HAMILTON COUNTY CRIMINAL COURT.

Office of the Attorney General,
Columbus, January, 1855.

DEAR SIR:—I have considered your request that I should file an information against Judge Flinn, and have determined against it.

In any aspect he does not unlawfully intrude into an office. For if there is a criminal court, he is lawfully exercising the office of judge and is not an intruder; if there is no such court then there is no office into which he could intrude. This disposes of my proceedings against Judge Flinn.

I will not commence proceedings against a judge of the Common Pleas, in your county, who exercises criminal jurisdiction because my present opinion is that there the jurisdiction belongs. I have no favor for *made cases* to test the constitutionality of laws, and cannot resort to a proceeding by *quo warranto* against an officer whom I believe to be in the discharge of his duty.

The Supreme Court, I understood, intimated to you that they would not direct me to proceed, so that no termination of your difficulties can be had by *quo warranto* on my relation.

I have no doubt you press it from an anxious desire to discharge your duty, and my determination will, of course, relieve you from responsibility.

Permit me to suggest that you proceed with the criminal business in the Common Pleas, and I have no doubt that counsel for the defendant upon the first conviction will take a writ of error and thus properly raise the question.

I have no doubt that the Supreme Court, if the writ should be allowed, will make it returnable to the Supreme Court and thus secure a speedy decision.

In the meantime, as you are confident of the correctness of your own views, you might suspend further crim-

inal proceedings until the determination of the point by the Supreme Court.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Joseph Cox, Esq., Prosecuting Attorney, Cincinnati, Ohio.

WARREN COUNTY CANAL.

Office of the Attorney General,
Columbus, January 9, 1855.

DEAR SIR:—I enclose herewith certain papers prepared in accordance with your request and in completion of the contract made by the board of public works for the sale of this canal to John A. Corwin and R. H. Hendrickson.

First—A release of John A. Corwin and Robert G. Corwine of all claims against the State for damage to the Whitehill mill property so called.

Second—A transfer of the canal, the water power and other property belonging thereto to said Corwin and Hendrickson by you as president of the board.

Third—A bond of Corwin and Hendrickson to the State of Ohio conditioned according to their proposition accepted by the board.

Fourth—A mortgage of the canal, its water power and other property pertaining thereto to be executed by Corwin and Hendrickson to the State conditioned for the performance of the conditions of their bond.

This last paper has been drawn because it is provided for in their accepted proposition, and I am not to be understood, from having prepared it, as expressing any opinion as to the security which it affords.

I have made the transfer as broad as the law permits. Anything not contemplated by the act would be void, even

if executed, and I return the paper submitted to me by you, and advise against its execution.

You will also please find enclosed the original proposition made by them, with your acceptance endorsed.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK.

Hon. Jas. B. Steedman, President Board of Public Work, Cincinnati, Ohio.

RECLAMATION OF FUGITIVES; BASTARDY.

Office of the Attorney General,
Columbus, January 11, 1855.

DEAR SIR:—The Governor has transmitted to me for my opinion your letter of the 9th inst., inquiring whether a requisition could be issued to the Governor of New York for the surrender of a person charged under the bastardy act. This proceeding is one solely for the support of the child and is not regarded or punished as a crime. It is not the subject of indictment or information, and I am opinion clearly that it is not within the provision of the act of Congress providing for the reclamation of fugitives from justice.

I regret very much to come to this conclusion, for if he had committed the same offence in his own State, New York, he would have been punished by imprisonment in the penitentiary.

Seduction is punished as a crime when the victim is of such tender years by the laws of Pennsylvania and New York, and the Governor of this State is very frequently called upon, by the executive of those States, to surrender fugitives charged with this crime. The demand is always complied with when a proper case is made.

But the defect is in our own law which has never yet

provided for the punishment of *seduction,* one of the vilest crimes.

I do not, of course, refer to ordinary cases of bastardy, but to instances where the youth of the victim and the acts of the seducer render the accomplishment of his designs so detestable.

I am, sir,

Very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

Geo. W. Houk, Esq., Dayton, Ohio.

TERM OF OFFICE; PROBATE JUDGE.

Office of the Attorney General,
Columbus, January 25, 1855.

SIR:—Your letter of the 16th inst. is acknowledged. The Governor is temporarily absent from the city, or he would probably have submitted the question made in your letter for my opinion.

The election in 1852 should have been for the unexpired term of the prior incumbent.

As the Governor will, perhaps, formally submit the matter for my opinion, I do not deem it necessary to give the grounds upon which my opinion proceeds.

Nor have I reflected as to what will be the consequence of a failure to elect at the election of 1854.

I am, sir,

Very respectfully, etc.,
GEO. W. McCOOK.

P. A. Taylor, Esq., Upper Sandusky, Ohio.

TAX ON CHATTELS UNDER MORTGAGE.

Office of the Attorney General,
Columbus, January, 1855.

SIR:—Your letter of the 11th inst., enclosing a letter from the treasurer of Darke County, and propounding to me certain questions, is received.

First—Is personal property under mortgage liable to distraint for taxes due from the mortgages?

I answer this case in the affirmative. There can be no question that the taxes due and chargeable against personal property may be collected by a distraint against *that property* so long as it remains in the possession of the party against whom the tax is assessed.

Cases in other states have gone so far as to recognize the tax assessed as a lien on the property from the date of the assessment, and have enforced that lien against the property in the hands of a purchaser for value.

I do not think that our courts would go to this extent, but I am confident that so long as the property remains in the possession of the party against whom the tax is assessed as mortgagor thereof, whether before or after condition broken, it would be held subject to distraint for taxes.

Any other rule would open the door to innumerable frauds upon the revenue and perhaps no better instance could be presented than that submitted from Darke County. The Greenville and Miami Railroad is assessed $1,800 for taxes—her road is covered with rolling stock and machinery necessary for the working of the road and this personal property is all mortgaged to bond holders in New York—the road refuses to pay her taxes and defies distress on the ground that the property, being mortgaged, cannot be seized. Perhaps every railroad in the State is in the same position and will so continue for many years, and they would have the power to prevent the collection of the taxes, at

their own option, if the claim set up for the Greenville and Miami road be recognized.

I advise that the treasurer, at once, seize personal property of the company whether mortgaged or not, and enforce a collection of the taxes by a sale of it if payment is still refused.

The New York mortgagees, if they have a valid lien and desire to have the property continue in the possession of the company, may secure their object by paying the taxes assessed by the State on the very property which our laws have protected for their security.

Second—Is personal property that has been assigned subsequent to the date of its assessment, liable to distraint for taxes due from the party in whose name it was assessed.

If the property has been, in good faith, sold, it is not liable to distraint for taxes; but if *assigned* in trust or if any interest remains to the original owner, his creditors or others for him, it is still chargeable wth the taxes and liable to distraint if the trustee or other party in possession refuses to pay them.

I am, sir,

Very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

Hon. Wm. D. Morgan, Auditor of State.

COSTS; PENITENTIARY.

Office of the Attorney General,
Columbus, February 8, 1855.

SIR:—The letter of the late warden of the penitentiary under date of the 13th January was not received by me until the last of that month, and my absence from Columbus since will explain the delay in replying to it.

My opinion is required as to the amount of costs properly chargeable against the State in an indictment prosecuted in Brown County against Gregg, Gardner and Clark for murder in the second degree. The costs bill does not show the acts very satisfactorily, but I gather from it that the parties were originally arrested and bound over or committed on a charge of stabbing with intent to kill, and afterwards, on the death of the party assaulted, were examined and convicted on the charge of murder.

That subsequently, under the act of March 12, 1852, they were brought before the probate judge, as an examining court, upon their application to be admitted to bail. They were jointly indicted, Gardner was discharged by *nolle prosequi,* I presume. Clark separately tried and acquitted, and Gregg convicted of manslaughter.

He obtained a new trial and was again convicted. The costs of all these proceedings is included in the cost bill and payment demanded of the State.

I am of opinion:

First—That only the costs in the case in which they were prosecuted can be demanded from the State. This excludes the cost in the first examination upon the charge of stabbing.

Second—That the costs incurred in the proceedings before the probate judge, upon the application for bail, are not costs of prosecution and are to be rejected.

Third—That the costs of the trial of Clark, who had a separate trial and was acquitted, are to be rejected.

Fourth—That the residue of the costs are properly a charge against the State, as those made by reason of Gardner, who was discharged, cannot be distinguished from those made against Gregg, who was convicted, the indictment being joint.

This allows the costs of the trial on which the verdict was set aside, as well as the subsequent trial which was followed by sentence. I have doubts as to the propriety of

making this allowance, and am willing to reconsider the question should any other case occur.

I have not undertaken to scrutinize the particular items which go to constitutte the cost bills, as I do not think it proper that any such labor should be imposed upon me, nor do I suppose that was the intention of the warden.

The laws fixing the items of costs are before you, and it is your duty to make this scrutiny.

I have indicated by pencil marks on the bill the costs to be rejected, and am,

Very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

To the Warden of the Penitentiary, Columbus, Ohio.

"THE KANSAS COLONIZATION UNION."

Office of the Attorney General,
Columbus, February 14, 1855.

SIR:—Your communication of the 7th inst., enclosing the certificate of J. P. Morssinger and four others, applying to become a body corporate under the act of May 1, 1852, to provide for the creation and regulation of incorporated companies in the State of Ohio, and requiring my opinion as to the legality of a company for the objects expressed in the certificate, is acknowledged.

The name of the proposed corporation is the "Kansas Colonization Union," in Cincinnati, Ohio. The object of the association is to found a city to be called "Humboldt City" in the territory of Kansas—thus necessarily involving the purchase of lands and the erection of houses thereon.

However laudable such an enterprise might be conducted by individuals or by an association in the nature of a partnership, or by the intervention of a trustee, it is im-

proper to create a corporation with any such powers, even if the land proposed to be settled upon was in Ohio.

Without entering at all into the argument, which to my mind is conclusive, I am clearly of opinion that a corporation of a character indicated in the certificate before me cannot be created under the laws of this State.

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. Trevitt, Columbus, Ohio.

INDEPENDENT BANKS—FORFEITURE.

Steubenville, March 6, 1855.

SIR:—I acknowledge your letter of the 1st inst., enquiring "whether an independent bank can redeem the amount of its stock deposited in your office and its circulation below the sum of $50,000 without a forfeiture of its charter."

A bank may retire as much of its circulation as it chooses without affecting its franchise, but it may not reduce its capital stock or stocks deposited in your office below the minimum provided by law.

The eighth section of the act declares that no company shall commence business, *nor carry it on*, or an independent banking company, unless its capital stock shall be at least fifty thousand dollars. Swan's Rev. Stat. 80.

The forty-fifth section permits a bank to diminish its circulation and to receive back its stocks deposited to an amount equal to the circulating notes delivered up, provided the amount of stocks remaining with the treasurer shall not thereby be reduced below the amount of the capital of the bank, nor *in any case* below the sum of fifty thousand dollars. Swan's St. 94.

The fifty-first section creates any company lawfully organized a body corporate, and continues its existence until the first of May, 1866, "if so long it shall comply with the provisions of this act." Swan's St. 96.

The act is the law of its life, and the moment it ceases to comply with the provisions of the law its existence ceases.

Any bank which has reduced its stocks below the minimum of fifty thousand dollars has ceased to have any banking powers, and its existence is continued only for the purpose of liquidation.

Very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

Hon. Jno. G. Breslin, Treasurer of State.

ORGANIZATION OF THE MILITIA.

Office of the Attorney General,
Columbus, March 20, 1855.

SIR:—I have considered the question submitted in your letter of the 10th February, as to the effect of the adoption of the constitution of 1851 upon the militia laws of the State in force on the 1st of September of that year, and particularly whether you, as commander-in-chief, would be justified in ordering elections for majors-general, and they for subordinate officers without further legislative authority.

Without entering into the inquiry whether any of the militia laws are in force, or if any, what portions of those laws, I can answer the question immediately involving your duties as governor and commander-in-chief.

You cannot, in my opinion, order the election of generals of divisions or brigade. The mode of electing those officers was provided by law, but that mode is inconsistent

with the provisions of the constitution and falls, for it cannot be saved by the first section of the schedule.

Before there could be an election, it would not only be necessary that you, as commander-in-chief, should order it, but the places of election must be designated as well as judges to hold it, and the manner of conducting and the mode of certifying the result must be prescribed.

These are matters to be provided by law and not by a military order or an execution proclamation.

It is clear that the constitution contemplates an organization of the militia, and the performance of military duty, but it is also certain that the General Assembly has not by law prescribed the mode of organization nor the duty to be performed by the citizens; and we may not resort to prior legislation to ascertain these, because the constitution itself partially provides the mode of organization and that is altogether inconsistent with the laws in existence when that instrument became of force.

I have the honor to be,

Very respectfully, etc.,

GEO. W. McCOOK.

To the Governor.

NOBLE COUNTY; SEAT OF JUSTICE; CONTEST OF ELECTION.

Office of the Attorney General,
Columbus, March 21, 1855.

SIR:—Upon my return to Columbus yesterday I received your letter of the 6th inst., inquiring my opinion as to the legality of the conduct of the commissioners of your county in contracting and paying for the services of counsel to resist a contest of election held under the act of April 29, 1854, 52 Ohio Laws 177, and also as to the liability of

the auditor, upon his bond, for drawing an order upon the treasurer to pay the fees agreed upon by the commissioners.

I know nothing at all of the facts of the case, and as you do not state them in your letter, I am to presume, what the law presumes, in their favor; that the commissioners acted in good faith, and if their proceedings were illegal that the illegality resulted from ignorance of their duty.

They would not, in such case, although their proceedings were unwarranted by law, be liable to criminal prosecution under the act to which you refer me. Swan's Rev. Stat. They are liable for misconduct only, and before any guilt or penalty attaches it must be proved that they acted knowingly and wilfully.

But, although an officer may not be liable to a criminal prosecution for his acts, he may be civilly responsible to the party injured, and this would doubtless be applied to commissioners as well as other officers. In this instance, however, it seems to me there can be very little probability that a civil suit could be successfully instituted.

The commissioners are by law entrusted with the conduct of the affairs of the county; and if, in their opinion, the public good required that the question so long dividing your county should be decided, and that the election held under the act of 29th April, 1854, should remain undisturbed, it was competent and proper for them to resist the contest, and in behalf of the county to employ counsel to aid them. They were not bound, in a matter involving the public welfare, to await the action of interested individuals.

If it was competent to retain counsel, it was lawful to pay them, and I do not think any responsibility attaches to the auditor on his official bond.

There may be facts in this case which would render the commissioners liable, but it would be necessary that they would be very clearly and satisfactorily shown.

I am, sir, Very respectfully, etc.,

GEO. W. McCOOK.

Jabez Belford, Esq., Sarahsville, Ohio.

LOAN TO COLUMBUS INSURANCE COMPANY.

Office of the Attorney General,
Columbus, March 22, 1855.

DEAR SIR:—Your letter of the 17th inst., is acknowledged. Suits had been brought by Mr. Pugh on the bonds of E. N. Sill and of A. A. Bliss, which are pending.

Upon examination I find that in the case against Mr. Bliss the wrong bond was sued upon; the loan having been made 31st December, 1849, and the bond sued on, although in its obligatory part bearing date 27th February, 1847, in its condition recites an election in 1850. I do not know of any defects in the bond, although it may be difficult to fasten the liability on Mr. Bliss unless he can be directly connected with the transaction.

As to your suggestion of a criminal prosecution in aid of a civil suit, I have to remark that if such a course were advisable, it cannot now be resorted to.

I do not think there can be any pretence that the case is within the first section of the act of March 2, 1846, to which you call my attention. The money was not converted by the officers to their own use, or used by investment in any kind of property or merchandise, or made way with or secreted by them. Either of these acts is punished by imprisonment in the penitentiary. For any other offences under that act, a pecuniary fine, forfeiture of office and temporary incapacity of civil rights, are provided.

The offence then was committed on the 31st December, 1849, and the power to prosecute and punish it terminated on the 31st December, 1852, before I had the honor to hold my present office. The act of 15th January, 1845, Swan's Rev. Stat. 281, limits prosecutions for such offences to three years. I was under the impression that the embezzlement or use of public moneys was expressly withdrawn from the operation of any act limiting the time of prosecutions, but upon examination I find no such exception.

I very much doubt the propriety of instituting any suit before the convening of the General Assembly, but will hold the matter under consideration.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK.

To the acting Commissioners of the Sinking Fund, Columbus, Ohio.

MATTHEWS VS. OHIO; MIAMI UNIVERSITY LANDS.

Office of the Attorney General,
Columbus, March 22, 1855.

DEAR SIR:—I have received your letter of the 19th inst., and the briefs in these cases to which it refers.

The Matthews case I have examined, and the same principle is involved in the Miami University land case, as in the Ohio University case which stands before it on the docket.

I have not read the newspaper report of Judge Bartley's decision to which you refer, but have heard it spoken of in conversation. I cannot believe he ever made such a decision, and if such a one per infortrenium has been made, you will nevertheless proceed as before, treating the sheriff in all respects as a ministerial officer of the Probate Court.

Yours very respectfully, etc.,

GEO. W. McCOOK,
Attorney General.

J. Robertson, Esq., Hamilton, Ohio.

PUBLIC WORKS; APPOINTMENT OF COLLECTORS, ETC.

Office of the Attorney General,
Columbus, March 25, 1855.

DEAR SIR:—My opinion upon the questions submitted in your letter was given verbally to the Governor, and also to Mr. Steedman, president of the Board of Public Works. But as the former has required an opinion in writing, I send you the conclusions to which the opinion arrived.

First—That the proviso of the sixth section extending the term of incumbents on the renewal of their bonds is constitutional and valid.

Second—That upon the meeting of the Senate it is the duty of the Governor to appoint with the concurrence of that body.

Third—Upon the happening of any vacancy from any cause in the meantime, the Governor alone to appoint.

Very respectfully,

GEO. W. McCOOK.

Mr. A. L. Backus, Resident Engineer, etc, Maumee City.

PUBLIC WORKS; WHO TO APPOINT COLLECTORS.

Office of the Attorney General,
Columbus, March 23, 1855.

SIR:—The questions submitted for my opinon in your letter of December 13, 1854, were answered by me in a personal interview, and until your secretary called my attention to it today, I had not supposed that a written opinion was desired.

Those questions arose upon the sixth section of an "act to amend an act defining the powers and prescribing the duties of the Board of Public Works," passed May 1, 1854, and are, substantially, as follows:

First—Do the terms of the present collectors, inspectors and weighmasters for the public works of the State expire on the first day of April, 1855.

Second—Is the proviso of that section, which extends the term of appointment of the present incumbents of those offices upon renewal of their bonds, until a time when those offices can be filled by the Governor and Senate, consistent with article 2, section 27, of the constitution?

At the time of the passage of this act the collectors, inspectors and weighmasters were all appointed by the Board of Public Works, and were in office for the period of one year only—that time being either expressly limited by law, as in case of inspectors, or fixed by the board, as in the case of collectors, and these appointments were all to expire on the first day of April, 1855.

By the sixth section above referred to, the appointment of these officers is taken from the Board of Public Works and conferred upon the Governor and Senate. and if that body is not in session, for the purpose of supplying vacancies which may occur, upon the Governor alone; but it is provided that no appointment shall be made under the act which shall interfere with persons in office until the expiration of their respective terms, and it is further provided, "that the persons already in by appointment of the Board of Public Works, by renewing their bonds, shall continue in their offices until the same shall be filled by the Governor and the Senate."

Upon the language just quoted the doubt arises whether such a provision does not conflict with the constitution which declares "that no appointing power shall be exercised by the General Assembly, except as provided in this constitution and in the election of United States Senators." Article 2, paragraph 27.

Now it is certain that the election or appointment of these officers is not by the constitution expressly conferred upon the General Assembly, and therefore that body, by the section recited, is forbidden to exercise any such power, and if the Assembly had undertaken directly to elect or appoint them to their offices, it would have been a palpable violation of that instrument.

I admit it is doubtful whether this provision of the act does not do indirectly what has been forbidden to be done at all. It may be argued that the appointments all were to expire on the first of April, 1855; that unless the incumbents were reappointed after that time, by some authority, their terms of office must then cease, and if they hold after that period by the renewal of their bonds, they so hold by virtue of some appointment; and as they are not appointed by the Board of Public Works, nor by the Governor, nor by the Governor and Senate, that their appointment is, and must be, by the General Assembly.

I feel the force of this, and concede that there is great difficulty in satisfactorily answering the objection. But on the other hand to ascertain what was meant by the constitutional inhibition, we look to the evil intended to be remedied by it, and of which the history of our legislature affords us many proofs. It was intended to obviate delay to proper legislation arising from the election of important officers of State in that body; to exclude the bargaining for the election of a person to one office as a consideration for the election of a favorite to another; and to prevent the passage of important measures from becoming dependent upon the gratification of individual ambition in promotion to high stations. These evils only existed when there were direct elections by the General Assembly as the constituent body and could not occur in a case like that under consideration.

Again let us clearly comprehend what was the intention of the legislature in enacting this section, which for careless phraseology and bungling construction has no parallel on the statute book. It is apparent that they intended to de-

prive the Board of Public Works of the appointing power, and at the same time not to confer it upon the executive alone, for his appointments are only to fill vacancies and for not longer than a year, whilst the appointments by the Governor and Senate are for two years.

It then provides that no appointment shall interfere with persons in office at the time, and as the General Assembly is about to adjourn for two years and no vacancies to occur for nearly a year, there would be no Senate to concur with the Governor in making the appointments when the vacancies would happen, and this difficulty the Assembly sought to obviate by the provision that the then incumbents should continue in office, upon renewing their bonds, until the Governor and Senate concur in filling them. Now the terms for which these officers were appointed are not fixed by the constitution, but by laws, and it was at any time competent for the legislature to change, either increasing or diminishing them, for the constitution, by the twentieth section of the second article, distinctly recognizes this power.

It was also clearly competent for that body to provide for the appointment of these officers, for the period intervening from the expiration of the term of the incumbents to the regular meeting of the Senate, and to give the power either to the board or the Governor, but it did not choose to do either, but simply extended the term of office of all incumbents to the time when the Senate would be in session.

The General Assembly was about to inaugurate a new system for the management of the Board of Public Works of the State—to take the power of appointment from one place and confer it in another—and in the meantime, until the authorities clothed with the power can exercise it, the act continues all incumbents in office; and this neither by way of an election nor the exercise of an appointing power.

This reasoning may not be altogether satisfactory, and it may fail to convince our minds that the legislature was clearly in the exercise of a constitutional power, but it is, nevertheless, sufficient to show that the exercise of the

power is not, beyond doubt, unconstitutional. Even to this extent it is enough, for if there is doubt the act prevails and it is to be regarded as law. The rule of the courts, whenever the constitutionality of an act of the General Assembly is drawn in question, is clear and well established.

In such case "the presumption is always in favor of the validity of the law, and it is only when manifest assumption of authority and a clear incompatibility, between the constitution and the law, appears that the judicial power will refuse to exercise it."

This is the language of our Supreme Court in *Wilmington Railroad Company vs. Commissioners of Clinton County,* 1 Ohio St. Rep. 77.

I do not see a manifest assumption of authority in this provision of the act under consideration, nor that a clear incompatibility between the constitution and the act appears, and am therefore of opinion:

That this provision of the act is valid and has the force of law.

That all incumbents, upon the renewal of their bonds, are entitled to continue in office until the meeting of the Senate, when their places are to be filled by the concurrent action of the Governor and the Senate; and

That all vacancies occurring in the meantime, from failure to give bonds or from what cause soever, are to be immediately filled by the executive appointment.

GEO. W. McCOOK,
Attorney General.

To the Governor.

FRAUDULENT SALES OF THE STATE LANDS AT DEFIANCE.

Office of the Attorney General,
Columbus, January 16, 1855.

SIR:—I have your letter of the 12th inst., referring to me the application of Thiebault Didier for a deed from the State for five several tracts of land, containing in the aggregate 2,298 acres, purchased by him on the 23d day of October, 1852, under the act of April 16, 1852—"To abolish the offices of register and receiver of the State land office at Defiance, to regulate the sale of lands at said office, and to create the office of land commissioner." 50 Ohio Laws 180.

In the *State of Ohio vs. Edward H. Phelps,* a case which I tried in the Common Pleas and District Courts in Franklin County, I had occasion very carefully to examine the act in question. The suit was brought by the State to vacate a purchase made by Phelps of several tracts containing 1,080 acres, at the reduced price fixed by the fourteenth section of the act, upon affidavit of intention to make actual settlement. The judgment of the District Court was for the State—the purchase was declared illegal, in fraud of the act, and the certificates issued by the land commissioner were ordered to be surrendered and cancelled. It was not necessary to decide in that case what quantity could lawfully be purchased under the act, but the court held there could be but one tract purchased—but one affidavit made—and as there were several tracts and as many affidavits, each purchase was declared unlawful. Of the correctness of that decision there can be no question, and as the construction placed by the court upon the act is fatal to Didier's claim, I would have contented myself with a bare reference to it if the decision had been made by the Supreme Court.

In order to a correct understanding of the act of 1852, a brief review of the two acts upon the same subject, immediately preceding it, will be requisite. In 1847 the State

departed from her early policy of treating her lands as a direct source of revenue by the proceeds arising from their sale, and adopted that of fostering their early occupancy by actual settlers, on the eighth of February in that year passed the act "To establish the price of the Miami, Wabash and Erie and Ohio canal lands, and to secure their sales to actual settlers." 45 Ohio Laws, 31.

That act provided for a reduction of one-third from the appraised value, at which alone they had previously been subject to entry, upon affidavit of an intention *to enter upon and improve the land and reside permanently thereon,* and the quantity which might be entered by any one person was limited to a quarter of a section.

This act was amended by that passed March 23, 1850, under which the limitation as to quantity remained; the price to actual settlers was reduced to one-half of the appraised value, and the affidavit required of the settler was "that it is *bona fide* his or her intention within twelve months to enter upon and improve the tract of land so purchased, and that he or she has not made such purchase for the purpose of speculation merely, but for the purpose of securing a permanent home for himself, or herself, and family." 48 Ohio Laws 90, paragraph 2.

The act of 1852 was next passed, under which this case arises. The act abolished the offices of register and receiver and created that of land commissioner; it reduced the appraisement of all lands at more than two dollars per acre to two dollars; it required sales to others than actual settlers at appraised value; it continued the reduction of fifty per centum from the appraised value until after the first day of January, 1853, and from and after that day the sales to actual settlers were to be at a reduction of seventy-five instead of fifty per centum, upon affidavit "That it was his or her intention, within twelve months, to enter upon and improve the tract so purchased, and that he or she has not made such purchase, for speculation merely, but for the purpose of

securing a home for himself, or herself, and family." 50 Ohio Laws 182.

It repealed, however, the act of 1847 which contained the express limitation of the quantity to be purchased by actual settlers, and after the act took effect it was claimed, and it seems that the claim was recognized by the land commissioner, that there was no longer any limitation but the elastic conscience of the purchaser who might enter any number of tracts and quantity of acres upon making the affidavit that it was intended for a home and not speculation merely. This construction gave the act a short career. It went into effect on the first day of June, 1852, and some entries were made, amongst them Didier's, previous to the reduction of seventy-five per centum, which was to take place "from and after the first day of January, 1853."

This day was Saturday and the commissioner decided that no entries could be made until *after* that day; the next day being Sunday the office was of course closed, and on Monday, the third day of January, all of the lands for entry were taken up, mostly by speculators, in quantities of from 600 acres down. These wholesale transactions led to the committee of the General Assembly to investigate the "Defiance land frauds" so-called, and resulted in the passage of the act of January 12, 1853, repealing the seventh and fourteenth sections of the act of 1852, and restoring the express limitations as to quantity to 160 acres, 51 Ohio Laws 293, and to a resolution of the General Assembly requiring the Attorney General to institute legal proceedings to set aside the fraudulent sales at the Defiance land office subsequently to the last day of December, 1852. 51 Ohio Laws 156.

The repealing clause of the act of 1853 contains a proviso, that the repeal shall in no wise effect *any rights* accruing under the seventh and fourteenth sections of the act of 1852.

This is the legislation upon the subject and it remains to be considered whether Didier, by his purchase, acquired

any rights which are saved to him by the proviso of the act of 1853. His purchase was made on the 23d of October, 1852, after the act of that year took effect, and at this time, as we have seen, there were no express limitations as to the number of acres to be taken by any one person. He made five several entries of five distinct tracts, and five affidavits of his intention to enter upon the tract severally described therein for the purpose of securing a home for himself and family. If no limitation is to be gathered from the several provisions of the act, his purchase was legal and he is entitled to a deed, but if there is such limitation his purchase is illegal, and notwithstanding his oaths, his instruments and his payments into the treasury, the deed must be refused.

A limitation may exist although the number of acres is not expressly stated. What was the intention of the legislature at the time of passing this act?

Did they intend any limitation, and can the intention be ascertained from the act itself?

The object of the legislature evidently was to induce the speedy settlement of the lands, and the price is reduced, to actual settlers, to one-fourth of the appraised value in order that the poorest might secure a homestead.

The language of the act of 1847 was "to improve the land and reside permanently thereon," that of 1853 "for the purpose of securing a *permanent home* for himself, or herself, *and family*," that of 1852 "for the purpose of securing a home for himself, or herself, and family." Could anything be clearer than that the bounty of the State was intended for the poor and homeless settler who was willing to enter upon and improve the lands?

But again, from *necessity*, there must be some limitation, for otherwise, a township or a county, if there was so much in one body, might be entered by one man, which would render the act absurd.

Language is used too, in the seventh and ninth sections, which is altogether inconsistent with the loose construction

claimed. A single affidavit and certificate are contemplated, "an affidavit," "a certificate," "to a single tract is contemplated," "the tract so purchased," "the tract for which he holds a certificate of purchase."

I think it very clear then, that a single tract was opened to actual settlers at the reduced price, and when one was selected no other affidavit could be made.

What, then, is a tract? We look, of course, to preceding statutes to ascertain in what sense the word has been employed. We find that for the purpose of survey and appraisement the term is applied in many statutes, to sections, half and quarter sections, eighty and forty acre lots, indifferently.

But in the acts of 1847 and 1850, those immediately preceding the one which I am considering, the tract spoken of as open to actual settlers is the quarter section.

Indeed, the seventh and ninth sections from which the limitation to "a tract" is clearly found, are almost identical with sections in the two preceding, and there the term "tract" is applied to quarter sections only. I may then, without violence, presume that the General Assembly when legislating upon the same subject matter as former assemblies, and using the same words, have employed them in the same sense. And this the more readily, when the General Assembly which passed the act within a week after the interpretation sought to be placed upon it becomes known, amend the act by expressly limiting the tract to a quarter section, and thereby clearly indicate what was the intention of the original enactment. I am of opinion then:

First—That but one tract can be entered by one person.

Second—That this tract cannot, in quantity, exceed 160 acres. Of the last I have not the same confidence as I feel in the first, but I believe it to be the true interpretation of the act.

Didier entered at one time five tracts containing 2,298 acres, when, by law, he could have entered but one containing 160 acres. The entry was in fraud of the law—he

acquired no rights thereby, and is not within the saving clause of the act of 1855 which preserves only rights acquired.

It is my opinion, therefore, that duty requires that yourself and the Governor should refuse deeds for the land so attempted to be obtained.

GEO. W. McCOOK,
Attorney General.

To the Auditor of State.

DEFIANCE LAND SALES.

Office of the Attorney General,
Columbus, March 26, 1855

DEAR SIR:—Your letter of the 24th inst., covering one from Mr. Parker, the State land agent at Defiance, and inquiring what, in law, constitutes an *actual improvement* and a *bona fide residence,* as contemplated by the statutes of this State, reducing the price of land to actual settlers, has been received.

Premising, that this is a new statute which has never received a judicial construction and that so many facts necessarily enter into questions of this nature that no general definition could satisfactorily be given of the terms made use of, I must decline attempting one.

But it is not, in my opinion, difficult to say what does not constitute either, and to the letter of the agent you may reply that merely going on the land and cutting a few trees and then abandoning it is not an *actual improvement,* and that simply remaining on the land a day or a part of a day, or any other time without the present intention of remaining, does not constitute *residence;* but that these things are mere color and pretence which ought not to satisfy the

agent, and that it is his duty to refuse the certificate to the Governor under such circumstances.

As to cases in which deeds have already been obtained, I may remark that where the law appoints an officer who is to be satisfied of and determine a fact and he does consider and decide it, it partakes of the nature of a judicial act, and is usually esteemed conclusive; but where the evidence on which the officer acts is wholly or in part, the oath of the person to be benefitted, who acts fraudulently, I do not think the rule would be applied.

I am, sir,

Very respectfully,

GEO. W. McCOOK.

Hon. W. D. Morgan, Auditor of State, Columbus, Ohio.

INCORPORATED COMPANIES; OBJECTS NOT WARRANTED BY LAW.

Office of the Attorney General,
Columbus, March 26, 1855.

SIR:—I have examined the certificates of William Bloomfield and others who claim to have incorporated themselves under the act of May 1, 1852, "to provide for the creation and regulation of incorporated companies in the State of Ohio."

The objects of the incorporation as expressed in the certificate are to be conducted at Marlboro, in Stark County, and are "merchandising, milling and grazing."

In my opinion the law does not warrant an incorporation for two of these purposes, merchandising and grazing, and as they are expressly included, the whole incorporation

becomes, thereby, unlawful. I have no doubt that a company may lawfully be formed for the purpose of milling.

I am, sir,

Very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

Hon. Wm. Trevitt, Secretary of State, Columbus, Ohio.

TRAFFIC IN LIQUOR; ACCUSED ARRESTED WHEN SOBER.

Office of the Attorney General,
Columbus, March 31, 1855

DEAR SIR:—Absence from the city until last night prevented earlier reply to your letter of the 26th inst.

So far as the duty of the sheriff is concerned, you doubtless have seen ere this that the newspaper report of Judge Bartley's decision was altogether inaccurate.

Upon the other point I cannot believe that he has decided that the accused must be arrested when drunk, but if he has you will not follow it for the present, as judges themselves do not recognize hasty decisions upon the circuit as committing them to the opinions expressed.

The offence punished under the fifth section is not simply the becoming intoxicated privily, which injures only the individual, but the offence against society in the publicity of the act and its evil example.

Drunkenness *in public* was punishable at common law, and I have no doubt our courts in placing a construction upon this section will follow the well recognized distinction which prevailed in England.

But at the same time I am clearly of opinion that the prosecution need not be instituted, nor the trial and judgment had whilst the party is intoxicated, nor an arrest made by an officer whilst the intoxication continues. The offence

is complete if the party is found intoxicated and the prosecu tion and punishment ought rather to be against him afte he has become sobered than before.

Very respectfully, etc.,
GEO. W. McCOOK.

Batavia, Ohio.

TAXES ON THE BRANCHES OF THE STATE BANK.

Office of the Attorney General,
Columbus, March 31, 1855.

SIR:—In reply to your letter of the 30th inst., I have to say that the taxes upon dividends which the branches of the State banks are required to pay; by their charters, can in my opinion, be enforced against those which have failed.

My interpretation of the sixtieth section is that a bank is bound, not only to ascertain the amount of the taxes, but to "set it off"—set it apart for this purpose only, not subject to future contingent hazard or loss.

If you furnish me the amount which they are liable to pay I will at once proceed to secure it and, my views of the statute being correct, there will be no difficulty in succeeding. These branches will never go into operation again, and it would be as well, perhaps, to secure what we may at present.

Very respectfully, etc.,
GEO. W. McCOOK.

To the Auditor of State, Columbus, Ohio.

TAXES; RECEIVER; TUSCARAWAS CASE.

Office of the Attorney General,
Columbus, March 31, 1855.

SIR:—I have considered the matter submitted in your letter of the 20th inst., and have examined the papers accompanying it which are herewith returned.

I am of the same opinion I expressed to you when you called my attention to this case in a personal interview.

The property was subject to taxation, pending a litigation as to who was entitled to the proceeds arising from its sale. Neither litigant would return it, and it was the duty of the person who held it in trust and for an indefinite period, to report it to the assessor. I have great regard for the judge who decided the case, but I cannot agree to the conclusion at which he arrived. It is true Mr. Judy, the receiver, ought not to suffer, and it was his duty to have taken steps promptly to have a decision of the question by the court above.

I have no doubt this may yet be done, and I cannot believe the counsel in the case will permit him to suffer.

I think the question was decided on the first impression and without much consideration, and perhaps after an argument from only one side.

The question is important and ought to be authoritatively decided, and entertaining these views I cannot advise you to direct the taxes paid to be refunded.

Very respectfully,

GEO. W. McCOOK.

Hon. W. D. Morgan, Auditor of State, Columbus, Ohio.

HOLMES COUNTY DEFALCATION.

Office of the Attorney General,
Columbus, March 31, 1855.

SIR:—It appears by your letter of the 29th inst., that of the sum of $21,835.14 taxes assessed against Holmes County, only $8,425.10 is proposed to be paid into the Treasury of State, that of the State common school fund to be paid by that county, amounting to $9,226.12, only the sum of $3,559.90 is ready to be paid, and notwithstanding this default that the authorities of that county claim to receive from the State the following sums:

Proportion of State Com. School fund..	$11,358 20
Interest on Section 16 fund..........	610 34
Interest on Va. Mil. School fund......	479 12
Aggregate	$12,442 66

You require to know whether you are bound to yield to this demand and draw upon the State treasury for the above amount before the sum due from Holmes County is paid into the treasury. I am of opinion that the interests arising on the fund derived from sales of school section sixteen and the Virginia military school lands should be paid over. The principal was received upon a sacred trust to pay the interest annually, for the use of schools, and the State must keep her faith. For these two sums I think you *must* draw.

Your duty with respect to the State common school fund is not so clear. It seems from your letter, although the fact is not distinctly stated, that the defalcation was charged against every fund, State and county, in proportion to the amount of taxes assessed for each, and although it would have been better for the county that the defalcation should have been made good at once, there does not appear any great injustice in this mode of apportioning its present consequences.

I am of opinion, therefore, that you *ought* to draw for the amount actually ready to be paid into the State common school fund $3,559.90 instead of $11,358.20. There is no hardship in this. The injury must fall somewhere. Why not upon the county where it was occasioned?

Respectfully, etc.,

GEO. W. McCOOK.

To the Auditor of State.

MATTHEWS VS. THE STATE.

Office of the Attorney General,
Columbus, April 3, 1855.

DEAR SIR:—As you express much interest in this case, I write to say that I have put in a brief argument in support of the indictment.

Your letter suggests all the authorities, but you cite Wharton with reliance and I consider him *dangerous* without other books to examine in connection. For example, if he is correct in his treatise on criminal law, p. 144, when he asserts that "feloniously took and carried away" is a good allegation of larceny, your indictment must be good. To sustain the test he refers to Hall, and that author says the allegation *must be* "felonice *factus, fuit,* cepit et asportavit." The same allegation is in Hawkins, Hale, East and Archbold; Starkie I have been unable to find and think it singular he should have interpolated "seize" instead of "steal."

Very respectfully,

GEO. W. McCOOK.

J. Robertson, Esq., Hamilton, Ohio.

RECOVERIES BY BANKS AGAINST TREASURERS.

Office of the Attorney General,
Columbus, April 3, 1855.

SIR:—I have examined three letters informing you of several recoveries against the treasurers of Belmont, Guernsey and Harrison Counties. You are already aware of the correspondence between this office and the counsel who represented the treasurer of Belmont County, but information of the recovery of the judgments in the other counties, after the adjournments and when too late to give notice of appeal, was the first knowledge I had that suits had ever been instituted.

So far as any legal proceedings are concerned in these cases we need not consider, as it is too late, unless perchance there should be error on the record.

It is also idle for you to take ulterior measures into consideration until it is known what course will be adopted by our own Supreme Court. You cannot enforce obedience to the law unless you are sustained by the judicial tribunals of our State.

It will certainly be known before the adjournment of the present term whether the decision of the Supreme Court of the United States is to be patiently submitted to in Ohio and I can only advise that executive officers of a State should conform their official action to the decision of the ultimate State tribunal whatever that decision may be.

I return herewith the letters submitted for my perusal.

GEO. W. McCOOK,
Attorney General.

To the Auditor of State, Columbus, Ohio.

SCHOOL LANDS; DEEDS TO HEIRS OF PURCHASER.

Office of the Attorney General,
Columbus, April 3, 1855.

SIR:—I have examined the final certificate and record from the Probate Court of Perry County of the proceedings by the administrator of D. S. Gilham to sell land to pay debts.

It appears that 160 acres were bought by Gilham in his lifetime, part of school section 16; that he died before the payments were completed; that his administrator sold one-half of the land so bought, for the purpose of paying debts, to Sarah Gilham, and that from the proceeds of this sale the residue of the original purchase money has been paid by the administrator.

They ask two deeds, one to Sarah Gilham, as purchaser, the other for the remainng half of the tract to the heirs of D. S. Gilham.

Except the trouble and a little additional care in the recital, there is no objection to two deeds.

First—The purchaser. Sarah Gilham, is clearly entitled, and there is no necessity that she be put to the expense of another judicial proceeding to obtain legal title.

Second—As to the residue of the tract, it appears that David S. Gilham died, and without the production of a copy of his will, the deed should not be made to his heirs at law. *If* it is devised to his children, they may as well be named in the deed, stating in addition that they are "the heirs at law of David S. Gilham." The widow is entitled to dower in the equity of which he died seized, but she can claim it notwithstanding the deed.

GEO. W. McCOOK,
Attorney General.

To the Auditor of State, Columbus, Ohio.

SCHOOL LANDS; CERTIFICATE.

Office of the Attorney General,
Columbus, April 3, 1855.

SIR:—The form you submitted for final certificate to purchasers of school section 16, may be made applicable to sales under prior and repealed laws by adding after the title of the act, these words, "* * * passed April 15, 1852," and of the saving clause "therein of rights acquired under laws theretofore in force * * * *"

The repealing section, you will perceive, has a clause expressly saving everything under prior laws. Swan's St. 834.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK.

Hon. W. D. Morgan, Auditor of State, Columbus, Ohio.

TREASURER'S PENALTY; BANK TAXES.

Office of the Attorney General,
Columbus, April 3, 1855.

DEAR SIR:—I have examined the question submitted in the letter of the auditor of Mahoning, which is herewith returned.

I am of opinion that Mr. King, the treasurer in office at the time the delinquency occurred on the 21st December, is entitled to the five per centum which then accrued as penalty for *the use of the treasurer* and that Mr. Wetmore, who after the dissolution of the injunction against King, was in office as treasurer and collected the taxes, penalty and poundage, is entitled to the *poundage* for collection only,

and that he should have paid the five per centum penalty into the treasury along with the taxes. And as he ought to have done this, that he can be compelled to do so, when it should be paid to Mr. King.

If the payment was a voluntary one, the bank is not entitled to recover the money back, and the payment might solely be made to King. But if the taxes were collected by distraint, the bank can still sue at law, and must bring her action against Wetmore and this course she probably intends to pursue.

In that event and a recovery by the bank in an action at law, the taxes, expenses and damages are to be paid ratably by all the parties who would have shared the revenue collected; but not the penalty or poundage, which the treasurer loses in the event of failure. This apportionment, too, can be forced by mandamus, as it is made the duty of the auditor to perform the act. Swan's St. 933, par. 13.

If the suit is to be brought it would be improper for the commissioners to act, and thus risk paying the money when they could not enforce it again from Wetmore, he being liable to the bank.

I wrote to Mr. King that he was entitled to the money, but that it was a case for the employment of private counsel, and I understood from his letter that the payment by the bank was voluntary. Respectfully, etc.,

GEO. W. McCOOK.

COMMERCIAL HOSPITAL; CINCINNATI.

Office of the Attorney General,
Columbus, April 3, 1855.

DEAR SIR:—I have examined the several laws to which my attention has been directed by your letter of the 30th ult., and referred in the newspaper article accompanying it.

But I am not informed who made the purchase of the ground, how it was paid for, or to whom the *legal title* was taken on such purchase.

I could not, therefore, give any opinion as to the title to the lot or the legal capacity of the city council to direct a disposition of it, by sale or otherwise.

It is not, in my opinion, a case in which I ought, officially, to interfere, for I cannot judge whether the interests of the indigent and the suffering originally intended to be the recipients of the county or the State will not be better provided for, in the disposition which the council may propose to make. Besides, until the meeting of the General Assembly, no rights can be prejudiced, as the purchasers take no title if the city had no capacity to sell, and that body representing the people from whom the county proceeded ought to decide whether the State should acquiesce.

The city of Cincinnati is, and necessarily must continue to be heavily charged for the support of the sick and the insane who are cast upon her and abandoned, and I would be very reluctant to interfere with any arrangements which the council who know all the facts and are presumed to act with integrity and for the best interests of the city, deem it their duty to make, although they might interfere with a charity to which, in its infancy, the State had contributed some assistance.

If, however, the Medical College is injured, it is competent for the trustees to test the legality of the sale by petition to restrain the council from making the conveyance, and if necessary I would be willing to allow the name of the State to be used for this purpose to a petition and permit it to be prosecuted thereafter, if your own courts should, on full hearing, allow the injunction. Beyond this I would not feel it my duty to do anything.

I am, sir, Very respectfully, etc.,

GEO. W. McCOOK.

Sam. G. Armor, M. D., Dean of Faculty, etc, Cincinnati, Ohio.

OHIO PENITENTIARY; SALARY; BOARDING CONVICTS.

Office of the Attorney General,
Columbus, April 4, 1855.

SIR:—I have examined the claims approved by the warden and directors of the penitentiary and presented to you for drafts upon the treasury, as requested by you in your letter of yesterday.

SALARY.

The first is in favor of the executrix of the late warden for salary up to the time of the appointment of the present incumbent, although previously thereto, the office had become vacant by the death of Mr. Wilson.

The warden is entitled to an annual salary and his duties are continuous throughout the year. His salary ceases as soon as he ceases to perform the duties, whether from resignation, removal or death.

> "Where the duties of a public officer, entitled to an annual compensation, continue through the entire year the salary accrues and becomes payable for the space of time only during which the duties are required to be performed." *Lawrence ex parte* 1 Ohio St. Reports 431.

I am of opinion, therefore, that you cannot pay this claim, and that it should be corrected so that the salary should terminate at the death of the warden and not at the time of appointment of his successor.

BOARDING CONVICTS.

The other claim is for boarding furnished by the late warden for convicts in his service, he paying the State for such service, as if they had been hired to other contractors.

The fifth section of the act of February 26, 1855, requires the convict to be fed on coarse but wholesome food, *Swan's Rev. St.* 604; and the act of April 26, 1854, plainly contemplates a purchase of provisions, etc., by the warden, in gross and from the lowest bidder, the bills for which are to be examined, etc., Swan's St. 601, par. 8, 11 and 12.

If they are subsisted at any other than the common table thus to be provided, no claim for such subsistence can be made against the State. Under the present law the convicts cannot be let out by contract to be boarded, nor can the warden board them himself and claim payment for such boarding. The law neither contemplates nor warrants any compensation boarding as such.

I am of opinion that you must reject this claim also. The originals enclosed in your letter are herewith returned.

Very respectfully, etc.,

GEO. W. McCOOK.

Hon. W. D. Morgan, Columbus, Ohio.

COUNTY TREASURER'S BOND.

Office of the Attorney General,
Columbus, April 4, 1855.

SIR:—I enclose you a form for the bonds of county treasurers. The law requires these bonds to be prepared by the prosecuting attorneys of the several counties, *Swan's Statute*, 756, par. 5, and the form can only be submitted to them for their approval or rejection.

The bond itself is very simple, and I think the difficulties in enforcing them have arisen from an improper execution, or rather, an execution after the time limited by law, and not from any defect of form in the bond itself.

The "neglect to give bond" of the first section of the act of May 1, 1854, Swan's Stat. 1017, is a neglect to do

it on or before the first Monday of June succeeding the election, and in such an event the commissioners *must* make an appointment, and they cannot, after that day, accept a bond prepared before it.

I have called attention to this matter in a note annexed to the form. Very respectfully, etc.,

GEO. W. McCOOK.

Hon. W. D. Morgan, Auditor of State, Columbus, Ohio.

FORM OF BOND.

Know all men by these presents that we—— ———————————— are jointly and severally held and firmly bound unto the State of Ohio in the penal sum of ——— thousand dollars, to the payment of which well and truly to be made unto the State of Ohio, we do hereby jointly and severally, bind ourselves, our heirs, executors and administrators. Sealed with our seals and dated this ——— day of ——— in the year eighteen hundred and fifty ———.

The condition of the above obligation is such that whereas the above bound ——— has been duly elected treasurer of the county of ——— in the State of Ohio for the term of two years from the first Monday of June in the year 185— and until his successor shall be elected and qualified. Now if the said ——— shall well and faithfully discharge all the duties of his said office, and shall pay over according to law, all moneys which shall come into his hands as such treasurer, for State, county, township and other purposes, then this obligation shall be void, otherwise to be and remain in full force and effect in law.

Witnesses present

———————————

———————————

———————————

———————————

———————————

———————————

———————————

NOTE.

1. The securities must be, at least, four freeholders.

2. The bond must be executed, approved and accepted by the commissioners, on or before the first Monday of June. *Swan's Rev. Stat.* 1009 ib. 1017.

3. This form only applicable to persons elected, not to appointees, for which purpose it may be here modified.

4. Scrolls made with the pen, for seals, before names are subscribed.

CONTESTED ELECTION; OFFICE DE FACTO.

Office of the Attorney General,
Columbus, April 7, 1855.

DEAR SIR:—I acknowledge your letter of the 4th inst., informing me of the successful contest of the election for the office of probate judge in Fulton County, and inquiring whether the acts of the person whose right to the office has been contested, can be recognized as legal after the determination of the contest by the judgment of the Common Pleas.

I am of opinion that all his acts whilst he was exercising *de facto* the duties of the office of judge, will be adjudged legal and binding, and perhaps this would be true of his proceedings after the judgment of the Common Pleas and before he was ousted by the person contesting his right. He is, however, a party to a proceeding in a judicial tribunal and necessarily has notice of the determination of the court adversely to his claim. He should at once surrender the office to the successful claimant, who should immediately qualify and enter upon the discharge of the duties of his office.

Indeed, I cannot understand why any question of this nature should be permitted to arise, and your letter affords no explanation.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

M. D. Hibbard, Esq., Auditor, etc., Fulton County, Ottokeo, Ohio.

INFORMATION; AMENDMENT.

Office of the Attorney General,
Columbus, April 7, 1855.

DEAR SIR:—My absence at Cincinnati prevented earlier attention to your letter of the 3d inst.

I do not think the case you make is an amendment within the meaning of our probate act, but becomes in fact, by the substitution of another name than that in the complaint, a new proceeding. If so, it cannot be mantained, as the court can only take jurisdiction upon a recognizance and transcript. The point has never been settled authoritatively, but I have no doubt that in the Supreme Court the judgment would be reversed. But it can only be taken advantage upon error, and cannot be reached or inquired into by a proceeding under the habeas corpus act.

Upon habeas corpus the court can only look to the warrant by which the party is held, and if that is legal on its face and specifies a conviction in a court competent to take jurisdiction of the party and the subject matter, all other inquiry is stopped.

The record of the conviction, in which only the error can appear, is not brought before the court on the return of the officer to the writ of habeas corpus. If the courts in your vicinity are inquiring behind the warrant under which

the party is held, it would be well for you to take up the case and terminate such an irregular practice.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK.

A. Summers, Jr., Esq., Bucyrus, Ohio.

COMPENSATION TO CONVICTS.

Steubenville, April 17, 1855.

SIR:—I was unable, before leaving Columbus, to reply in writing to the case made by yourself and Mr. Bruck as to compensation for overwork by a convict who was engaged upon work for the State directly, and not indirectly, through the intervention of a contractor.

My opinion was expressed to you, verbally, that you ought not to discriminate between the convicts employed by contractors and the others who work for the State, and in compliance with your request, I now place it in writing.

The statute should receive a most liberal interpretation and any other than that which I have given would, I believe, be fatal to the discipline of the prison and would rest upon a legislative intention unworthy of the representatives of the people of this State.

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. J. B. Buttles, Warden, etc.

LIQUOR CASES; HABEAS CORPUS.

Steubenville, April 17, 1855.

DEAR SIR:—The tenth section of the act of 1847, Swan's Rev. Stat. 454, provides for a writ of error in certiorari to review the proceedings upon habeas corpus.

You can obtain a record and apply for a certiorari at the next term of your District Court.

The docket of the Supreme Court is now so heavy that the judges despair of seeing the end of it, even at their adjourned term, or I would present the case to that court at once.

Yours very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

A. Summers Jr., Esq., Bucyrus, Ohio.

PROBATE COURT PRACTICE; DISPENSING WITH JURY AT ANY TERM.

Office of the Attorney General,
Columbus, May 3, 1855.

DEAR SIR:—Your letter of the 18th April was not received until yesterday, and I hasten to reply.

By section forty-eight of the act regulating its practice, the Probate Court is required to hold a monthly term for criminal business and, by the seventy-fourth section, the judge is authorized to dispense with a jury at any particular term, but not to dispense with the term itself.

A party recognized to appear at any term must appear at the term in discharge of his recognizance, and if no trial

can be had, must enter into recognizance for his future appearance, not at a time to be arbitrarily fixed by the judge, but at the next term of the court.

The judge must be clothed with this power, or offenses committed within ten days before the first Monday might go unpunished unless the expenses of summoning a jury should be incurred every month, whether there was business for the court or not. No recognizance may be before him ten days before the term, and it would be the duty of the judge, in such case, to dispense with a jury. The object of the General Assembly clearly was to prevent unnecessary expenses; and it is not to be presumed that any judge would be so lost to the duties of his trust as to dispense with a jury when there were recognizances before him of parties entitled to trial.

I have after some examination thought best to defer an answer to the other, and most important, inquiry of your letter, until I have time for more thorough examination and reflection.

Very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

B. W. Fuller, Esq., Prosecuting Attorney, Wilmington, Ohio.

PARDON; BEVINGTON'S CASE.

Office of the Attorney General.
Columbus, May 3, 1855.

SIR:—I have examined the application for the pardon of Henry A. Bevington, and the papers accompanying it.

His pardon upon the present conviction would not, in any manner, affect the case of *The State vs. Bevington* now pending in Huron County.

PROSECUTING ATTORNEY; ADVISER.

State of Ohio,
Attorney General's Office,
Columbus, June 12, 1878.

Thos. J. McElhenie, Esq., Auditor of Wayne County, Wooster, Ohio:

SIR:—In answer to yours of the 8th instant, I have to say, that the prosecuting attorney is made by statute the legal adviser of the county commissioners, and to him your question should be referred. It would be improper for me to give advice in the matter unless he should request it. I presume the question can be answered by the prosecuting attorney.

Yours,
ISAIAH PILLARS,
Attorney General.

PROSECUTING ATTORNEY.

State of Ohio,
Attorney General's Office,
Columbus, June 12, 1878.

John A. Price, Esq., Bellefontaine, Ohio:

DEAR SIR:—I regret I cannot give you an official opinion as requested in yours of the 10th instant. As you are aware, the statute makes the prosecuting attorney the legal adviser of the county commissioners, and I, as attorney general, have no authority for giving an opinion, and it would be improper for me to do so.

Respectfully yours,
ISAIAH PILLARS,
Attorney General.

ATTORNEY GENERAL NOT ADVISER.

State of Ohio,
Attorney General's Office,
Columbus, June 13, 1878.

Col. I. N. Alexander, Van Wert, Ohio:

DEAR SIR:—Your communication of the 10th instant, with enclosures, came duly to hand, and contents carefully noted.

As you are aware, the attorney general is made by the statute the legal adviser of the governor, and various heads of departments and various public institutions and prosecuting attorneys. Beyond these my predecessors, who were Stanbery, Pugh and Wolcott, have held the attorney general was not authorized in giving official opinions.

You say in your letter "the object of taking my (your) opinion was to guard against proceedings in quo warranto."

One of the grounds for the writ is "when any association of persons shall act as a corporation within this State, without being legally incorporated." (S. & Cr., 1265.)

If the association avoids this provision, there will be no danger of proceedings in *quo warranto.*

Respectfully yours,
ISAIAH PILLARS,
Attorney General.

P. S.—Since writing the above, the superintendent of insurance, Mr. Wright, has called my attention to sections twenty-four and twenty-five of act of March 12, 1872 (69 Vol. O. L., 39), and he says he will insist upon the thorough enforcement thereof. PILLARS.

COSTS IN CRIMINAL CASES BEFORE JUSTICES OF THE PEACE.

Office of the Attorney General,
Columbus, May 8, 1855.

SIR:—Your letter of the 6th February having been mislaid is the best apology I can give for so long neglecting a reply.

The right of the justice and constable to their costs is not at all dependent upon the conviction of the accused in the court to which he is recognized, for the costs are to be paid in case the defendant "shall afterwards be acquitted in the further progress of the case." Swan's St. 536, par. 23.

Although this section is modified by the act of 7th March, 1842, Swan's Stat. 541, par. 37, the particular provision I have quoted is not changed.

Taking these two sections in connection with the explanatory act of 1845 the true interpretation is not, in my opnion, difficult.

Whenever the magistrate commits or recognizes a party to another tribunal having jurisdiction of the offence, for trial, the costs are to be paid by the county treasury without any regard to the character of the crime or the final result of the prosecution.

No time is fixed directly by law when these costs shall be paid out of the treasury, but the twenty-third section requires the justice, immediately after the trial, to make out the costs and deliver a transcript to the auditor who is required to file the same. These costs are to be paid from the treasury and the law being silent as to the particular time of payment, it is but reasonable to presume the General Assembly intended the payment to be made or the order drawn at the time the paper, which is the voucher, is required to be preserved and filed.

I regret the delay in replying to your questions, and I am, Very respectfully, etc.,

GEO. W. McCOOK,
Attorney General.

James Walker, Esq., Prosecuting Attorney, Bellefontaine, Ohio.

PROBATE JUDGE; PER DIEM IN CRIMINAL BUSINESS.

Office of the Attorney General,
Columbus, May 8, 1855.

SIR:—Your letter of the 29th March having been mislaid for some time, escaped earlier attention.

The forty-seventh section of the act of 14th March, 1853, Swan's Stat. 752, provides an annual compensation to probate judges for their services in criminal business, and declares they shall receive no other compensation for services in criminal business. The fees to which they would otherwise be entitled are to be taxed in the cost bill and, when collected, are to be paid into the county treasury.

I am clearly of opinion that the probate judge is not to be paid anything, by way of per diem, for the transaction of any criminal business of which his court has jurisdiction.

He is, however, entitled to two dollars per day for holding an examining court under the act of March 12, 1852, Swan's Stat. 722, when any person has been committted to prison, charged with the commission of any crime or offence, of which the Court of Common Pleas has jurisdiction, par. 1, 2.

Regretting the delay in replying to your interrogatory, I am, sir. Very respectfully, etc.,

GEO. W. McCOOK,
Attorney General.

M. D. Hibbard, Esq., Auditor, etc., Ottokeo, Ohio.

ESCHEAT IN LUCAS COUNTY.

Steubenville, June 11, 1855.

DEAR SIR:—Constant engagements in court have prevented an earlier reply to your letter of the 3d May.

If the coroner is disposed to act honestly he may pay the money into the treasury of the county where it may await lawful claimants, if any exist. If he will not do this, you must procure some person to administer, as an escheat can be lawfully established only through a *peaceful* administration.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

W. J. Mann, Esq., Toledo, Ohio.

PRACTICE IN PROBATE COURT; COMPLAINT BOND.

Steubenville, June 15, 1855.

DEAR SIR:—Your letter of the 7th inst., has been forwarded to me here. The decision to which you refer was made by the District Court in Columbiana County, but no judge of the Supreme Court was in attendance. I understood from the prosecutor of Richland County that Judge Bartley had intimated the same opinion and the probate judge was conforming his action accordingly.

The question is certainly not free from doubt, and has never, to my knowledge, been passed upon by the Supreme Court. The books to which you refer have no weight. The one is not entitled to any credit anywhere, and the other is

a new edition prepared, I am afraid, without the case which would have been necessary in an original work. For I am satisfied that out of abundant caution the learned judge would have inserted the finding in the form if his attention had ever been called to it. I have not yet seen or examined the work, however.

I will not say that the absence of the finding will prove fatal on error, but you ought to endeavor to avoid the difficulty in all future cases.

I am, sir, Very respectfully, etc.,

GEO. W. McCOOK.

Jno. Johnston, Esq., Batavia, Ohio.

FOREIGN INSURANCE COMPANIES.

Office of the Attorney General,
Columbus, June 26, 1855.

DEAR SIR:—The question as to the right of your company to transact business in this State without complying with the provisions of our law regulating companies incorporated under the law of other States or countries, has been referred by the Auditor of State for my determination.

My present impression is that you must comply with the law, but I am willing to consider the matter further.

If Mr. Pell has the opinion of Ogden Hoffman, given since he became Attorney General of New York, under a statute similar to ours, I will examine it before I make up my own, if Mr. Pell will send it to me at the Astor House, as I proceed to New York tomorrow.

The sentence copied from the opinion of the Attorney General of Illinois is enough, and I do not wish to see another word of it.

I am, sir, Very respectfully, etc.,

GEO. W. McCOOK.

Mr. Howard Matthews, Cincinnati, Ohio.

PARKER VS. THE STATE; RECOGNIZANCE.

Steubenville, July 27, 1855.

DEAR SIR:—I submitted this case on a written brief, and as I was absent at the adjournment of court, I knew nothing of it afterwards. My impression is that it was not reached, as it came late on the calendar.

I have heretofore given an opinion that on forfeiture of a recognizance in the Probate Court, proceedings to collect it should be instituted in a court of common law jurisdiction.

You will therefore seek your remedy in the Common Pleas.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

U. C. Canfield, Esq., Prosecuting Attorney, Chardon, Ohio.

TREASURER'S BOND; QUO WARRANTO.

Steubenville, July 27, 1855.

DEAR SIR:—I regret the difficulty in your county and Mr. Toole should have obviated it by accepting the appointment. If, however, the bond *as it now is* was actually given on the first Monday of June, I would be slow to conclude that the commissioners by delaying action on it, could oust him of his office. On the other hand, as the commissioners are required to perform an act, namely, appoint to the vacancy on failure of the treasurer-elect to give bond within a limited period, I cannot construe the time fixed by the statute as directory merely. The validity of the bond, and

in the event of a default by the officer, the security of the county depend upon the legality of the action of your commissioners. In the Common Pleas I have been informed it has been decided in one circuit that a bond given after the first Monday of June is good and binding on the securities, and in another that it is illegal and the sureties discharged.

QUO WARRANTO.

The form to which you refer may readily be adapted to this case. The allowance should be by a judge of the Supreme Court, but the information may, in my opinion, be prosecuted in the District Court. It clearly may, if prosecuted in my name, and unless there is personal or political malice in this case, I authorize you to use it for this purpose. The information need not refer to the falsity of the record, but will negative the giving or approval of the bond on or before the first Monday of June. I do not feel it my duty to advise you whether you ought or ought not to proceed, but am free to say that I desire an authoritative decision of the question by the Supreme Court, if a proper case has arisen. If you determine to apply for an allowance you should give Mr. Toole notice so that he may be heard upon the application. I have the power to institute proceedings of my own motion, but in this case I would move for leave, as the difficulty may be obviated after an allowance on hearing.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

H. R. Saunders, Esq., Logan, Ohio.

TAXES ON PERSONALTY IN OHIO WHERE THE PARTY, BEFORE REMOVAL, WAS ASSESSED, FOR THE SAME YEAR, IN ANOTHER STATE.

Steubenville, August 7, 1855.

DEAR SIR:—I acknowledge your letter of the 4th inst., presenting for my opinion the case of Frazier Cushman, who was assessed in Indiana before his removal to this State for the year 1854, and subsequently assessed for the same year in Ohio.

Every person resident in Ohio at the time fixed by law is subject to assessment for the current year. Our laws for the year afford protection for his property and he must contribute to the support of the government. We cannot recognize what has been done in other States, and when the party changes his domicil he becomes fully subject to the operation of our laws for the collection of taxes.

The hardship upon Mr. Cushman is the payment of the taxes in Indiana, and not in Ohio.

I am busily engaged preparing for the District Court here and write my first impressions, but they are very decided, and I think upon reflection you will concur with me.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK.

Thomas Milliken, Esq., Hamilton, Ohio.

PROTEST OF BANK NOTES FOR NON-PAYMENT ON DEMAND IN GOLD OR SILVER COIN.

Steubenville, August 9, 1855.

SIR:—Where a demand has been made, by a notary, on a bank for payment of its circulating notes in gold or silver coin, which payment is refused, and the circulating notes have been passed into the hands of the banker who refuses to return them, I am of opinion that it is not necessary to attach the notes, of which payment was demanded, to the protest.

A copy, as nearly as can be, under the circumstances, should be annexed; and the refusal of the banker to return the notes is a sufficient excuse for not attaching the original, or a precise copy. If this were not so, the banker would have it in his power at any time to defeat the operation of the laws by obtaining the notes under pretence of redemption and then refusing their return. By this course the bank would only subject itself to a civil action for the recovery of the amount of the notes, thus escaping the forfeiture of its franchises, which the law has imposed as the penalty of a refusal to redeem.

I am, sir,

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus, Ohio.

MARION BANK; PROTEST FOR NON-PAYMENT OF NOTES.

Steubenville, August 10, 1855.

DEAR SIR:—I am of opinion that the paper of which a copy is enclosed to me, is not such a protest as is contemplated by the thirty-fourth section of the "act to authorize free banking."

The notary has made no demand of payment at the bank during usual business hours, but undertakes to determine judicially upon the sufficiency of a demand of which evidence is furnished him in the shape of ex parte affidavits.

This he had no right to do, and you would not, in my opinion, be warranted in proceeding, as an executive officer, to sell the stocks or to place the assets of the bank in the hands of a receiver. The whole subsequent proceedings contemplated by the act are summary, to be controlled by executive, not judicial officers, and the result is to remove a large amount of property from the possession of persons, appointed by its owners, to manage it.

If an act of insolvency is committed and it is evidenced in the manner prescribed by statute, the law imposes the penalty—a forfeiture—and it should be rigidly exacted; but where consequences so serious are to result, courts are careful and executive officers should not be less so, to proceed only upon a clear case.

Whatever I may be compelled to think of the conduct of this corporation as shown by the papers, I am satisfied

I write in haste during recess of court, but not without confidence on both points.

that the proper steps have not been taken, by the holders of the bills, to obtain a valid act of protest.

As to the other point on which you desire an opinion, I have already given one in a letter addressed to you and handed to Mr. Dumble, who came here to see me. I think

it monstrous that the party on whom the demand is made, should be permitted, by his own unlawful act, in taking and refusing to return a note presented for payment to escape the consequences of his refusal to redeem. He thus obtains impunity for one unlawful act by the commission of another. In such a case the next best evidence which the nature of the case will admit, is sufficient. I enclose a copy of my letter as it may not have reached you.

I am, sir,

Respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State.

MILITIA LAWS; THE MODE OF SELECTING OFFICERS THEREUNDER.

Office of the Attorney General,
Columbus, November 12, 1855.

SIR:—I have the honor to acknowledge the receipt of your letter of the 16th of October, desiring my opinion upon the militia laws of this State in force at the time of the adoption of the constitution of 1851, and the effect of certain provisions of that instrument upon these laws.

Regretting very much that the General Assembly did not, in accordance with the suggestion of your message, pass a law for the organization of the militia consistent, in all its parts, with the constitution, or at least repeal the old laws and thus relieve executive officers from doubt and embarrassment, I proceed to give you my views of these laws in reply to the questions to which you particularly invite my attention.

First—Are the officers who were duly in command at the time of the adoption of the present constitution, and

whose terms have not expired under the thirty-ninth section of the act of 1824, still authorized to retain their positions, or did their official authority terminate with the adoption of that instrument?

My mind has not been free from doubt on this question, inasmuch as the law provided one mode for the election of some of these officers, and the constitution another. I was inclined to the opinion that by force of the adoption of the constitution, the commissions of officers previously elected in a manner inconsistent with its provisions, were vacated. But the same offices designated by the same titles are adopted from the constitution of 1802, and the schedule, which was designed to prevent the interregnum which would otherwise have existed, by its tenth section provides that

> "All officers shall continue in office until their successors are elected and qualified."

This should be held to include all officers, military as well as civil, and I am, therefore, of opinion that the officers duly in commission under the thirty-ninth section of the act to which you refer, 2 Curwin's Rev. Stat. 1,049, whose terms have not expired, are still authorized to discharge their functions, and that their official authority did not terminate with the adoption of the constitution.

Second—Are brigadier generals and field officers elected since the adoption of the present constitution, by commissioned officers, etc., in accordance with the provisions of the old constitution, and commissioned by the Governor, entitled to be respected as such, or are all such elections and commissions void?

The militia act of 1824 in the mode of electing all officers of the line, above those of the company, is different from the mode prescribed by the constitution, and falls by reason of the inconsistency. In this particular the law is not saved by the schedule.

Whenever, therefore, a vacancy for any cause exists,

in the general or field offices, that vacancy must be supplied in the manner given by the constitution, or it is not supplied at all.

The election cannot be by the commissioned officers of the brigade or regiment, but must be made by all the persons subject to military duty, in the proper district, article 9, par. 2. The commission can only follow a lawful election, and if any has been issued in a case where the election has been held by the commissioned officers alone, it was unlawfully issued.

Third—Has the Governor any power to appoint or to order an election for the appointment by "the persons subject to military duty," of any officer in the militia, whatever?

In replying to this question I will consider *first,* the power of appointment. I am of opinion that the Governor has no power to appoint any officer in the militia except the officers of the general staff, and "such other staff officers as may be provided by law." Art. 9, par. 3.

I am well aware that Governor Wood, since the adoption of the constitution, appointed to vacancies in the office of major-general, in at least two instances, and that you, following this precedent, have also supplied a vacancy in the same manner.

The power, as I understand, was claimed to be exercised under the eighth section of the schedule, which is as follows:

> "Vacancies in office occurring after the first day of September, 1851, shall be filled, *"as is now prescribed by law,"* and until officers are eletced or appointed and qualified under this constitution."

I inquire then, what was the mode prescribed by law for filling vacancies in the office of major-general on the first day of September, 1851? The statutes are wholly silent, but I make no quibble upon this, as the manner was prescribed by the constitution of 1802; and although that instrument is undoubtedly abrogated I concede, that for the

purpose of construing a statute passed during its obligation and with reference to its provisions, we are to look to that constitution, and anything prescribed by it was on the first of September, 1851, prescribed *by law*.

In article 2, paragraph 8, of the constitution of 1802, we find the power of the Governor to fill vacancies.

> "When any officer, the right of whose appointment is, by this constitution, vested in the General Assembly, shall during the recess die, or his office by any means become vacant, the governor shall have power to fill such vacancy, by granting a commission which shall expire at the end of the next session of the legislature."

Major-generals were of this class of officers, as they were "appointed by joint ballot of both houses," art. 5, sec. 5, and the filling of a vacancy in that office may be, therefore, within the letter of the eighth section of the schedule, but it is, in my opinion, forbidden by the whole tenor and spirit of our constitution. For if construction is ever to be applied strictly, or to one portion of the constitution rather than to another, it should be so applied to those clauses which confer upon the executive appointing power.

Under the former constitution then the Governor might, within the following careful limitations, appoint to a vacancy:

First—If it was in an office elective by the General Assembly.

Second—If it occurred during the recess of that body.

Third—To continue only until the end of the next session thereof so that the vacancy might properly be supplied.

But under the constitution of 1851 the General Assembly can exercise the appointing power only in particular cases of which the election of a major-general is not one, art. 2, par. 27, and if you recognize the power as existing in the Governor since the first of September, 1851,

you strip it of the limitations which hedged it in before that day.

If I may be permitted to illustrate by a reference to the practical operation of the exercise of this power the case of major-general of the first division affords an instance.

A vacancy occurred by resignation in February, 1853, as I am informed, and it was supplied by an appointment for the unexpired term of the former incumbent, although the office was not then elective by the General Assembly, and the vacancy occurred during the session, and the limitation of term under the constitution of 1802 was to expire at the end of the next session. Another vacancy occurs by resignation in the same office in 1855, although if the preceding appointment had been ever so legal, it had expired at the end of the next succeeding session of the legislature, and it is again filled by the executive. Now I am of opinion even if the constitution of 1802 were still in force, if a vacancy had once been filled by the executve and the legislature had failed at the next session to elect, that the Governor could not make another appointment. The office must remain vacant until the legislature should act. How can the case be stronger under the present constitution, when the vacancy continues not from any neglect of the legislature to fill it, but because there was a constitutional disability to do so. Without undertaking to determine whether the commissions of major-generals upon executive appointment, or of brigadiers upon an unconstitutional election, are absolutely void or whether they should be vacated by quo warranto, I do not suppose it is necessary now to determine, for I feel assured that no good citizen would undertake in such a case to exercise any doubtful authority.

As to the other branch of your inquiry, involving as it does the consideration of the power of the executive to order any election in the militia, I beg to send as a reply an extract from my letter of the 20th March, 1855:

> "You cannot, in my opinion, order the election of generals of division or brigade. The mode of electing those officers was provided by law, but that mode is inconsistent with the provisions of the constitution, and falls, for it cannot be saved by the first section of the schedule. Before there could be an election, it would not only be necessary that you, as commander in chief, should order it, but the places of election must be designated, as well as judges to hold it and the manner of conducting it and the mode of certifying the result must also be prescribed. These are matters to be prescribed by law, and not by an executive order, or military proclamation."

This disposes of the question as to the superior officers.

My views have undergone no change and subsequent reflection has only tended to strengthen me in the conclusion at which I then arrived. I find no law which authorizes you "to order an election for any officer in the militia whatever."

The mode of electing officers of the company is the same under the present as the former constitution, and in regiments, brigades and divisons without general or field officers, captains take command by seniority and may perform the functions of those officers.

I am, sir,

Very respectfully, etc.,
GEO. W. McCOOK.

To the Governor.

MEDICAL COLLEGE OF OHIO AT CINCINNATI.

Office of the Attorney General,
Columbus, November 18, 1855.

SIR:—I have considered your letter of the 6th of November desiring my opinion upon the application of Mr.

Ball, treasurer of the Ohio Medical College, and have examined the statements contained in the letter of Mr. Vattier of March 2, 1855.

Without entering into examination of the claim to exemption from taxation on the ground that it is within the exceptions of the law, I decide that it should not be upon the duplicate if the facts of the case are correctly stated in the letter to which I have referred.

For the collection of taxes upon real estate the law fixes a lien upon the land itself, and not a personal obligation upon the party in whose name it is charged upon the duplicate.

It is sold as delinquent, or if not sold declared forfeited *to the State* and again offered as forfeited lands.

These provisions are wholly inapplicable where the fee of the land is in the State, and it is against public policy and the sovereignty of the State that her property should be subjected to burdens imposed by municipal authorities. Dr. Vattier states that the building and the lot upon which it is erected belong to the State of Ohio. If he is not mistaken in the statement of fact, the property should not be upon the duplicate, and the purchaser should not be imposed upon by paying for a property to which he can acquire no title.

GEO. W. McCOOK,
Attorney General.

Hon. Wm. D. Morgan, Columbus, Ohio.

SAMUEL A. SNIDER'S APPLICATION FOR A DEED FOR PART OF SECTION SIXTEEN, HANCOCK COUNTY, SOLD TO JOHN PATTERSON.

Office of the Attorney General,
Columbus, December 11, 1855.

SIR:—I have examined the papers submitted with the application for a deed in this case, and return them for preservation in your office.

In March, 1836, John Patterson bought a part of a school section 16 in Hancock County, and in 1841, having completed the payments, obtained a final certificate upon which to procure a deed. The certificate, however, erroneously described the tract as the northwest fraction of the *northwest* quarter of section 16, etc., instead of the W. W. fraction of the *southwest* quarter, the true description of the land which Patterson had bought, and of which immediately after the purchase he took possession.

The deed from the Governor follows the erroneous description of the certificate. In 1843 Patterson sold and conveyed to Gray; and in 1854 Gray sold and conveyed to Snider who is now in possession, and in these deeds the erroneous description is continued. In 1855 Snider, having detected the error in his paper title, reconveyed the lands described in his deed to the State, obtains a certificate of the purchase and payment by Patterson, according with the true description, and as grantee under Patterson, who is now dead, but without any formal assignment of the certificate of purchase, demands a deed.

Upon this state of facts you desire to know whether the deed may lawfully issue to Snider.

I am of opinion that the deed ought to issue. The deed to Patterson by Governor Corwin in 1841 passed no title, because:

First—There was no tract in the northwest quarter,

Samuel A. Snider's Application for a Deed for Part of Section Sixteen, Hancock County, Sold to John Patterson.

as it was never subdivided, which would answer the description of the deed, the northwest *fraction,* etc.

Second—The whole of the northwest quarter had been sold to Andrew B. Kagy in 1853, three years before Patterson's purchase, and a deed having been executed to him for the whole quarter the State had no title to convey to Patterson in 1841.

It may issue to Snider directly. No final certificate was ever made until that of August 3, 1855, by Henry Brown, auditor, the paper given as such by Wm. L. Henderson, May 26, 1841, being altogether illegal, as there were no facts in his office to support it.

This certificate shows, it is true, that Patterson is entitled to the deed, and there is no technical assignment of the paper itself, within the letter of the statute, and none can be procured, as Patterson is now dead. But Patterson sold the land which he bought and the possession of which he took to Gray, who sold to Snider, and although the description of the deeds is inaccurate, they would nevertheless in equity as against Patterson if the legal title were in him, entitle Snider to a decree for the conveyance. If the State could be sued as a natural person the same result would follow as against her occupying, as she does, the position of a naked trustee.

I treat these deeds then, defective as they are, as an equitable assignment of the certificate, and as the legal title is still in the State, the executive officers ought to do in her behalf that which her own laws would enforce against a natural person.

Let a deed then be made in the usual form, to Snider, as assignee of Patterson.

Very respectfully, etc.,

GEO. W. McCOOK,

Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus, Ohio.

SWAMP LANDS RECLAIMED.

Office of the Attorney General,
Columbus, December 11, 1855.

SIR:—I have examined the question made in the letter of the auditor of Wood County as to the liability of reclaimed swamp lands to taxation, and it is difficult to understand how the doubt arises.

Until the completion of the contract the right to the land is, to say the least, inchoate, and it may never become the property of the contractor. But after the contract is completed he has property in the land, although the evidence by which his title to it is to be manifested, is not yet complete. It should surely be taxed as soon as the contract is completed, for it is at the option of the party to present his certificate and obtain a deed. By delaying to procure the evidence of his title to the property which he owns and enjoys, he might, upon any other construction, altogether escape taxation for it.

I am, sir,

Very respectfully, etc.,
GEO. W. McCOOK,
Attorney General.

Hon. Wm. D. Morgan, Auditor of State, Columbus, Ohio.

HOCKING TREASURER'S CASE.

Office of the Attorney General,
Columbus, December 18, 1855.

DEAR SIR:—Your letters of the 27th November and 4th December were duly received. I have been very much engaged in preparing my report for the General Assembly and did not think it necessary to give any special attention

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