

Sentence of William R. James From Washington County.

fidavits or otherwise, that the executive of the demanding state has been imposed upon, withholding his warrant until such executive be apprised of the proofs of such imposition with a view to a withdrawal of the requisition. For such a purpose, to examine into the *bona fides* of the proceeding extrinsic affidavits may, in my opinion, be properly considered.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

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SENTENCE OF WILLIAM R. JAMES FROM WASHINGTON COUNTY.

The State of Ohio,  
Attorney General's Office,  
Columbus, January 7, 1875.

*Colonel G. S. Innis, Warden, Etc.:*

SIR:—I have examined the certificates of sentence of William R. James, made October 30, 1869, where it appears that said James was on that day sentenced to imprisonment in the penitentiary from Washington County, in two cases—in one for two, and in the other for six years—it not being stated in either sentence that the term of imprisonment should begin on the expiration of that named in the other; also my predecessor's opinion of the date of January 30, 1871, referred with the certificates with respect thereto, that his time would expire with the longer term. Although not clear that my predecessor is correct in his conclusion, my conviction is not so strong to the contrary to warrant me in advising you differently.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

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*Condemnation for the Public Works.*

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## CONDEMNATIONS FOR THE PUBLIC WORKS.

The State of Ohio,  
Attorney General's Office,  
Columbus, January 9, 1875.

*A. B. Newbury, Esq., Secretary of Board of Public Works,  
Columbus, Ohio:*

SIR:—In reply to the queries propounded by Thomas F. Wildes in his communication of the 4th instant, Drane says:

First—The lessees should deposit before, or during proceedings, money enough to meet the damages assessed. If it should fall short they would only have to make up the deficiency before occupying the land.

Second—Every one who will be injuriously deprived of any water should be notified, etc. Even those along the waterway from the proposed channel to the Cuyahoga River should, out of abundant caution, be notified. To such as clearly are not damaged in any appreciable amount merely nominal damages should be tendered.

Third—No other issue, I think, can be made in such proceedings except as to damages. The proceeding is a statutory one. Nothing can be done in it except the statute authorizes the same.

Fourth—I regard the action of the board as conclusive on the question of the necessity of the appropriation proposed, and no question as to that can be made.

Very respectfully,

JOHN LITTLE,  
Attorney General.

*Publication of Delinquent Tax Lists—Individuals Can Carry on Insurance Business; Franklin Mutual Insurance and Aid Association is Subject to the General Insurance Laws.*

PUBLICATION OF DELINQUENT TAX LISTS.

The State of Ohio,  
Attorney General's Office,  
Columbus, January 14, 1875.

*Assistant Prosecuting Attorney, Port Clinton, O.:*

SIR:—I am disposed to the opinion that the 48th section of the County Auditors' Act as amended in 1872 (Laws, p. 169), will be complied with by inserting the notice therein contemplated twice in succession in a weekly newspaper, although the last insertion be but three days before the 3d Tuesday in January. In the case in 8 O.114, the notice was held bad because the record did not show all the publications required were *between* the period named.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

INDIVIDUALS CAN CARRY ON INSURANCE BUSINESS—FRANKLIN MUTUAL INSURANCE AND AID ASSOCIATION IS SUBJECT TO THE GENERAL INSURANCE LAWS.

The State of Ohio,  
Attorney General's Office,  
Columbus, January 28, 1875.

*Hon. W. F. Church, Superintendent of Insurance:*

SIR:—The inhibition against insurance in this State otherwise than in accordance with the insurance laws thereof, is against *companies, corporations and associations*. (See

*Appropriation for Expenses of the Ohio River Improvement Commission.*

acts of April 12 and 27, 1872, Laws, pp. 32 and 140). I see no objection to *individuals* insuring each other and, in so doing, they would not be subject to any of the requirements of those laws. It is difficult to say from the pamphlet inclosed, but I am disposed to the opinion from an examination of it, that the "Farmers' Mutual Insurance and Aid Association" is an "association" within the meaning of the statute and that it cannot carry on the business of insurance except in accordance therewith.

Yours, etc.,  
JOHN LITTLE,  
Attorney General.

APPROPRIATION FOR EXPENSES OF THE OHIO RIVER IMPROVEMENT COMMISSION.

The State of Ohio,  
Attorney General's Office,  
Columbus, January 28, 1875.

SIR:—In answer to yours of yesterday I have to say:

Money (if such there be) in the asylum fund, transferred thereto from the general revenue fund, may properly be applied to the extent of the appropriation named, in payment of the "expenses of Ohio River Improvement Commission," as per the act of April 20, 1874 (Laws, p. 157).

*As to such money*, the appropriation contravenes no provision of the constitution, for the money is not sought to be applied to any other use than that for which it was raised by taxation.

Money, however, in the asylum fund raised by taxation for asylum purposes, or "transferred" thereto from other funds than the general revenue, cannot, in my opinion, be legally applied to the use directed in the act. To so apply

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*Trial Can Be Had on Certified Copy of an Indictment in  
Certain Cases.*

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it would be to use the money for a purpose other than that for which it was raised by taxation, which is forbidden by the constitution.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

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TRIAL CAN BE HAD ON CERTIFIED COPY OF AN  
INDICTMENT IN CERTAIN CASES.

The State of Ohio,  
Attorney General's Office,  
Columbus, February 10, 1875.

*J. A. Justice, Esq., Prosecuting Attorney, Canfield, Ohio:*

DEAR SIR:—Yours bearing date January 5, but post-marked February 6, is received.

You inquire: "If a person is indicted, tried, verdict guilty; motion filed to set aside verdict sustained, and then the indictment lost or *stolen*, can a prosecutor proceed and again try the defendant upon a certified copy of said indictment?"

In my judgment he may.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

*Constitutionality of the Act Providing for the Maintenance  
of Chutes for the Passage of Fish.*

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CONSTITUTIONALITY OF THE ACT PROVIDING  
FOR THE MAINTENANCE OF CHUTES FOR  
THE PASSAGE OF FISH.

The State of Ohio,  
Attorney General's Office,  
Columbus, February 11, 1875.

*Hon. George L. Converse, Speaker of the House of Representatives:*

SIR:—I have the honor to acknowledge the receipt of House Resolution, No. 148, recently adopted, requesting from this office an "opinion with regard to the constitutionality of an act to provide for the erection and maintenance of chutes for the passage of fish over the dams across the streams of this State," passed March 31, 1871 (O. L., Vol. 68, page 15), and submit the following in answer thereto:

The act referred to requires the owners and proprietors of dams across rivers and creeks in this State to erect and maintain at their own expense, sufficient passage ways or chutes for the passage of fish over such dams, and contains provisions for enforcing the requirement. The question presented is, whether the General Assembly has power to make and enforce such requisition.

The grant of legislative power in Ohio is general, and extends to all subjects falling within the domain of legislation in general, unless expressly excluded by the constitution (11 O. S., 534). That legislation for the protection and propagation of fish in the private streams and other waters of the State comes clearly within such power, there is no doubt. It is sanctioned not only by considerations of public good, but by long and established usage. Laws upon the subject enacted at an early date may be found upon the statute books of most of the older states. This State has asserted the power for many years, as in the passage of its seine laws. There are numerous decisions of the courts of

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last resort, in a number of states, which it is unnecessary particularly to refer to, that recognize the authority of the legislature over the subject. What such legislation shall be—whether to provide for passage ways for fish to ascend over dams, etc.—is for the General Assembly to determine.

But while the legislative power over the subject is complete and unquestionable, it must be so exercised as not to result in the destruction of, or injury to, private property unless compensation be made to the owners therefor. (See 19th section of Bill of Rights.) This act makes no provision for such compensation. If, therefore, its enforcement would result in injury to private property existing and vested at the date of its passage it is to that extent unconstitutional. (7th O. St., 45 and 8th O. St., 333.)

The right of private property in a stream of water results from the ownership of the land over which it passes. In fact, the term "land" in its legal signification comprehends, says Lord Coke, "any ground, soil, or earth whatsoever, as meadows, pastures, woods, *water*, marshes, furzes and heath." "The right of flowing water is now well settled to be a right incident to property in land." (Shaw, C. J., 10 Cush., 547.) It is the *use* of the water in which the land proprietor has an ownership, and not the water itself. (5 O., 477.) The restrictions upon this use, in this State, are stated by Judge Wood in *Buckingham et al. vs. Smith*, 10th O., 297. "The uses of the waters," he says, "of private streams, belong to the owners of the lands over which they flow. They are as much his individual property as the stones scattered over the soil. If such streams can be passed with boat and rafts, the public has the right of passage; but, subject to such easement, the owner of the land may appropriate the use of the water in his own discretion, taking care not to flow it on the proprietor above, and to return it to its natural channel before it leaves his own lands." (See also. 5 O., 321, 16 O., 540, 6 O. St., 187, and 9 O. St., 495.)

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of Chutes for the Passage of Fish.*

Subject to these conditions, and perhaps to a single other hereinafter mentioned, the right of riparian proprietors to construct and maintain dams across their streams in such form and manner as they chose, was, prior to the act named, unquestionable in Ohio, however the law may be since. It inhered in the land itself, and of course passed by conveyance, often giving it its chief value.

Perhaps most of the water privileges in the State were, at the date of the act, what the law terms "ancient," they having been enjoyed as of right for twenty-one years and more. Even if not well founded in their inception they ripened by prescription into indefeasible rights, as was supposed. Some of the dams, though tight, retained scarcely enough water to run the mills connected therewith. This is a fact of common observation. To impose a new requirement upon the proprietors of such dams, compelling the erection of chutes or passage ways, however small, for fish, would result in injury to their property, a hardship they could not be compelled to undergo, unless it be true as a general proposition of law, as held in a line of cases, that the right to build dams for the use of mills is under certain implied limitations, among which is one that "a sufficient and reasonable passage way shall be left for fish; and that this limitation being a public benefit is not extinguished by any inattention or neglect in compelling the owner to comply with it." (4 Massachusetts, 522.) But this doctrine is founded upon a long continued custom of the legislature (of Massachusetts) to exercise control over the subject of the locating and constructing of dams so as to provide passage ways for fish to ascend. And it is held in these cases that if the State either expressly or by necessary implication waive the limitation or requirements as to such passage ways in the grant of a mill privilege, it would be bound, and the limitation could not be enforced. (See Angell on Water Courses, 94; also *People vs. Platt* 17 John, 195.) In Ohio no such custom has existed. The right to supervise the

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structure of dams has never been asserted by the State. On the contrary, the legislature has by implication recognized and affirmed the right to obstruct the passage of fish by means, plan or device whatever, *excepting mill dams*, to being an amendment of that of March 19, 1857, which related only to navigable waters provides. "That it shall be unlawful for any person or persons \* \* \* to use any means, plan or device whatever, *excepting mill dams*, to prevent the transit of fish in the waters of any bay, river or stream, or within the waters of any lake, at a less distance from the mouth of such bay or river than sixty rods." The only legislative limitation upon the construction of dams in this State, so far as I know, prior to the act of January 31, 1871, is that contained in the 129th section of the crimes act, wherein it is made an offense to erect, continue or keep up any dam or other obstruction, in any river or stream of water in this State, and thereby raise an artificial pond or produce stagnant waters, which shall be manifestly injurious to the public health and safety.

I am therefore of the opinion that the doctrine alluded to, which has obtained in Massachusetts, and perhaps in some other New England states, *by reason of the established legislative policy thereof*, does not obtain in Ohio.

It is true that the maxim, "*Sic utere tuo ut alienum non loedas*," has been applied to the right of riparian proprietors to take fish from their streams; and that a supra-riparian proprietor at common law might maintain an action to abate an obstruction as a nuisance which prevented fish from ascending to his premises. Whether this be law in Ohio—the obstruction being a mill dam—*Quere*. But this is quite certain, I think, that where the owner has acquired a prescription right to such obstruction, such an action would not lie.

Without prolonging this communication, I have come to this conclusion from an investigation of the inquiry submitted.

That the act of January 31, so far as it relates to what

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are termed "ancient dams," and to those rightfully existing at the time of its passage, the property in which would be impaired by its enforcement, is unconstitutional. But so far as it has a prospective application—relating to dams constructed after its passage, and perhaps also in so far as it relates to those existing at that date but not as by prescription, which would not be impaired by the erection of such chutes, it is constitutional.

The erection of such passages and chutes being for a public use, I have no doubt that the General Assembly might provide for the appropriation of private property necessary for their construction; but, as has been stated, private property—and such is the right of owners in their mill privileges—cannot be taken, even for public use, without compensation.

Very respectfully,

JOHN LITTLE,

Attorney General.

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OCTOBER ELECTIONS ARE GENERAL ELECTIONS; APRIL ELECTIONS ARE NOT; WOOD COUNTY SEAT QUESTION MUST BE SUBMITTED AT THE FALL ELECTION.

The State of Ohio,  
Attorney General's Office,  
Columbus, March 10, 1875.

*Hon. James Murray, Neil House:*

DEAR SIR:—You inclose a copy of the act providing for the removal of the county seat of Wood County, and ask, on behalf of certain officers charged with duties thereunder, what, in my judgment, is meant by the phrase "general elec-

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*October Elections Are General Elections; April Elections Are Not; Wood County Seat Question Must Be Submitted at the Fall Election.*

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tion" as used therein—whether it refers to the April or October election. But for your personal request, I should certainly not venture to express an opinion on a question of construction to one so much better qualified to judge of it, than myself.

The act, in accordance with the terms of the constitution, requires the submission of the question of removal to the electors of the county "at the next general election after the passage thereof."

I think the October election is meant for several reasons:

First—That phrase, "general election," is used in two other places in the constitution in such relation as to make it quite clear that the fall election is referred to. The State officers are required to be elected on the second Tuesday of October (Art. 3, Sec. 1). And section 18 of that article provides that in case of a vacancy in the office of auditor, treasurer, secretary or attorney general, the same shall be filled by election "at the first *general election* that occurs more than thirty days after it shall have happened." To give effect to both these provisions, elections to fill vacancies must be had on the second Tuesday of October, and such has been the uniform practice in the State. Again, section 3 of article 16, requires the question of calling a constitutional convention to be submitted to the electors of the State "at *the general election* to be held in the year 1871." Had the convention regarded the April election as a "general election," this language would hardly have been employed. It would, it seems to me, have said: "At one of the general elections," or "at *a general election*."

Second—The word *general*, in this connection, is used in contradistinction to *local*. The April elections are essentially local though held in all parts of the State on the same day, in that only local officers are elected thereat, while the October election is general, in that officers are then elected

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from the State at large—the electors vote for a general ticket.

Third—The act plainly contemplated the October election, because it provides for the use of the instrumentalities provided by law for that election which are wanting with respect to the April election. Thus, it requires returns to be made as at general elections, and that “the officers opening the returns of said election (general) shall *at the same time* that they make, certify and sign the abstracts required by law, also make, certify and sign a separate abstract of all the votes so returned,” etc. Then again it is made “the duty of the sheriff or coroner, as the case may be, to cause proclamation to be made to the qualified voters of said county in the same manner, *and at the same time*, as by law he is required to do in other elections, notifying said electors to vote as aforesaid upon the question by this act submitted to them.” The sheriff not being required by law to make proclamation, etc., preceding April elections, and no abstracts thereof being required to be made out, certified and signed by officers, as in this act contemplated, it is clear to my mind, that in legislative intendment, the April election was not meant.

In expressing these views I am not unmindful that the General Assembly has on one occasion, at least, designated the April as a general election. (See act of May 1, 1873, O. L., Vol. 70, p. 244.)

Yours, etc.,

JOHN LITTLE,

Attorney General.

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*Validity of Subscriptions to Capital Stock of Railroad Companies in Certain Cases.*

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VALIDITY OF SUBSCRIPTIONS TO CAPITAL  
STOCK OF RAILROAD COMPANIES IN CER-  
TAIN CASES.

The State of Ohio,  
Attorney General's Office,  
Columbus, March 10, 1875.

*Hon. John G. Thompson, Commissioner of Railroads:*

SIR:—I have examined the letter of the president of the G. M. C. A. & C. R. R. Co., bearing date February 22, 1875, relative to the construction to be given to section 3 of the act of April 15, 1857 (S. & C., p. 325), and have the following to say in respect thereto:

First—Before subscriptions can be taken under said section, the company must have obtained actual *bona fide* subscriptions to its capital stock to an amount of at least 20 per cent. of its authorized capital.

Second—It must have expended at least 10 per cent. of such capital in the construction of its road.

Third—If either of these requirements is wanting the subscription to the capital stock conditioned as therein provided, would not be valid as against the subscribers.

Very respectfully,

JOHN LITTLE,  
Attorney General.

*State Mine Inspector; Duties of as to Requiring Operators  
to Conform to the Law.*

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STATE MINE INSPECTOR; DUTIES OF AS TO  
REQUIRING OPERATORS TO CONFORM TO  
THE LAW.

The State of Ohio,  
Attorney General's Office,  
Columbus, March 23, 1875.

*Hon. Andrew Roy, Mine Inspector, Columbus, Ohio:*

SIR:—In answer to yours of the 21st *inst.* I have to say:

First—If it becomes necessary in the discharge of his duty to have an attorney to prosecute proceedings in injunction under the 14th section of the act regulating mines and mining (Laws, 1874, p. 24), the mine inspector may employ and out of his contingent fund pay such attorney.

Second—Said act, by implication at least, makes it the duty of the mine inspector "to see that the provisions of this act are obeyed." If to compel obedience to the requirements of sections 9 and 10 (or of any other), it is necessary to resort to the remedy by injunction he, in my opinion, should not hesitate to do so.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

*Fees of Sheriffs and Witnesses in Legislative Investigating Cases Can be Paid Out of General Revenue—Geological Report in German, Volume 2, Printing of.*

FEEs OF SHERIFFS AND WITNESSES IN LEGISLATIVE INVESTIGATING CASES CAN BE PAID OUT OF GENERAL REVENUE.

The State of Ohio,  
Attorney General's Office,  
Columbus, March 31, 1875.

*Hon. James Williams, Auditor of State:*

SIR:—In answer to your verbal inquiry of this date, I have to say:

That the fees and mileage of sheriffs and witnesses allowed by the "act to authorize committees of the General Assembly to compel the attendance of witnesses and for other purposes" passed April 3, 1872, upon being certified to as in the fourth section provided, may be paid out of the general revenue fund under the appropriation for "contingent expenses" of the General Assembly.

Very respectfully,

JOHN LITTLE,  
Attorney General.

GEOLOGICAL REPORT IN GERMAN, VOLUME 2,  
PRINTING OF.

The State of Ohio,  
Attorney General's Office,  
Columbus, April 13, 1875.

*Hon. William Bell, Jr., President Board of Printing Commissioners:*

SIR:—In answer to yours of this date, I have to say: That in my judgment, Volume 2, in German, of the Geolog-

*Validity of Bills and Joint Resolution, Passed or Adopted  
By the General Assembly, But Not Signed By the Pre-  
siding Officers.*

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ical Survey under the circumstances detailed, should be printed under the recent contract for that class of printing.

Very respectfully,

JOHN LITTLE,

Attorney General.

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VALIDITY OF BILLS AND JOINT RESOLUTIONS,  
PASSED OR ADOPTED BY THE GENERAL AS-  
SEMBLY, BUT NOT SIGNED BY THE PRESID-  
ING OFFICERS.

The State of Ohio,  
Attorney General's Office,  
Columbus, April 14, 1875.

*Hon. William Bell, Jr., Secretary of State:*

SIR:—In yours, dated April 1, but not received at this office till yesterday, the following questions, in substance, are embraced, to-wit:

First—Are bills and joint resolutions, which have passed both branches of the General Assembly by the requisite vote, and which have been correctly enrolled and signed by the presiding officer of one house, but owing to the confusion attending adjournment, not signed by the presiding officer of the other, nevertheless valid laws and resolutions?

Second—Are such bills and resolutions so passed, which have been enrolled, but not, for want of time, examined by the Enrollment Committee, and not signed by the presiding officer of either house, nevertheless valid laws and resolutions?

Third—Are such bills and resolutions so passed, but neither enrolled nor signed, nevertheless valid laws and resolutions?

*Validity of Bills and Joint Resolutions, Passed or Adopted  
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siding Officers.*

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The 17th section of article 2 of the constitution requires the presiding officer of each House to sign "publicly" in the presence of the House over which he presides, while the same is in session and capable of transacting business, all bills and joint resolutions passed by the General Assembly. And the main question presented by the three inquiries is whether the fulfillment of this requirement is essential to the making of a law. If it be, of course the inquiries submitted must all be answered in the negative, for the failure of one officer to sign would be as fatal as that of both.

On consideration, I am disposed to the opinion that this requirement of the constitution is directory merely, and that its observance is not absolutely requisite to render a law or joint resolution valid. The constitution lodges no discretion in these officers in this matter. Their duty is mandatory and peremptory. To say that the refusal of either to sign a bill, would defeat its becoming a law, would be to place in his hands an absolute veto power. Of course, such a power was not intended and would not be tolerated. There are other provisions of the constitution alike imperative in their terms, with regard to the passage of laws, which have been held to be merely directory. Thus, the provision "every bill *shall* be fully and distinctly read on three different days," etc., and the one, "no bill shall contain more than one subject which shall be clearly expressed in its title," are declared to be directory, and their observance a matter solely for the consideration of the General Assembly. (See 3 O. St., 475; 15 O. St., 573.)

That which determines the passage of a measure and its enactment into a law, is *the will of the General Assembly*, constitutionally expressed, and not the ministerial act of any officer thereof. The official act of such officer may, in the present state of law, furnish the only legal evidence, or a necessary link in the chain thereof, as to what the General

*Validity of Bills and Joint Resolution, Passed or Adopted  
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Assembly did in a given instance; but aside from this, no such act can be essential to the validity of the thing done.

The purpose of requiring the presiding officers thus to sign bills and joint resolutions, is to identify and authenticate them. If the journals of the houses were so kept as to furnish, in addition to the evidence of their passage or adoption, proof absolute and unmistakable that the bills or resolutions claimed to be passed or adopted, are in fact the identical ones passed or adopted—that would, it seems to me, suffice; the purpose of the signature being thus accomplished without them.

But the journal should furnish this proof. It cannot be supplied *dchors* them; not even by the certificate of the presiding officers and the clerk of the two branches after adjournment, for such certificates have no warrant in law. The journals alone contain the evidence of the action of the General Assembly. (See *State ex rel. Loomis vs. Moffit*, 5 O., 358; *Miller & Gibson vs. State*, 3 O. St., 475; *Fordyce vs. Godman*, 20 O. St., 1.) Are then the journals so kept as to furnish proof of identity, etc.? They are, ordinarily, as to joint resolutions; for these are spread upon the journal of the House in which they originate, and the means of comparison is at hand, therefore. But it is different with respect to bills. Their titles and numbers and designation (as to whether House or Senate) are alone recorded. And there is no official copy (as there should be) required or authorized by law, of bills presented to each House, to be kept. A legal standard of comparison as respects the body of a bill is therefore wanting. Are the title, number and description (as to whether House or Senate) sufficient for identification? To illustrate, if a bill be presented, Mr. Secretary, unsigned with the representation that it had passed both Houses of the General Assembly at the recent session, and on examination of the journals, you should find that a bill of the same description, title and number in fact passed, would you be jus-

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*Validity of Bills and Joint Resolutions, Passed or Adopted  
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tified in concluding that the bill presented was the identical one passed? I think not. The danger of such a conclusion, as a precedent, would far outweigh any possible good that might result from upholding the law. But if such a bill had the signature of one presiding officer (only) made as required by the constitution and evidenced by the proper journal; or if the bill were spread at length upon a journal as sometimes happens where the entire measure consists of an amendment made by striking out all after the enacting clause and inserting, etc., so that a criterion of comparison would be at hand—that would be sufficient to complete the proof of identity, and you would be justified, in either case, in treating the bill as a law. The enrollment of a bill or resolution is not in the view taken essential to validity.

I think, therefore, you should treat as valid those unsigned joint resolutions deposited in your office, which are spread upon the journals and shown thereby to have been *finally* passed by the requisite vote of each branch; likewise those bills so deposited, the passage of which is attested by only one presiding officer. But I should not publish with the laws the bills reported passed but without the signature of either of said officers; *unless* they are spread at length upon the journals and shown thereby to have received the requisite vote of each House, which is unlikely.

Very respectfully,

JOHN LITTLE,

Attorney General.

*Liquor Inspection Law; Suits Under, How Brought; Inspections Under—State Stone Quarry; Control of.*

LIQUOR INSPECTION LAW; SUITS UNDER, HOW  
BROUGHT; INSPECTIONS UNDER.

The State of Ohio,  
Attorney General's Office,  
Columbus, April 14, 1875.

*Wilson S. Potts, Esq., Prosecuting Attorney, New Lisbon,  
Ohio:*

DEAR SIR:—It would seem that prosecutions under the act of May, 1854, "to prevent the adulteration of alcoholic liquors must be by information in the Probate Court."

The inspection contemplated by the act should be such as to result in the detection of any substance the mixture of which with the liquors is prohibited. Whether that could be done short of a chemical analysis, I am sure I cannot say with certainty.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

STATE STONE QUARRY—CONTROL OF

The State of Ohio,  
Attorney General's Office,  
Columbus, April 14, 1875.

*T. R. Tinsley, Esq., Architect, Etc., Columbus, Ohio:*

DEAR SIR:—Yours of the 8th instant, in regard to the custody of the State stone quarry is received.

From May 16, 1868, to April 27, 1872, the control of the quarry was in the superintendent of the State House. At the last mentioned date that authority was taken away (Laws, 1872, p. 170), and on the same day transferred to

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*Trustees Are Not Required to Exact a Penalty From Contractor for Building Industrial School for Girls; Mechanics' Lien Law Applies.*

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the trustee of the Central Asylum (Laws, 1872, p. 318). By the act of March 31, 1874, the offices of said trustees were abolished, and their powers and duties *relative to the asylum and the asylum property*, transferred to the present commissioners. (Laws, 1875, p. 43.) So that unless the State quarry can be regarded as a part of the "asylum property" (and of that I am not advised), the present Board of Commissioners have no control over it; nor indeed has the comptroller of the treasury, the act conferring it having as above stated, been repealed. (Laws, 1872, p. 170.)

Very respectfully,

JOHN LITTLE,

Attorney General.

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TRUSTEES ARE NOT REQUIRED TO EXACT A PENALTY FROM CONTRACTOR FOR BUILDING INDUSTRIAL SCHOOL FOR GIRLS; MECHANICS' LIEN LAW APPLIES.

The State of Ohio,  
Attorney General's Office,  
Columbus, April 19, 1875.

*Rev. F. Merrick, Chairman, Etc., Delaware, Ohio:*

DEAR SIR:—In answer to yours of the 17th instant I have the following to say:

First—The trustees are not *required* to exact the penalty from a contractor because of failure to complete his contract with the State within the time limited. In such a case I would not advise a formal extension of the time; but, if the work be well done within a reasonable time, and without loss to the State by the delay, I should recommend its acceptance, without forfeiture of the penalty.

*Appropriation for the Codifying Commissioners; Specific Appropriations Defined.*

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Second—If bills for materials, etc., are properly presented to the board under the mechanics' lien law, they should be paid before settlement with the contractor, or sufficient money retained to pay them.

Yours etc.,  
 JOHN LITTLE,  
 Attorney General.

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APPROPRIATION FOR THE CODIFYING COMMISSIONERS; SPECIFIC APPROPRIATIONS DEFINED.

The State of Ohio,  
 Attorney General's Office,  
 Columbus, April 20, 1875.

*Hon. James Williams, Auditor of State:*

SIR:—In your communication of the 29th *ult.* you ask whether the language contained in section 6 of the act "to provide for the revision and consolidation of the statute laws of Ohio," passed March 27, 1875, directing the *per diem* of the commissioners and their clerks, and their incidental expenses to be paid, etc., amounts to a "specific appropriation" within the meaning of section 22, article 2 of the constitution; and whether you would be justifiable in drawing your warrants upon the treasurer of state for such payment, there being no appropriation made elsewhere for the purpose.

The section of the act referred to provides as follows: "Each of said commissioners shall receive ten dollars per day for the time actually employed in the work of the commission. And each clerk employed by the commission shall receive four dollars per day for his services. The same, together with the incidental expenses of said commission, shall be paid from time to time upon the certificate and warrant

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*Appropriation for the Codifying Commissioners; Specific Appropriations Defined.*

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of the auditor of state, out of any funds in the treasury not otherwise appropriated."

Thus, there are three classes of claims named in the act for the payment of which "out of any funds in the treasury not *otherwise* appropriated," the auditor is directed to draw his warrant from time to time, to-wit:

First—The *per diem* of the three commissioners.

Second—The *per diem* of the clerk (unlimited in number).

Third—The incidental expenses of the commission (unrestricted in amount).

The provision of the constitution bearing upon the inquiry is this: "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." The question then is: Does the language of the section quoted amount to a specific appropriation for any or all the purposes named?

A "specific appropriation," as the phrase is used in the constitution, may be defined to be: the setting aside and limiting by law of a certain amount of the public money for and to a definite lawful purpose; such amount to be drawn upon, to the extent authorized for such purpose. (See opinion by Swan, J., 7th O. S., 528.)

The law should be "specific" both as to the *amount* and purpose of the appropriation. The effect and intent of an appropriation are to place a *limit* to the amount that may be expended for a particular use. The limit must be fixed before any money can be drawn for such purpose, and that too by the legislature itself. Its authority and duty in this behalf cannot be delegated. Were it otherwise the doors of the treasury could be thrown open at the command, and the amount of expenditure made to depend upon the discretion of a public officer; one of the evils this constitution guards against.

No particular form of expression is necessary to make

*Appropriation for the Codifying Commissioners; Specific Appropriations Defined.*

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an appropriation; as I think, words which clearly convey the intention to appropriate are sufficient. Thus language authorizing the payment of a particular sum for a proper purpose, and directing the auditor of state to draw his warrant on the treasurer for that sum payable out of any funds not *otherwise appropriated* would amount, in my opinion, to a "specific appropriation," although the usual (and I may add desirable) formal words of appropriation be omitted.

It has been announced from the Supreme Court of this state, that "a check drawn upon an existing fund is an absolute transfer or *appropriation* to the holder of so much money in the hands of the drawee" (5 O. St., . . .). Why is not a warrant drawn by the auditor of state upon an unappropriated fund in the treasury for a certain sum, issued in pursuance of a requirement of law, not likewise an appropriation of money in the hands of the drawee, to-wit: the State?

While, as I have said, to make a specific appropriation, a definite sum is required to be specified, it is not necessary that this sum be named in words. The maxim, *id certum est quod certum reddi potest*, is applicable, and has been in practice applied frequently, in the matter of making appropriations. For illustration, the appropriation for Longview Asylum is every year left to the auditor of state to compute; and it would perhaps be impossible for the legislature at the time of making the appropriation each year to determine the amount due thereto, under the law. But the rule for the determination is fixed, and the amount to be paid is ascertainable thereby.

Applying these observations to the statute of March 27, how does the case stand?

There are three commissioners appointed under its provisions. These are entitled to \$10.00 per day each for the time employed. If they work every day, each will be entitled to \$3,650 a year, or twice that sum for two years—the period covered by the appropriation (if there be an appropriation).

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*Appropriation for the Codifying Commissioners; Specific Appropriations Defined.*

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The limit to the payment of each is therefore fixed for the two years at \$7,300. The language of the law in this respect is tantamount to saying: "The amount so to be paid out of the treasury to each commission in two years shall not exceed the sum of \$7,300," and the statute would have meant nothing more or different had such a clause been inserted.

The compensation of the clerks is fixed at \$4.00 per day; and had their number also been fixed, the same remarks made as to the commissioners would be applicable to them. But their number is not fixed. It is only limited by the discretion of the commissioners. Of course it cannot be *less* than one. It may be any number greater. The legislature could not, therefore, have had in mind any limit (or the means of ascertaining one), to the amount that might be paid for clerical services, beyond that for a *single* clerk. As to a single clerk the amount of compensation is determinable as in case of the commissioners. But to go beyond, and pay all the clerks, the commissioners might, under the law, employ, would be to give the latter the power to draw indefinitely and unlimitedly from the treasury. So likewise there is no limit fixed to the incidental expenses which they may incur. And to pay either these incidental expenses, or for clerical assistance beyond the *per diem* of one clerk, would be to make a dangerous precedent, and one, in my judgment, not warranted by law; *for the reason*, as stated, *that the legislature has failed to place a limit, or furnish a rule to determine a limit, to the sum that might be thus drawn from the treasury.*

My conclusion therefore is, after some doubt, that under section 6, you are authorized to pay the *per diem* of the commissioners and that of one clerk, the appropriation as to them being "specific," but nothing more.

Very respectfully,

JOHN LITTLE,  
Attorney General.

*County Treasurer; How Appointed to Fill a Vacancy in Affects the Eligibility of Appointee for Election to Two Terms Afterwards.*

COUNTY TREASURER; HOW APPOINTED TO FILL A VACANCY IN AFFECTS THE ELIGIBILITY OF APPOINTEE FOR ELECTION TO TWO TERMS AFTERWARDS.

The State of Ohio,  
Attorney General's Office,  
Columbus, June 18, 1875.

*General W. H. Enochs, Ironton, Ohio:*

DEAR SIR:—In yours of the 14th inst. you state that your present county treasurer, Colonel Betts, was originally appointed to fill a vacancy in the office of the treasurer, and was subsequently, in 1873, elected (of course under the decision in 7th State, 125 for the full term) to that office; and you inquire whether he would be eligible to a re-election this coming fall under the constitutional provision limiting the eligibility of any person to that office to four years in any period of six years.

That article of the constitution (10th) treats of the election (not appointment) of officers; and I am disposed to the view that the word "eligible" in section 3, is to be taken in a strictly derivative sense and that it means "*qualified to be elected.*" The section, to use the language of the Supreme Court in *Warwick vs. The State*, 25th St., 25, "is disenabling and should therefore receive restricted rather than an enlarged interpretation." The prohibition, then, is against the *election* of any person for more than four years in any period of six years. But if this interpretation be correct, Colonel Betts is nevertheless clearly eligible for re-election this fall; for the period of four years will not have expired with his present term.

To be enabled to serve that full period for which he is eligible under the narrowest construction a re-election is

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*Letting of Contracts for Central Lunatic Asylum.*

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necessary; and under such construction the question of his eligibility could not be raised until he shall have been in office four years.

JOHN LITTLE,  
Attorney General.

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LETTING OF CONTRACTS FOR CENTRAL LUNATIC ASYLUM.

The State of Ohio,  
Attorney General's Office,  
Columbus, May 15, 1875.

*T. R. Tinsley, Esq., Architect, Etc., Columbus Ohio:*

DEAR SIR:—Where the commissioners of construction advertised for sealed proposals, etc., under section 3 of the act of April 3, 1873 (L., p. 102), and proceeded under section 4 thereof to open the proposals, and awarded a contract to one of the bidders, their powers in that behalf are at an end, and the other bidders are absolved from all obligations in the premises. Should the successful bidder fail to enter into contract as required by law, the commissioners would not, in my opinion, after having absolutely accepted his bid and awarded him the contract as aforesaid, have the discretion to accept the proposal of another bidder.

Where a firm is the successful bidder, and the members thereof refuse to enter into contract as such firm, the law does not authorize the commissioners to contract with one of the firm.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

*Unearned Premiums of Insurance Companies Cannot Be Deducted From Credits in Making Returns for Taxation—Witnesses Entitled to Fees in Nollied Cases; Compensation of Counsel to Indigent Prisoners.*

UNEARNED PREMIUMS OF INSURANCE COMPANIES CANNOT BE DEDUCTED FROM CREDITS IN MAKING RETURNS FOR TAXATION.

The State of Ohio,  
Attorney General's Office,  
Columbus, June 24, 1875.

*Hon. James Williams, Auditor of State:*

SIR:—The "unearned premiums" which insurance companies are required to reserve in estimating their surplus profits for dividends are not *bona fide* debts that can be deducted from credits in making returns for taxation.

Very respectfully,

JOHN LITTLE,  
Attorney General.

WITNESSES ENTITLED TO FEES IN NOLLIED CASES; COMPENSATION OF COUNSEL TO INDIGENT PRISONERS.

The State of Ohio,  
Attorney General's Office,  
Columbus, June 28, 1875.

*D. M. Brown, Esq., Prosecuting Attorney, Carrollton, Ohio:*

DEAR SIR:—First—In criminal cases where a *nolle prosequi* is entered, witnesses are entitled to the same fees as if such cases had been prosecuted to trial and judgment.

Second—Counsel appointed to defend indigent prisoners before, but not rendering service till after, the passage of the act of March 3, 1875, requiring county commissioners

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*Duty of County Auditors to Correct Errors in Assessments;  
And in Case of Payment County Commissioners Should  
Direct the Same to Be Refunded.*

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to examine claims for fees, etc., are to be paid in accordance with that act. The act of February 19, 1866 (S. & S.), does not apply.

Third—The limitation to the amount of compensation to counsel named in the proviso to section 1 (14) of the act first named, is a limitation as to each attorney, where there are two, and not as to the amount that may be allowed in gross in any case.

Very respectfully,

JOHN LITTLE,

Attorney General.

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DUTY OF COUNTY AUDITORS TO CORRECT ERRORS IN ASSESSMENTS; AND IN CASE OF PAYMENT COUNTY COMMISSIONERS SHOULD DIRECT THE SAME TO BE REFUNDED.

The State of Ohio,  
Attorney General's Office,  
Columbus, June 28, 1875.

*J. M. Kirk, Esq., Prosecuting Attorney, Wilmington, Ohio:*

DEAR SIR:—It is made the duty of county auditors to correct errors in assessments, and where the same have been paid to call the attention of the commissioners thereto, who are directed to cause the same to be refunded, etc. (See act of January 16, 1873, pp. 10-11, of Laws.) It seems to me that the case you put in your letter of the 16th inst. comes within that act—that is, if the county abides by the decision of the District Court without further litigation.

Yours, etc.,

JOHN LITTLE,

Attorney General.

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*Appeals in Cases Under the Justices' Code.*

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APPEALS IN CASES UNDER THE JUSTICES'  
CODE.

The State of Ohio,  
Attorney General's Office,  
Columbus, June 30, 1875.

*M. C. Hale, Esq., Sidney, Ohio:*

DEAR SIR:—The questions arising under the recent statute amending certain provisions of the Justices' Code relating to appeals, are involved in difficulty and doubt, and the conclusions to which I have come concerning them are not altogether satisfactory to myself.

The sections pertaining to the right of appeal are the 90th, 111th and 123d. These before the amendment, stood as follows:

"Section 90. If either the plaintiff or defendant in their bill of particulars, claim more than twenty dollars, the case may be appealed to the Court of Common Pleas; but if neither party demand a greater sum than twenty dollars, and the case is tried by a jury, there shall be no appeal."

"Section 111. In all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the Court of Common Pleas of the county where the judgment was rendered."

"Section 123. Appeals in the following cases shall not be allowed:

First—On judgments rendered on confession.

Second—In jury trials where neither party claim in their bill of particulars a sum exceeding twenty dollars.

Third—In the action for forcible entry and detention, or forcible detention of real property.

Fourth—In trials of the right of property under the statutes either levied upon by execution or attached."

Sections 111 and 123 were amended and the original sections, of course, repealed. Section 111 as amended, pro-

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*Appeals in Cases Under the Justices' Code.*

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vides, in substance that in cases not otherwise provided for by law, either party may appeal from a judgment of a justice of the peace amounting, exclusive of costs, to \$100 or more. And section 123 is changed only in the second clause thereof, which as amended, reads as follows. "Second, in jury trials where neither party in their bills of particulars claim a sum exceeding one hundred dollars and the judgment, exclusive of costs, is less than one hundred dollars."

The 90th section is not in terms amended or repealed.

Upon its face, then, the statute now would seem to stand thus, as respects the right of appeal:

One section authorizes appeals in cases where neither party *claims* more than twenty dollars, and prohibits them in other cases where the claim is not greater than that sum, when tried by a jury. Another authorizes appeals in all cases, not otherwise provided for by law, where either party *recovers a judgment* of not less than one hundred dollars, exclusive of costs (denying by implication the right to appeal where the recovery is less). And another still prohibits appeals in jury trials where neither party *claims* more than that sum *and* the judgment is for less (raising the counter implication that in such trials appeals may be had where either party *claims* more than that amount, although the judgment be for less).

In seeking the proper interpretation of these provisions, certain well settled rules of construction must be borne in mind:

First—In giving construction to certain sections of an act, the entire act—its plan as well as its policy and purpose—must be looked to.

Second—In case of conflict between two acts, the later one prevails.

Third—But repeals by implication are not favored; and such a construction is to be sought as will harmonize with each other, as far as may be, and give operation to the several sections and parts of an act.

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*Appeals in Cases Under the Justices' Code.*

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Fourth—A part of a section may be repealed or modified by implication and the remainder continue in force; and where a part can be upheld that should be done rather than strike down the whole.

Looking at the plan of the original act it will be seen that it is divided into various subjects or sub-divisions, and that section 90 is found under the head of "Jury." The sections from 75 to 93 inclusive are devoted to the subject of jury trials, while section 111 forms the beginning of the chapter on "Appeals." It gives the right of appeal in all cases *not otherwise provided for by law*. It seems to me, then, that section 90 standing among the jury provisions, may properly be considered as giving the right to appeal in jury cases, and in those alone and section 111 as conferring the right in other cases. This view gives room for the operation of the first clause of the former, to-wit: "If either plaintiff or defendant in their bill of particulars claim more than twenty dollars, the case may be appealed to the Court of Common Pleas," which is a necessary provision in the view taken, otherwise there could be no appeal in jury cases, for the right to appeal must be conferred by positive enactment. But if this view be not correct—if section 111 apply to jury as well as to other cases, then the clause named was and is wholly superfluous; for there could be no use in specially granting appeals where the claim by either party exceeded twenty dollars in the same act in which appeals were allowed in all cases without regard to the amount claimed. And it can never be assumed (whatever the actual fact may be) that the legislature is given to useless legislation.

The modification, therefore, of the 111th section did not disturb the 90th.

The 123d contains the limitations upon the power of appeal, and being the embodiment of them all, repeats that of the 90th. In the amended 123d that limitation is altered, the effect of the alteration being to change "twenty" into "one hundred." Under the old law to secure an appeal in

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*Appeals in Cases Under the Justices' Code.*

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a jury trial the claim had to exceed twenty dollars; under the new, it must exceed one hundred. To preserve the harmony between the two sections a corresponding change should have been made in the 90th—"twenty" should have been stricken out and "one hundred" inserted. But the failure finally to make the change is not fatal to the section. The section still preserves the right of appeal in jury cases, subject to the hundred dollar limitation in the later enactment. In fact, the change suggested is, in contemplation of law, made, and you are to read "one hundred" instead of "twenty" where the latter occurs. Unless this construction be adopted, I cannot see the use of the second clause in section 123. It does not affect section 111 in any way. No appeal authorized by that would be prohibited by it. The operation of what section then was the clause intended to limit, if not the 90th; and if intended to restrict the operations of that, of course, the legislature did not intend to repeal or supersede the section. Under the view here taken, the clause becomes operative, and the implication arising thereunder intelligible; and, as it seems to me, the three sections better harmonize with each other and the whole act—each having operation—than under any other construction that has suggested itself.

One difficulty (aside from the one indicated in what has been said) in holding that section 123 only modified the latter clause of section 90, leaving the former clause to stand in full force and as applicable to all cases, is that such a construction would leave section 111 practically inoperative. It is true that the right of appeal in the one is based upon the amount *claimed*, and in the other upon the amount recovered. Still as the amount recovered will never exceed the amount claimed, the recognition of such distinction would not remove the difficulty.

From the foregoing the following conclusions may be stated:

First—In a case tried by a justice of the peace where

*Appeals in Cases Under the Justices' Code—Independent Militia Exempt From Services on Juries.*

either party recovers as much as \$100, exclusive of costs, an appeal will lie; but not otherwise.

Second—In a case tried by a jury where either party *claims* more than \$100, without regard to the amount recovered, an appeal will lie; but where the claim of neither exceeds \$100, there is no appeal.

It is proper to say that some courts in Ohio of eminent responsibility have taken a different view of this subject from the foregoing; and I am not aware that any have adopted the conclusions reached by me.

The purpose of the amendatory act seems to have been to confine litigation as far as practicable to justices' courts, where the administration of justice might be more speedy and inexpensive. How far this end is likely to be realized, it is not material here to inquire. But it is to be regretted that, in a matter of such general concern and importance, and where, therefore, conspicuity was especially called for, the legislative intent was not more clearly expressed.

I trust the delay in answering your letter will not render mine wholly unserviceable.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

INDEPENDENT MILITIA EXEMPT FROM SERVICES ON JURIES.

The State of Ohio,  
Attorney General's Office,  
Columbus, July 1, 1875.

*General Charles H. Sargent, Assistant Adjutant General:*

SIR:—In answer to yours of the 26th *ult.*, I have to say: That under the 9th section of the act of April 18, 1870, "to organize and regulate an independent militia" (Laws, p.

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*Independent Militia Exempt From Services on Juries.*

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107), active and contributing members of independent companies formed under said act and the amendments thereto, are, in my judgment, exempt from services as jurors in the courts of this State. The only ground to question such exemption is found in the 21st section of the act of April 1st, 1873, "relating to juries." (Laws, p. 167.)

This section providing for exemption of certain classes of persons from jury service, it might be contended with some, though I think not the better, reason, that the exemption of all others is excluded, and that the exempting clause of said 9th section is repealed by implication. But the clause is in the nature of a special law, and such laws are not repealed by general provisions, unless the intention to repeal is clearly expressed. Besides repeals by implication are not favored, and will not be declared unless there exist irreconcilable inconsistency between the acts in question. This I think does not appear in this case.

A case can be made under the law, where a court refuses to recognize the privilege of such a member by his refusing to serve and excepting to the action of the court in proceedings to punish for contempt. If the question is to be made, I would suggest that it be done amicably. A case might be made before a justice of the peace and carried to the higher courts.

Very respectfully,

JOHN LITTLE,  
Attorney General.

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*Compensation of Counsel for Indigent Prisoners.*

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## COMPENSATION OF COUNSEL FOR INDIGENT PRISONERS.

The State of Ohio,  
Attorney General's Office,  
Columbus, July 6, 1875.

*Walter L. Weaver, Esq., Prosecuting Attorney, Springfield,  
Ohio:*

DEAR SIR:—In answer to yours of the 2d instant, I have to say:

In my judgment, the act of March 3, 1875 (Laws, p. 46), relative to the appointing and paying of counsel for defending indigent prisoners, does not extend in its operation, to any case except where "any person shall be indicted for an offense, which is *capital, or punished by imprisonment in the penitentiary for life.*" And it is only for services rendered under an appointment by the court in one of these two cases that an attorney is entitled to compensation, on the allowance of the county commissioners, out of the county treasury.

In fixing the limit to the compensation of counsel for such services, such cases are divided into two classes, to-wit: "homicide" and "other" cases. Under the former, are of course included prosecutions for murder in the first and second degree, and for aiding and abetting the same. Under the latter are included prosecutions for rape upon a daughter or sister, or child under twelve (under the 4th section of the crimes act), and for aiding and abetting in the same (under the 36th), and for treason (under the act of April 26, 1861, S. & S., 261). These latter are the only crimes that occur to me under the statute, aside from murder in the second degree ("homicide") punishable by imprisonment in the penitentiary for life.

Since said act of March 3, I know of no law under which counsel can be paid out of the county treasury for defending indigent prisoners charged with felonies other

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*Industrial School for Girls; Contract for Fireproof Building at.*

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than those punishable as aforesaid, under an appointment of the court. Yet it remains the duty of the court, under the 104th section of the criminal code, on request, to assign counsel to defend a prisoner charged with any felony.

Yours truly,  
 JOHN LITTLE,  
 Attorney General.

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INDUSTRIAL SCHOOL FOR GIRLS; CONTRACT  
 FOR FIREPROOF BUILDING AT.

The State of Ohio,  
 Attorney General's Office,  
 Columbus, July 8, 1875.

*Hon. James Williams, Auditor of State:*

SIR:—I have examined the contract between the Board of Trustees of the Girls' Industrial Home and Ralph Hills, for the erection of a "fireproof building" at said home, of the date of June 26, 1875, placed in my hands through you for approval.

The contractor, Mr. Hills, is the architect who prepared the original estimates, and drew the plans, specifications and descriptions of the building which are made, in terms and under the law, a part of the contract itself.

It is stated in the specifications that, in the construction of the arches for the ceilings and supports of the floors "*the architect of this building introduces a device of his own, for greater security.*" This device is a complete net work of iron rods laid in the walls, so locked at the corners and intersections as to be unyielding and thus completely *belting* every principal room." Under the head of "Water Closets and Bath Rooms," it is stipulated that the "contractor is at liberty to use any of the iron pipes or other material now in-

Convicts in Penitentiary; Sentences of to Run Continuously.

the old laundry and bath houses—*so far as approved by the architect.* And under the "General Conditions" of the specifications is this provision: "All and every part of the building must be executed to the entire satisfaction of the architect and trustees of the Girls' Industrial Home."

Without elaboration it is sufficient to say that in my judgment, this is not a "proper" contract and in accordance with law, for the reason mainly that, under the specifications, the "architect of this building" is not in a position to be or become a competent and proper contracting party for the construction thereof. My approval of the contract, which is herewith returned, is therefore withheld. Aside from the legal questions involved, I should not willingly sanction a precedent such as an approval of this contract would involve.

It is proper to add that in this matter the trustees and Mr. Hills seem to have acted in the utmost good faith toward the State.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

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CONVICTS IN PENITENTIARY; SENTENCES OF  
TO RUN CONTINUOUSLY.

The State of Ohio,  
Attorney General's Office,  
Columbus, September 23, 1875.

*Colonel G. S. Innis, Warden Ohio Penitentiary:*

SIR:—In your favor of the 16th instant you state that you have in your custody a prisoner named Wm. S. Dunham, who was sentenced for ten years from May 12, 1866, and that by good behavior his time expired December 28, 1874; that you have another certificate of sentence for three

*Convicts in Penitentiary; Sentences of.*

years, even date with the first one, commencing May 12, 1876; and you ask if it is your duty to discharge said prisoner and run the risk of recapturing him on the 12th of May next, or can you hold him until he serves both sentences, putting in the time continuously. In reply I have to say:

That it is your duty to hold him until he has served both sentences, allowing one to immediately follow the other.

Very respectfully,

JOHN LITTLE,

Attorney General.

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 CONVICTS IN PENITENTIARY; SENTENCES OF.

The State of Ohio,  
 Attorney General's Office,  
 Columbus, September 23, 1875.

*Colonel G. S. Innis, Warden Ohio Penitentiary:*

SIR:—I am in receipt of your favor of the 16th instant, in which you state that you have in your custody one Robert C. Fulton, who was sentenced by the Miami Common Pleas Court for the term of two years, and at the same time for the term of one year—the latter sentence to commence at the expiration of the former—and that the two years' sentence has expired. You then ask if the prisoner is entitled to his liberty.

I answer that he is not entitled to his liberty until he has served three years, deducting, of course, the time he may have gained by good behavior.

Very respectfully,

JOHN LITTLE,

Attorney General.

*Intimidation of Jurors or Witnesses—Duty of Secretary of State as to Election Returns and the Issue of Commissions.*

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INTIMIDATION OF JURORS OR WITNESSES.

The State of Ohio,  
Attorney General's Office,  
Columbus, September 25, 1875.

*Mr. Wm. B. Wolverton, Prosecuting Attorney, Norwalk, Ohio:*

DEAR SIR:—In answer to yours of the 20th *inst.* I have to say:

That it is only when a person endeavors to influence, intimidate or impede any juror or witness, or obstruct the administration of justice, "*corruptly or by threats or force,*" that he may be prosecuted therefor. It occurs to me that under the circumstances you detail, the actions of the accused cannot, within the meaning of the law, be said to be corrupt, or accompanied with threats or fears. Herein the statute is lame.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

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DUTY OF SECRETARY OF STATE AS TO ELECTION RETURNS AND THE ISSUE OF COMMISSIONS.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 1, 1875.

*Hon. William Bell, Secretary of State:*

SIR:—In yours of the 25th *ult.*, awaiting my return to-day, you say:

"In the abstract of votes returned to this department no votes or number of votes are placed opposite the township

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*Duty of Secretary of State as to Election Returns and the Issue of Commissions.*

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of Perrysburg. It is claimed that with the township counted some other officers are elected than are certified to this office, and I am requested to defer issuing commissions to those certified to have been elected until the matter can be adjusted in court; and you ask my opinion as to your duty in the premises.

The secretary of state is required by law to take charge of and safely keep the abstracts of votes for state and local officers transmitted to him according to law. He is also required in conjunction with and in the presence of certain other officers to open certain of the returns and ascertain therefrom the number of votes given to different persons for certain specified offices. Here his duty begins and ends with respect to such abstracts or returns, and such duty is wholly ministerial. He has no authority to issue or withhold commissions. He is simply required to countersign such as are required by law to be issued by the governor. Persons elected to certain offices are entitled to receive from the governor commissions upon producing to the secretary of state legal certificates of their election. And where such certificates are enclosed to the latter officer (as is the custom) there is no legal objection to his making out the commissions for the signature of the governor, and forwarding the same when executed to the proper persons. In this he acts simply as the agent or clerk of the governor. But as to whether a commission should issue or be withheld in any case, he can have no concern, and can take no action.

Very respectfully,

JOHN LITTLE,

Attorney General.

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*Central Lunatic Asylum; Extra Compensation to Contractors for Under Joint Resolution of General Assembly; Jones & Son, Contractors.*

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CENTRAL LUNATIC ASYLUM; EXTRA COMPENSATION TO CONTRACTORS FOR UNDER JOINT RESOLUTION OF GENERAL ASSEMBLY; JONES & SON, CONTRACTORS.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 11, 1875.

*To the Board of Construction, Etc., Central Lunatic Asylum:*

GENTLEMEN:—In the communication of Mr. Thomas R. Tinsley, architect, etc., of the 9th instant, made on your behalf, my opinion is asked as to the application of the rule of measurement mentioned in a resolution adopted April 20, 1874 (O. L., p. 246), relative to the relief of F. F. & W. A. Jones. "The question being, shall we simply apply the rule of measurement as used at the Athens Lunatic Asylum to the measurement of brick work in the walls of our asylum as far as Jones & Son's contract reaches, provided that in the aggregate the relief does not exceed \$15,000?" A certified copy of the Athens rule of measurement is given. Jones & Son are the assignees of the contract for the stone masonry, cut-stone, and brick work of the asylum. The preamble of the resolution sets forth their claim of large losses, "without fault on their part in the performance" of the contract, "that it is equitable and just that the State relieve them of such losses," and it alleges that "the prices stipulated in said contract to be paid by the State for said work and material are inadequate, and are, and were, at the making of said contract, below the fair and reasonable price and value thereof." And the resolution provides, "that the trustees of the above asylum are hereby authorized and required to take into consideration the facts herein stated, and if they find upon investigation, the said facts and allegations set forth in said memorial to be true, to so amend said contract or contracts

*Central Lunatic Asylum; Extra Compensation to Contractors for Under Joint Resolution of General Assembly; Jones & Son, Contractors.*

now existing between said Thomas F. Jones and W. A. Jones and the said trustees, as to allow to said contractors a fair and reasonable rule of measurement of the walls of said asylum building as is customary in the construction of buildings of a similar character in the State, and being such rule as was allowed in the construction of the new lunatic asylum building at Athens—such rule providing for the measurement of the hollow spaces in the walls and the air-flues as solid work.” “The extra compensation resulting from the change of measurement” is limited to \$15,000.

First—Just what rule of measurement was contemplated by the legislature it is difficult to determine from the language used. But I am inclined to the opinion, and advise you, that the Athens rule, a copy of which is given as above stated, was intended; and that the language—“such rule providing for the measurement of the hollow spaces in the walls and air-flues as solid work”—was intended to identify rather than fully to describe the rule.

Second—But the construction to be given the resolution is not, in my judgment, a matter of practical importance, so far as your duties are concerned. For, although your inquiry relates to the matter of construction only, yet I deem it my duty to go further and advise you that the resolution confers no authority whatever upon you. The constitution provides (Sec. 29, Art. 2): “No extra compensation shall be made to any officer, public agent, or *contractor*, after the service shall have been rendered, or *the contract entered into* \* \* \* unless such compensation \* \* \* be allowed by two-thirds of the members elected to each branch of the General Assembly.”

The resolution was not passed by the requisite vote in each branch of the General Assembly, it only receiving fifty-nine affirmative votes—eleven less than two-thirds—in the House. And even if it had received a two-thirds vote in each House, the question would still remain whether your

*Central Lunatic Asylum; Extra Compensation to Contractors for Under Joint Resolution of General Assembly; Jones & Son, Contractors—Central Lunatic Asylum Contracts; Final Adjustment of.*

duties in the premises, defined and fixed by the statute as they are, could be in any respect enlarged or modified by a joint resolution; whether, in other words, such a resolution as to such a matter would have the force and effect of law duly enacted. But this question is not here involved, and I express no opinion upon it. It is sufficient to know the resolution involves the proposition to give extra compensation to a public contractor for services and work under a contract after the same was entered into, and that the resolution did not receive the votes of two-thirds of the members elected to each branch of the General Assembly.

It will be your duty, therefore, entirely to ignore this resolution in your settlement with the contractors therein named.

Very respectfully,

JOHN LITTLE,

Attorney General.

CENTRAL LUNATIC ASYLUM CONTRACTS;  
FINAL ADJUSTMENT OF.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 11, 1875.

*T. R. Tinsley, Esq., Architect, Etc., Columbus, Ohio:*

SIR:—In yours of the 9th instant, you inquire:

First—Can a settlement be made with Messrs. Day, Kinney & Winner and Messrs. Thomas F. Jones & Son, separately, they representing one and the same contract?

A brief history of the contracts for the erection of the Central Asylum will be useful in answering this question.

On the 24th of September, 1869, the trustees entered

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*Central Lunatic Asylum Contracts; Final Adjustment of.*

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into a contract with L. Whitney and D. W. H. Day, for the brick, stone masonry, cut stone, carpenter and excavating work, painting and glazing of the Central Asylum, to be erected on the old asylum grounds, in the city of Columbus. Under the act of April 18th, 1870, the site was changed to the present location, and changes and transfers in the contract were made as authorized by the act, as follows:

May 5th, 1870, Whitney sold out to Day and Day entered into a new contract, embodying the terms of the old one, for the brick, stone masonry and cut stone, and work incident thereto; and Beaver & Butts, with Day's assent entered into a contract for the carpenter work, painting and glazing.

These contracts of May 5th, 1870, may be regarded as the original contracts for the construction of the asylum.

On November 3, 1870, Day entered into a contract for the stone and brick work, including excavation, of the four extension wings of the asylum, then recently authorized by the General Assembly, with John L. Winner and Jonathan Kinney as sureties. And on November 5, 1870, Day sold one-third of his entire interest in both of his contracts to Kinney and one-third to Winner, and the three agreed to do the work as a firm under the name of Day, Kinney & Winner. Winner was to be the fiscal agent of the firm and to receive and disburse all moneys. A written contract was entered into between them to this effect of that date, a memorandum of which, signed by all of the parties was deposited with the board of trustees, and by it recognized on February 7, 1871. The board ordered a copy of said memorandum to be deposited with the auditor of state, and requested him to recognize that agreement, which he did.

On June 13, 1872, Day, Kinney and Winner sold and transferred to Thomas F. Jones & Son, all their rights and interests in said contracts so far as related to work thereafter to be done, and directed the trustees to recognize the firm of Thomas F. Jones & Son as their assignees and to make

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*Central Lunatic Asylum Contracts; Final Adjustment of.*

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all future estimates and payments to them. The trustees so recognized the new firm by an order entered on their minutes June 18, 1872, and requested the auditor of state also to recognize such new firm, which he did.

Each of these contractors, that is to say, Day, Kinney & Winner and Thomas F. Jones & Son, has done a part of the work in the construction of the building. How much each has done I am not advised. Where Day left off and Day, Kinney & Winner commenced, and where Day, Kinney & Winner left off and Thomas F. Jones & Son commenced, seems not to be known. This circumstance is not important as far as Day is concerned, for he assigned all interests whatever under the contracts, past and prospective, to Day, Kinney & Winner. But the firm last named assigned their interests only as pertained to the work yet to be performed, reserving their rights as to the retained percentage, etc., on the work done before their assignment; so that, in determining the amount due each of these firms, it becomes material to know the amount of work done by each. There are other questions arising out of the construction to be given to the several contracts and assignments alluded to, which affect the determination of the amounts to be paid these firms severally which questions, I do not deem it the duty of the commissioners of construction to undertake to settle. In my judgment they should determine the amount due under the contract with Day of May 5, 1870, as a whole, and deduct therefrom the payments made, thus ascertaining the balance due under said contract. The deduction should embrace the \$10,000 for brick of the old asylum, and any other sum that it may be proper to deduct under the contract. This balance, thus ascertained, to be paid to the several parties named as they may agree among themselves.

The foregoing answers your first inquiry.

Second—This contract being prior to the act of April 3, 1873, the contractor could not be subjected to the provisions thereof, differing from the provisions of the act of

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*Requisitions for Fugitives From Justice; Power and Duty  
of the Governor in Reference to Issuing Them.*

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May 4, 1868, except by his consent. With such consent and the approval of the governor, auditor of state and secretary of state, the changes of which you speak may be made.

Third—Your inquiry as to the resolution of April 20, 1874, is answered in a separate communication to the board of construction of this date.

Fourth—The board should recognize the attested claim of T. F. Jones & Son, to which you refer, and out of any money due, or to become due Charles W. Vogel, or the firm of Jackson & Russell on account of work by Vogel attended to in the attested account, they should retain a sufficient sum to satisfy said claim. The account is herewith returned.

Very respectfully,

JOHN LITTLE,  
Attorney General.

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REQUISITIONS FOR FUGITIVES FROM JUSTICE;  
POWER AND DUTY OF THE GOVERNOR IN  
REFERENCE TO ISSUING THEM.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 11, 1875.

*Hon. William Allen, Governor:*

SIR:—You submit the affidavit of Abraham Morey, and other papers, being an application for a requisition upon the governor of Iowa for one J. B. Coote charged with the commission of a misdemeanor in Union County, on the 12th day of October, 1874, to-wit: the selling of a patent right and the taking of a promissory note therefor without having the words "given for a patent right" written thereon; and you ask my opinion as to your power and duty in the premises.

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*Requisitions for Fugitives From Justice; Power and Duty  
of the Governor in Reference to Issuing Them.*

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First—That the governor has the power to issue the requisition I have no question. The provision of the U. S. Constitution relating to this subject is as follows: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

The Supreme Court of the United States in *Commonwealth of Kentucky vs. Dennison, Governor, etc.*, 24 Howard, 99, says: "The words 'treason, felony or other crimes,' in their plain and obvious import as well as in their legal and technical sense embrace every act forbidden and made punishable by a law of the State. The word 'crime' of itself includes every offense from the highest to the lowest in the grade of offenses, and includes what are called misdemeanors as well as treason and felony."

It seems clear, therefore, that the offense charged in the affidavit comes within the meaning of "crime" as here defined, and that on demand of the governor of this State the executive of Iowa would be in duty bound to surrender Coote. But there is no obligation resting upon the executive of this State to make the demand. That is a matter resting in his sound discretion. I should say it is not the duty of the governor to make requisition in case of an ordinary misdemeanor, and in this particular case the application, in my judgment, should be denied.

Very respectfully,

JOHN LITTLE.

Attorney General.

*“Reserves” of Insurance Companies Cannot Be Considered  
as Bona Fide Debts in Making Returns for Taxation.*

“RESERVES” OF INSURANCE COMPANIES CAN-  
NOT BE CONSIDERED AS *BONA FIDE* DEBTS  
IN MAKING RETURNS FOR TAXATION.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 11, 1875.

*Hon. James Williams, Auditor of State:*

SIR:—I have again carefully considered the question of the right of insurance companies to treat their “reserves” as *bona fide* debts in making their returns for taxation, and after weighing the considerations urged, have arrived at no different conclusion from that heretofore reached, and communicated to you.

The liabilities to meet which the reserves are required to be made, are, in contemplation of law, but contingent. They may occur and they may not. And it does not, in my judgment, change the legal aspect of the matter, that as a rule among companies such reserves are about equal to the losses actually occurring to the payment of which they are applied.

At first view it would seem that an exception should be made as to life companies doing business upon the endowment plan, or issuing paid up policies after payment of one or more premiums, so far as such policies are concerned. But in such cases is the money in the hands of the company, with which it must pay the policies at some date, to escape taxation? That cannot be, nor can it be that the policy holder must return it for taxation. The utmost that can be assumed for such a company in this behalf is that it holds such money as the trustee or agent, for the policy holder, in which case, of course, it must return it for taxation.

Very respectfully,

JOHN LITTLE,  
Attorney General.

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*Central Lunatic Asylum Contracts; Final Settlement Under.*

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CENTRAL LUNATIC ASYLUM CONTRACTS;  
FINAL SETTLEMENT UNDER.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 17, 1875.

*Hon. George W. Monypenny, President Board of Construction, Etc.:*

DEAR SIR:—On further consideration I desire to make the following *addenda* to my letter of the 11th *instant*, relative to estimating the brick work, etc., on the Central Asylum:

Before making the final estimate of the whole work, as therein recommended, cause the usual estimate to be made for the work done and materials furnished since the last preceding estimate. This will, of course, be the last of the series of estimates on the structure pertaining to that class of work. When the final estimate of the whole is made, it should be carefully compared with the several estimates, the object being to detect any possible error that may have been made before final payment by the State.

As the law requires the estimates made from time to time to be *full and accurate*, the probability is, of course, that you will find no errors; but there may be some.

All figures and calculations should be carefully preserved for the inspection of the General Assembly, or any one concerned.

If your comparisons should show errors in former estimates against the State to any material extent, I should like to advise further with you, before payment is made to contractors on account thereof.

Yours, etc.,  
JOHN LITTLE,  
Attorney General.

*County Commissioners' Transcripts, Etc.; Examination of;  
No Compensation Can Be Allowed for Such Services—  
Ohio State Library Improvement; Contract for.*

COUNTY COMMISSIONERS' TRANSCRIPTS, ETC.;  
EXAMINATION OF; NO COMPENSATION CAN  
BE ALLOWED FOR SUCH SERVICES.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 17, 1875.

*Byron Stillwell, Esq., Prosecuting Attorney, Ashland, Ohio:*

DEAR SIR:—First—Under the act of March 30, 1875 (O. L., p. 146), the court may, or may not, appoint the prosecuting attorney as one of the "Committee of three suitable and judicious persons" to examine transcripts, etc., of commissioners' proceedings.

Second—I know of no authority of law to compensate any of such committee (whether the prosecuting attorney be one or not) for services under the act. The costs which the clerk is authorized to certify "arising under the proceedings" and "which fees shall be allowed by the court," refer to the fees, and costs of subpoenaing witnesses before the committee.

Very respectfully,

JOHN LITTLE,  
Attorney General.

OHIO STATE LIBRARY IMPROVEMENT; CON-  
TRACT FOR.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 24, 1875.

*T. R. Tinsley, Esq., Architect of State Library Improve-  
ment:*

SIR:—Under the circumstances detailed in your communication of yesterday relative to the contract of J. Gill

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*County Commissioners; Compensation of, How Paid.*

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Blain for the improvement of the Ohio State library room, the library commissioners, with the written consent of the governor, auditor of state and the secretary of state, have the power to employ upon the work contracted, additional force and supply the necessary material, etc., as provided in the twelfth section of the act of April 3, 1873 (Laws, p. 106), but whether they should exercise that power rests in their sound discretion.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

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COUNTY COMMISSIONERS; COMPENSATION OF,  
HOW PAID.

The State of Ohio,  
Attorney General's Office,  
Columbus, November 30, 1875.

*J. L. Vallandigham, Esq., Prosecuting Attorney, Hamilton,  
Ohio:*

DEAR SIR:—In answer to yours of yesterday I have to say, that under the act of March 30, 1875 (Laws, pp. 169, 170), county commissioners cannot properly be paid their *per diem* mileage, etc., until the same shall have been certified to by the prosecuting attorney of the proper county and approved by the probate judge thereof.

Very respectfully,  
JOHN LITTLE,  
Attorney General.

*County Commissioners Cannot Furnish Offices for Prosecuting Attorneys—Harries Guards; Payment of.*

COUNTY COMMISSIONERS CANNOT FURNISH OFFICES FOR PROSECUTING ATTORNEYS.

The State of Ohio,  
Attorney General's Office,  
Columbus, December 10, 1873.

*E. J. Duer, Esq., Prosecuting Attorney, Millersburg, Ohio:*

DEAR SIR:—This in answer to yours of the 8th instant: County commissioners have no warrant or authority in law to rent or provide at public expense offices for prosecuting attorneys.

Yours, etc.,  
JOHN LITTLE,  
Attorney General.

HARRIES GUARDS; PAYMENT OF.

The State of Ohio,  
Attorney General's Office,  
Columbus, January 1, 1876.

*General James O. Amos, Adjutant General:*

SIR:—In answer to your communication of the 22d ult. I have to say:

That under the circumstances detailed, the account for the *per diem* of members of the Harries Guards, Ohio National Guards, for September 1 and 2, 1875, should be approved and paid out of the State treasury, when an appropriation shall be made for the purpose.

Very respectfully,  
JOHN LITTLE,  
Attorney General.