Entitled to Benefits of Act
"For Relief of Families of Volunteers."*

FAMILIES OF DRAFTED SOLDIERS NOT EN-
TITLED TO BENEFITS OF ACT "FOR RELIEF
OF FAMILIES OF VOLUNTEERS."

Attorney General's Office,
Columbus, October 11, 1862.

S. Alex. Leckey, Esq., Auditor Shelby County, Ohio:

SIR:—The act of May 10, 1861, entitled "an act to afford relief to the families of soldiers mustered into the service of the United States, under the requisition of the president," authorizes the levy of a given amount of tax for the purpose of affording relief to the families of the *Ohio Volunteer Militia* and provides for the distribution of the amount thus raised among the families of such volunteer militia, according to the discretion of the board of county commissioners.

The act is limited in its terms to the families of volunteers. A drafted man is in no sense a volunteer; his service is not freely given—it is not voluntary. On the contrary, it is forced, unwilling and involuntary, and however hard it may be upon the innocent and needy families of such men, so long as they remain drafted soldiers and fail to avail themselves of the opportunity so freely given them to become volunteers, relief cannot be afforded their families, however worthy, innocent or needy they may be, under the provisions of the above cited act of May 10, 1862.

JAMES MURRAY,
Attorney General of Ohio.

Attorney General's Office,
Columbus, January 12, 1863.

Hon. R. W. Tayler, Auditor of State:

SIR:—In answer to your note requesting my opinion as to the liability of the State for the tax imposed upon the