the difference between the amount collected and the amount he claims he ought to pay under the general tax law would have been insignificant, and that insignificant sum is not greatly increased by the ten per cent. penalty. All his fellow-townsmen were in the same category, and if any money was due it was for their common benefit. Under these circumstances the doctor should let the matter rest.

JOSEPH McCORMICK,
Attorney General.

TOLLS ON THE SANDY AND BEAVER CANAL.

Attorney General's Office,
Columbus, January 6, 1852.

His Excellency, Reuben Wood, Governor of Ohio:

SIR:—I have examined the question presented in the letter of David Beggs, president of the Sandy and Beaver Canal Company, to you of the 5th inst. which you did me the honor to hand to me for my opinion.

The Board of Public Works have paid the tolls on freight and passengers as granted to the Sandy and Beaver Canal Company by the third section of the amendment to the charter of that company, 32 O. L. L. 298, but refuses to pay or allow tolls on boats as claimed by that company.

In my opinion the Sandy and Beaver Canal Company have no legal right upon which to base their claim, the language of the act being "said company shall be entitled to collect and receive the tolls accruing on the Ohio Canal and all freight and passengers that may be transported thereon, and which have been transported," etc.

Freight and passengers are objects which are strictly transported, and boats are necessary to transport those

objects, but the boats themselves are neither in legal or nautical phrase transported, they transport the object transported. The language of the act clearly confines the right of toll to the thing transported and not the vessel in which it is transported, which is itself a different subject of toll.

The claim to this toll is based on implication.

This position is not sustained by the authorities in which it is valid as law that in grants by the public nothing passes by implication and parties are entitled to nothing not clearly given by the act.

United States vs. Aneamdo, 8 Peters 738.
Chat. River Bridge vs. Warren B., 11 Peters 546.
Proprietors Stone Con. vs. Wheely et al., 2 Barn. and Ad. 793.
Portland Bank vs. Billing & Pet., 4 Peters, 546.

I am, sir,

Respectfully yours, etc.,
JOSEPH McCORMICK,
Attorney General.

ORDER OF SUPPLYING WATER TO LESSEES.

To the Board of Public Works:

GENTLEMEN:—Your note requires my opinion in case thus stated:

> "A., leased of the state, in 1840, one hundred feet of surplus water of the canal on a certain level. B., in 1842, leased one hundred feet of surplus water from the same level. C., in 1844, leased one hundred feet of surplus water from the same level. The water fails so that there is not sufficient to supply the amounts leased. The (subsequent) lessees claim that what water there is should be equally used by

> each lessee. The first lessee claims that he is entitled to his hundred feet of surplus water, if there be that amount, and that the subsequent lessees have no claim to use any water except it be a surplus after the use of his hundred feet."

Unless the leases contain some provision not expressed in the foregoing case, the claim of the first lessee is correct. The second lessee can have no greater right, as against the first, than the State had, in 1842, before making his lease. And the State had contracted before that time to give the first lessee one hundred feet of surplus water (if so many feet there happened to be) from the level specified. The second lessee must take his hundred feet of water (if he can get them) after the first lessee has been fully served. And the third lessee in like manner must wait until both the first and the second lessees have taken what was let to them. It is not a case for equal abatement, for the rights of the lessees are not equal. B has only an interest in the residue after satisfying A's demand, and C has an interest in the residue only after satisfying B's demand also.

I am, gentlemen,

Very respectfully, your obedient servant,

G. E. PUGH,
Attorney General.

Columbus, February 28, 1852.

EXISTENCE OF THE FREE BANKING LAW.

To the Auditor of State:

SIR:—I have examined the question which you submitted to me some weeks since, whether the act to authorize free banking, dated March 21, 1851, is now in force. It was suggested, I understand, by applications for the establishment of new banking companies.

Existence of the Free Banking Law.

The present constitution goes upon the idea that by its adoption as in case of any complete change in the form of government, all acts of the General Assembly are repealed, or amended, except such as it expressly saves. The first section of the schedule is in these words:

> "All laws of this state, in force on the first day of September, one thousand eight hundred and fifty-one, not inconsistent with this constitution, shall continue in force until amended or repealed."

This is not a repealing but a saving clause, and it would be idle in the last degree if any law *not thereby saved* should continue to have force and operation.

It remains to be considered, therefore, whether the act of March 21, 1851, is consistent or inconsistent with the mandates of the constitution upon the subject of corporations, and such especially as claim banking privileges. Those mandates will be found plainly set forth in the thirteenth article.

> "Section 1. The General Assembly shall pass no special act conferring corporate powers.
>
> "Section 2. Corporations may be formed under general laws, but all such laws may from time to time, be altered or repealed.
>
> be secured by such individual liability of the
>
> "Section 3. Dues from corporations shall stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."
>
> "Section 4. The property of corporations now existing or hereafter created, shall forever be subject to taxation the same as the property of individuals.
>
> "Section 7. No act of the General Assembly authorizing associations with banking pow-

> ers, shall take effect until it shall be submitted to the people at the general election next succeeding the passage thereof, and be approved by a majority of all the electors voting at such election."

Does the act of March 21, 1851, exist with these provisions? Would it (if now for the first time proposed) be constitutional, and without any vote of the people, operative? Each of these inquiries, in my judgment, must that such a pledge was within the constitutional power of the General Assembly when made; but in deciding receive a negative answer.

The act of March 21, 1851, is not a special act; it is quite as general as could be asked. But it does not contemplate any exercise of the right of amendment, or repeal so as to affect companies established under its provisions, before the passage of an amendatory or repealing act. The tenth section confers corporate powers and privileges until the year 1872, and *thereafter* until the repeal of the act, holding out the pledge, clearly, that for twenty years there shall be no repeal to affect the companies organized and in existence. I do not say (nor do I believe) upon the policy of the act, whether it be or be not consistent with the paramount law, we must look to all provisions which its authors themselves deemed essential.

The act secures (or professes to secure) the paper issued by the companies to circulate as money; but the "dues" of a company in the proper extent of that term, are not secured, as, for example, its indebtedness to depositors and general creditors. The constitution says that in *any* event, the stockholders shall be liable for an additional amount equal to their several subscriptions; the act recognizes nothing of that kind. But the constitution allows the General Assembly a discretion to require a higher and further degree of security for corporate indebtedness, and until the General Assembly has exercised that discretion by passing a law no man can tell what indi-

vidual liability or what "other means" of indemnification the creditors are to have against banking or other corporate companies.

It has been suggested to me, however, that the last clause of section thirty-five renders the stockholders individually liable (when they do not exceed five in number) for all the corporate debts. But that I take to be a clear exclusion of the idea that when there are more than five stockholders in any company, they can be made so liable. And in this respect, therefore, the act and the constitution are irreconcilable.

As the act is silent upon the subject of taxation, however to be indulged, the act of March 21, 1851, is merely may not tax companies already organized upon both their property and their franchises. Therefore, in view of the fourth section, thirteenth article, the act is not objectionable.

It has been urged upon my attention by the counsel for the applicants that as no presumption of repeal ought ever to be indulged, the act of Mrch 21, 1851, is merely modified in some of its provisions, by the constitution since adopted, and that *with those modifications* it continues to be the law of the land.

But as to the third section, thirteenth article, the legislature has not yet expressed its will; and how can we say in that regard of what modifications the act is susceptible?

And though part of an act may be repealed or abrogated, whilst the residue of it continues to be operative, though an act may remain in force subject to limitations and amendments superinduced by a constitution or a subsequent law, yet there is one plain qualification applicable to the present case. The act of March 21, 1851, pursues a uniform system throughout. Many of its details, perhaps, might be altered or repealed, without affecting the principles of that system; but the particulars specified in the second and third sections, article thir-

teen, of the constitution, are vital to every system of corporate organization, and cannot be treated as matters of mere detail. The policy of the whole act must be gathered from these and other like particulars; and looking to that policy, thus ascertained, I cannot harmonize it with the constitutional provisions above mentioned.

But the seventh section, article thirteen, is one which (it seems to me) cannot be evaded:

> "No act of the General Assembly authorizing associations with banking powers, shall take effect until it shall be submitted to the people at the general election next succeeding the passage thereof, and be approved by a majority of all the electors voting at such election."

It is urged, however, that this section is *prospective* only and that the constitutional convention never contemplated a vote of the people upon any *existing* act. I do not understand the section to be prospective in the sense suggested; no more prospective, certainly, than the whole constitution. The words "take effect" mean that the act shall have operation, validity or force of law, whether it be directly or circuitously induced. And before we undertake to say what was contemplated by the convention, it should be recollected that neither the act of March 21, 1851, nor any other act authorizing the creation of corporations with banking powers, was in force when the constitution was framed and signed.

The act to incorporate the State bank of this and other banking companies passed February 24, 1845, had not been repealed, but then the power of creating companies under it had been exhausted. The act to authorize free banking was, in truth, passed one day later than it bears date; and when the constitutional convention adjourned on the 10th of March, 1851, no such act was in existence and would not (keeping in mind the constitutional provi-

sions) have reasonably been contemplated. If we are to indulge any surmise as to the motives of legislative bodies, we must imagine either that the General Assembly expected the act of March 21, 1851, to be abrogated by the taking effect of the constitution in September thereafter, or that it meant to frustrate the purposes of the constitution in an essential particular. It is altogether immaterial, in my judgment, which of these two things the General Assembly proposed; for it cannot be seriously pretended that, pending the question before the people whether the constitution should or should not be adopted, the General Assembly could so interpose as to defeat its operation and policy in the event of adoption.

I admit indeed that the convention did not contemplate the act of March 21, 1851, in framing the seventh section quoted above; but it contemplated (as every citizen must have done) that the constitution would take effect in the same sense in which it was proposed, and that between the tenth day of March and the first day of September, 1851, nothing would be attempted (or, if attempted, would prevail) to render it an idle and fruitless law.

If the act of March 21, 1851, continues to be in force (as claimed), then what the legislature cannot accomplish—the creation, to-wit: of corporations invested with banking powers—is accomplished by the governor, the secretary and the auditor, through mere circumvention or sufferance. The effect of the constitution would thus be superseded.

It is urged, however, that this view of the case will destroy the franchises of all banks and banking companies organized before the constitution took effect, or, at least, repeal their acts of incorporation. I do not think so. The banks organized under special charters had acquired their rights (whatever those rights may be) long before the constitution was promulgated. The companies

organized under the act of February 24, 1845, had also acquired their rights. Nothing, in respect of them, remained to be done.

The question is not as to corporations then in existence; it is whether such corporations can now be created. A power executed has been said to vest a right. A power unexecuted imports, by its very name, that no right has vested; and it may (unless coupled with an interest) be revoked or superseded at any time. What has been done under a power applicable to several matters or cases, may be supported and yet the power may, as to all future matters or cases, be completely annulled. Such a power is that in the act of March 21, 1851, for creating new companies. It would be revoked undoubtedly by a repealing act; and still the companies organized previous to the first day of September, 1851, might continue in existence. And a power will not only be revoked by express terms of repeal or dissent, but it will be revoked by any disposition of the subject matter inconsistent with its exercise or continuance. A will is revoked by a subsequent will inconsistent with its provisions, though not so much as named. A power of attorney to sell lands (unless coupled with an interest) is revoked by the ascertained insanity of the principal, or his death, unless it has been executed; or if one part of the land be sold before such insanity or death, that sale may be good and all subsequent sales invalid. And so, if the principal himself sell the land or a part of it before the power of attorney has been executed, that is a complete revocation, or a partial one, as the case may be.

It does not follow, therefore, because the constitution operates to supersede the power of creating banks after the 31st of August, 1851, that all banks then in existence are abolished. I think, on the contrary, that even the companies formed under the act of March 21, 1851, which had obtained a certificate (such as the fifth section

requires) before the constitution took effect, may continue to transact business.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH,
Attorney General.

Columbus, March 5, 1852.

Note—The Supreme Court in Bank of Steubenville vs. Wright, 6 O. St. 318, held the act to be in force.

PILLARS,
Attorney General.

CONSTRUCTION OF FREE BANKING LAW; SIXTEENTH SECTION.

Attorney General's Office,
Columbus, March 13, 1852.

SIR:—Your note of day before yesterday requests my opinion relative to the sixteen section of the act to authorize free banking, and your right to vary, ————, in any case the proportions therein specified. The section provides:

> "Notes of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, and one hundred dollars each, and no note of any other denomination may be issued by any banking company deriving its powers or privileges from this act. Of the notes issued by any such banking company, not more than two per centum of the amount shall be in notes of one dollar each, not more than five per centum in notes of two dollars each, not more than

> ten per centum in notes of three dollars each, not more than twenty per centum shall be in notes of all denominations under five dollars nor more than fifty per centum in notes of all denominations under ten dollars."

The plate furnished by the engraver upon the order of your predecessor, does not print ten per centum of notes of the denomination of one dollar, and does print more than ten per centum of notes of the denomination of three dollars. And the cashier of the Springfield Bank demands that the deficiency in one-dollar notes shall be supplied from the excess of three-dollar notes.

I can see no ground or pretense for such a demand. The language of the act is very plain; and the mistake of the former auditor, or the engraver cannot change it in any respect. There is no case whatever in which you will be authorized to issue more than ten per centum of notes of the denomination of three dollars, or otherwise to depart from the proportions fixed by section sixteen.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH.

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

CONSTITUTIONALITY OF THE "ACRE" TAX.

Attorney General's Office,
Columbus, April 14, 1852.

SIR:—I have examined the act to authorize the trustees of townships in certain counties to levy an additional road tax, passed February 22, 1848, and find it to be at variance with the twelfth article, section second, of the constitution.

The act authorizes a specific assessment, not exceed-

ing two cents, on every *acre* of land listed for State and county taxation. The constitution provides that all real and personal property shall be taxed *"according to its true value in money."* The act is not saved, therefore, by the first section of the schedule, and such taxes as have been assessed under its provisions since the first of September, 1851, are invalid.

I am sir,

Very respctfully, your obedient servant,

G. E. PUGH.

Wm. D. Morgan, Auditor of State.

TAXATION OF RAILROAD PROPERTY, ETC.

Attorney General's Office,
Columbus, May 7, 1852.

Messrs. H. B. Payne, N. Wright, Wm. Hunt, Jas. H. Gorman, J. H. Sullivan; Committee:

GENTLEMEN:—I have received your favor of yesterday, addressed to the auditor of state and myself relative to the new tax law and its operation upon the real and personal property of railroad companies.

I concur with you that the legislature meant by the twenty-first section, to discard the method of taxing either the profits or the capital stock. The assessment is to be upon real and personal property, monies and credits; and except as the productiveness of a road and the cost of its construction may enter into and affect the actual value of the corporate property, they must be disregarded.

I have carefully examined the questions which you propound and arrived at these conclusions:

First—Each railroad company should estimate and return under the twenty-first section, all the real estate belonging to it and used for or connected with its special corporate purposes. But real estate which a company

should happen to own, disconnected with its principal object, it holds as an ordinary proprietor; and all such real estate should be appraised (as in the case of an individual) by the district assessor.

Second—The tax, in my opinion, is upon *the land* as such and not upon *the title* which a person or corporation may have in it. And, therefore, so long as the right of way exhausts the whole use of the land, I think that its entire value should be estimated and returned for taxation by the company so using it. Should the land revert to the former owner, by disuse or forfeiture, he will again become liable for the taxes.

Third—What I have just said answers fully question three.

Fourth—It would be a satisfactory compliance with the law, in my opinion, if each railroad company should return the full value of the real estate used or intended to be used for its special corporate purposes in each township, town, city or ward, where situated (including the enhanced value imparted to the land by the construction *and use* of the road), adding the value of the superstructure as laid, together with the value of all depots, buildings, switches, sidetracks, water tanks, and other fixtures used in managing the road. This, I mean, would represent the "stationary and fixed" property which the company is required to list. And to this estimate, of course, each company must add the proportionable value of its movable property in the several townships, towns, cities and wards as required by the twenty-first section.

Fifth—It is desirable, for many reasons, that the value of personal property should be distinguished in the return from the value of real estate.

I am, gentlemen,

Very respectfully, your obedient servant,

G. E. PUGH.

N. B.—This letter was addressed to the committee directly at the auditor's suggestion.

The Appropriation Bill of May 1st, 1852, and the Omission to Provide for Paying Interest on the State Debt and the Expenses of Superintending and Repairing the Public Works.

THE APPROPRIATION BILL OF MAY 1ST, 1852, AND THE OMISSION TO PROVIDE FOR PAYING INTEREST ON THE STATE DEBT AND THE EXPENSES OF SUPERINTENDING AND REPAIRING THE PUBLIC WORKS.

Attorney General's Office,
Columbus, May 8, 1852.

Wm. D. Morgan, Auditor of State:

SIR:—The question submitted by your letter of the 3d instant is one full of perplexity and (which way soever I decide it) full of serious consequences. You state, truly, that the legislature has made no provision in its appropriation bills, for the payment of the May and July interest on the domestic and foreign debt, nor for the superintendence and repair of the public works. And you ask me as to your right to draw upon the treasurer for money to discharge those obligations and expenditures.

The constitution has two principal clauses applicable to the subject:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and no appropriation shall be made for a longer period than two years. Art. II, Sec. 22.
>
> "An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom and on what account, shall from time to time be published as shall be prescribed by law." Art. XV., Sec. 3.

This language seems to me hardly susceptible of two interpretations. I take it as declaring that all public

The Appropriation Bill of May 1st, 1852, and the Omission to Provide for Paying Interest on the State Debt and the Expenses of Superintending and Repairing the Public Works.

money should be paid into the state treasury; that it should be kept there for disbursement, that whatever the treasurer parts with, to any person, should be in pursuance of a specific legislative appropriation. But it is my duty to tell you that a different contsruction was given to clauses of similar import in the old constitution more than twenty-five years ago, and that the present General Assembly took that construction as applicable to the construction now in force. The doctrine so adopted seems to hold:

First—That only "the net annual income" of our state improvements can be considered as public money or revenue.

Second—That this income and all other particulars of the sinking fund remain in the custody of the treasurer of state as the mere bailee, depositary, of the commissioners charged with its management.

It would seem to follow, if these propositions be law, that although the *gross* income of the public works is really paid to the treasurer of state from time to time, by the several collectors, he is not bound to render an account of it to the legislature except as the agent of the Board of Public Works or the commissioners of the sinking fund. The former may draw from the gross receipts at discretion, and the latter may direct the residue, "the net annual income," to be loaned, invested, or deposited as they choose. A distinction has been taken and has long prevailed between the revenue of the State derived from the public works and that derived from taxation; and there has been a further distinction, equally ancient, between the funds raised to pay the interest and principal of the State debt and the funds raised for ordinary State purposes.

These are, to say the least, subtle distinctions. I do

The Appropriation Bill of May 1st, 1852, and the Omission to Provide for Paying Interest on the State Debt and the Expenses of Superintending and Repairing the Public Works.

not find them clear to my mind, even upon the statutes heretofore enacted. But they seem to have prevailed as true expositions of the law for a long time; the Board of Public Works, the fund commissioners, the auditor and the treasurer of state have uniformly been governed by them.

In a case where the consequences of holding an act or omission of the legislature unconstitutional will be so serious—will break that "faith of the State" which has hitherto been inviolate—will produce such an extent of individual annoyance and suffering—in such a case, I say, one should require *undeniable* warrant for so bold a decision. That, sir, I have not. I believe that the constitution intends and directs otherwise—that the General Assembly ought to make specific appropriations biennially for payment of the interest and principal of the State debt and the expenses of superintending and repairing the public works—that public money (no matter from what source it comes) should be kept in the State treasury alone, and never disbursed except in pursurance of the plain letter of law. The members of the legislature are of different opinion. To their judgment, and to the stress of the present emergency, I surrender my own convictions. You must draw upon the treasury in accordance with the usage to which I have referred.

But, sir, I cannot reconcile it with my sense of duty to allow the occasion to pass without an earnest, though humble, dissent from the construction *practically* put upon the new constitution in this instance.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH.

Assessments for the Construction of Free Turnpike Roads, Levied on the Adjacent Real Estate, According to the Area of Each Tract.

ASSESSMENTS FOR THE CONSTRUCTION OF FREE TURNPIKE ROADS, LEVIED ON THE ADJACENT REAL ESTATE, ACCORDING TO THE AREA OF EACH TRACT.

Cincinnati, May 24, 1852.

SIR:—I have received yours of the 19th instant, enclosing a letter from the auditor of Wood County on the subject of specific taxes or assessments for the construction of certain free turnpike roads.

I do not think that those assessments are of the same character as the taxes levied under the act "to authorize the trustees of townships in certain counties to levy an additional road tax," passed February 22, 1848, which I have found it my duty to pronounce unconstitutional.

The taxes levied under the act of February 22, 1848, are *general* road taxes, and not for the purpose of constructing a particular improvement. Now, as I understand the constitution, township taxes may either be levied upon property or upon persons. The first section, article twelve, allows taxation "by the poll" for township purposes. If, however, a general road tax be imposed on property by the township authorities, it must be "according to its true value in money" always. It was because the act of February 22, 1848, assessed a general township tax (although for road purposes) according to the number of *acres* in each parcel, without the least regard to comparative values, that I could not sustain it. I do not doubt that such legislation is highly beneficial in townships or counties where large landed estates are owned by non-residents and are unimproved. But I cannot make the constitution yield to the convenience, or even to the necessities of a part of the people.

The assessments imposed by the act to lay out and

Assessments for the Construction of Free Turnpike Roads, Levied on the Adjacent Real Estate, According to the Area of Each Tract.

establish the Wood and Lucas Free Turnpike Road, passed February 19, 1851, and the other acts of a similar character to which the auditor of Wood County refers, seem to me something different. They are levied upon the real estate adjacent to the road itself, within given distances, according to the area of the several tracts; and they are to be appropriated specifically to the construction and repair of the road. It is the same system, in principle, as that long used in our cities and towns (which the General Assembly has just adopted, too, in the municipal corporation bill) of assessing the cost of an improvement upon the adjacent real estate, and according to the number of feet front in each lot. The late court in bank decided that the old constitution did not invalidate such assessments. *Bonsal vs. The Town of Lebanon,* 19 Ohio Reports, 418. I confess that if the question were a new one, or if the legislature had not treated it as settled, I might not agree to a continuance of the system. But the Supreme Court of New York promulgated the doctrine thirty-eight years ago, that assessments of this kind are not *taxes* in the strict sense, and that this is only a method of remunerating the public for benefits *particularly* conferred upon the owners of adjacent land by the construction of an improvement. So rigidly was the doctrine applied, in the case to which I allude, that religious societies whose property was exempt from taxation, by statute, were compelled to pay for the pavement of streets in front of their church and burial grounds. *The matter of the Mayor of New York,* 11 Johnson, 77. In *Thomas vs. Leland,* 24 Wendell, 65, and *Sharp vs. Speir,* 4 Hill, 76, the same court upheld such assessments as constitutional, and distinguished them from mere taxes.

I do not feel at liberty to declare assessments of this sort unconstitutional, at so late a day, although I doubt whether they could have been sustained, originally, upon

Opinion as to the Time When the Municipal Corporation Law Took Effect.

fair argument. It is enough for me, now, that they differ from the taxes imposed by the act of February 22, 1848, in the very particular which warranted my opinion of April 14.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH,
Attorney General.

To the Auditor of State.

OPINION AS TO THE TIME WHEN THE MUNICIPAL CORPORATION LAW TOOK EFFECT.

Cincinnati, May 31, 1852.

SIR:—I have examined, at your request, the act to provide for the organization of cities and incorporated villages, bearing date the third instant, with a view to the question whether it will take effect on the 16th of May, 1853, or has already taken effect.

The difficulty arises upon the last section—"This act shall take effect from and after the fifteenth day of May next." This, if construed according to its most grammatical sense, would postpone the operation of the act till May 16, 1853, provided the date of the act is to be holden as the time when it became an expression of the legislative will.

The fact is, however, that the last vote was taken upon the bill on the 28th day of April, 1852, in the Senate, and its great length (for it contains one hundred and eleven sections) prevented its enrollment and signature before the third day of May, 1852, when it bears date. This is the third case in which difficulty has arisen from the date given to an act at the time of its signature.

On the 6th of January, 1848, the bill to establish the Commercial Court of Cincinnati passed the Senate, and on

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the 29th of the same month it passed the House of Representatives without amendment. But it was not enrolled and signed until the 4th of February, 1848, at which time the speaker of the Senate gave it a date. On the *third* of February, however, the members of the two houses met and elected a judge of the court for seven years. A question arose, hereupon, whether the election was valid or void. But instead of requesting another ballot, and thus removing all doubts, the Senate of that day undertook as well to give a decision upon the case as to establish a rule for the dating of acts in future. The subject was referred to the Committee on the Judiciary for Examination; and by that committee's advice, reported February 24th, 1848, it was agreed that the act had taken effect from the time (January 29th) of the last vote, and not from the time (February 4th) when the speaker of the Senate signed the enrollment. And so the election was unanimously adjudged to be legal. Senate Journal, Vol. 46th, pp. 668-671.

But during the late session another case presented itself and the Senate took the subject again under advisement. By the ninth section of an act which received its last vote on the 15th day of March, 1852, and bore date accordingly, it became a serious question whether all the notaries public of the State were not turned out of office, a result, perhaps, which the General Assembly did not contemplate. But it was found, upon inquiry, that the act had not been signed until the first day of April, 1852, and thereupon the Senate directed that its date should be changed from the time of the last vote to the time of its signature.

The constitution now in force provides, article two, section seventeen, that "the presiding officer of such house shall 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." This does not (it will be ob-

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served) require that any date should be affixed; that is only required by the joint standing rules.

In January, 1848, the joint rule upon the subject was this:

> "After examination and report (by the committee on enrollment) each bill and joint resolution shall be signed, in their respective houses, first by the Speaker of the House of Representatives, and then by the Speaker of the Senate, who shall fix the date thereto." Rule 14th.

But the case of the Commercial Court bill induced an alteration, and the rules of the next session were these:

> "After examination and report each act and joint resolution shall be signed in their respective houses, first by the Speaker of the House of Representatives, and then by the Speaker of the Senate." Rule 13th.
>
> "The clerk of the Senate shall attach to each act and joint resolution, signed by the speakers, the date of the last action of either house thereon, and then deliver it to a member of the committee of enrollment on the part of the Senate, who shall deposit the same in the office of the secretary of state and take his receipt therefor, which receipt shall be filed with the papers of the Senate." Rule 15th.

The thirteenth and fifteenth joint rules of the next two sessions were identical with those just quoted; and the clerk of the Senate informs me that the fifteenth rule was in force, just as I have quoted it, both when the act respecting notaries public passed and when the Senate altered its date. In each of these cases, therefore, the Senate departed from the standing rules which had been adopted by the House of Representatives, as well as by itself, in order to accomplish a result found to be desirable.

I do not know that it is necessary to decide which of the directions so given by the Senate to its clerk, should

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be followed as the correct one; though, if it were necessary, I should sustain the first direction in preference to the second. The laws of this State take their life and effect from the legislative will, as expressed by the votes of the two houses concurring upon a given proposition, rather than from the act of an enrolling clerk, or a committee of enrollment, or even the presiding officers of the two houses. I have said that the constitution does not require an act of the legislature to be *dated* at all; it need only be signed and that for the purpose of identifying it as the proposition or bill which received the assent of the houses over which its signers respectively preside. I do not hesitate to say that an act signed, but not dated, would be valid as a law; for the journals of the Senate and the House of Representatives are not only public and authentic records, but they afford indisputable evidence in all courts and places of what the legislature has done, and how and *when* it was done. *The State ex rel. Loomis vs. Moffit,* 5 Ohio Reports, 358. The present case illustrates the justice of this doctrine. It was on the 28th day of April, 1852, that the General Assembly completed the expression of its will (the Senate voting last) in reference to the organization of cities and incorporated villages; and then the 15th of May, 1852, was in every sense the 15th of May next. The General Assembly could not have used language which at the time, would have been more appropriate; its intention, as evidenced by its own journals, does not admit of any dispute. But the delay of enrollment, examination and signature—a delay, perhaps, inevitable—is made to turn away the plain intent and the appropriate language (when used) of the law-making power.

I am of opinion, therefore, although the date given to an act, when signed, is *prima facie* evidence of the day of its passage, that nothing but the legislative journals can be taken as conclusive in this respect. The date of a deed, or covenant, or contract (no matter how solemn) may be con-

tradicted or explained always, even at the instance of the signers themselves. And that the journals are proper books of reference to contradict or explain the date given to an act of the legislature or to explain (if they can) a misprint or mistake of any sort in the printed or enrolled act, seems to me very clear. It may be (and probably is) a safe rule that, as respects a penal law, a law operating by way of forfeiture, a law extending the liability of sureties, and such like, no court should give them effect before the day of signature or even of publication. And yet any court would, I apprehend, look behind the date of an act to the time of its passage (and, if necessary, give it effect) in order to sustain a conveyance made, or to uphold any like thing done upon the faith of it as a law.

But there is, in the present case, an argument more conclusive. Every act of the legislature must be interpreted as an entire proposition, and to each of its clauses must be given, if possible, a meaning which will reconcile and effectuate all the parts. We are told, sometimes, that the first words of a deed and the last words of a will must prevail; the rule is at best arbitrary and artificial. But, even under that rule, courts always endeavor to harmonize all the parts of a deed, or of a will, before submitting either the one or the other to litigation. And less forbearance, certainly, should not be shown to a solemn expression of the legislative will.

The phrase "the fifteenth day of May next" is susceptible of two interpretations. It means usually the fifteenth day of the next month of May, but it can mean the next fifteenth day in any month of that name. The first, I repeat, is the usual meaning, and the one which accords better with the rules of grammar and the genius of our language. But the other is a meaning not impossible, though it is, generally, an improbable one. And where a deed, or a contract, or a law is such as to be futile without giving the phrase that interpretation—be it ever so unusual or ungrammatical

—courts will not hesitate to uphold the deed or contract or law, by means of it. I might refer to many examples, but I will cite a pragraph from Rutherforth's Institutes as decisive:

> "In doubtful matters, it is reasonable to presume that the same person is always in the same mind, where nothing appears to the contrary, that whatever was his design at one time, the same is likewise his design at another time, where no sufficient reason can be produced to prove an alteration of it. If the words, therefore, of any writing will admit of two or more different senses, when they are considered separately, but must necessarily be understood in one of these senses rather than the other, in order to make the writer's meaning agree with what he has spoken or writen upon some other occasion, the reasonable presumption is that this must be the sense in which he used them. We frequently apply this rule of interpretation in reading the works of any author either ancient or modern. If we meet with a passage which is of doubtful meaning, we usually make him, if we can, a commentator upon himself by comparing this with some other passage in his writings. And whatever we find to have been his meaning, where he speaks plainly, we conclude to have been likewise his meaning where he speaks doubtfully." Ruth. Inst. Book II, Ch. VII.

If it be necessary, therefore, to sustain the municipal corporation act, or to harmonize its provisions, the words "the fifteenth day of May next" will be construed as intending the next fifteenth day in any month of May, whether in the month then present, or in one not commenced.

The fifty-ninth section of the act requires an election to be holden on the first Monday of April, 1833, for two trustees in every ward of the cities, and prescribes certain things to be done by those trustees forthwith afterwards. The whole section would be a nullity, and with it would fall the organization of the city council in all our cities if

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the act should take effect on the 16th day of May, 1853, instead of the 16th of the present month.

The seventy-sixth section requires that on the first Monday of April next (1853) three commissioners to superintend streets, bridges, sewers, etc., shall be elected in cities of the first-class, and that they shall proceed immediately to the performance of certain duties. But this is impossible (or, at least, insensible) if the act itself does not take effect for six weeks after that period.

The eighty-seventh section provides that until the first Monday in April, 1853, the mayor shall act as police judge in cities of the first-class. But how can this be if there are no duties for a police judge to perform in such cities, until the 15th of May, 1853, shall have come and gone?

The hundred and ninth section authorizes the municipal officers heretofore elected to continue in office, and to perform their duties "under the provisions of this act," until their terms expire. Now, (as the legislature well knew) the terms of many and even most of the municipal officers heretofore elected will expire before the 16th of May, 1853, and before "the provisions" of the act (if that be the time of its taking effect) can afford the least assistance or color of right.

I might, if that were requisite, dwell upon the style of the whole act—the *in presenti* application of some clauses, and the deferring of others until the first Monday of April, 1853, as to a time when the scheme should be completely developed. I might, also, take notice of the imperative mandate of the constitution that such an act should be immediately brought into effect, and supersede the local charters which are barely tolerated by the terms, and are inconsistent with the policy of the new organic law. And I might well argue from that alone, even against the strictness of the letter, that the General Assembly did not design to put off the beneficial operation of the constitution in so important a matter without necessity or excuse.

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For tnese reasons, sir, I am of opinion that the act took effect on the 16th instant, and that it is now the law of the land.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH,
Attorney General.

To the Secretary of State.

OPINION RELATIVE TO THE CONSTITUTIONALITY OF THE ACT REQUIRING TWO DAYS OF LABOR, ANNUALLY, ON THE PUBLIC ROADS.

Cincinnati, June 5, 1852.

SIR:—I have examined the act prescribing the duties of supervisors and relating to roads and highways, passed March 20, 1837, with a view to the question whether its first six sections are constitutional or otherwise. The principle of those sections will appear, sufficiently, by a quotation of the first one:

> "That all male persons, between twenty-one and sixty years of age, who have resided three months in this State, and who are not a township charge, shall be liable yearly and every year, to do and perform two days' work on the public roads under the direction of the supervisor within whose district they may respectively reside." Swan's Stat. 806.

The penalty for disobedience, fixed by the second section, is one dollar—to be recovered by an action of debt, before any justice of the peace in the township.

It is urged by the auditor of Lucas County and others, at whose instance you have submitted the matter to my

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judgment, tnat this act contravenes as well the Federal as the present State Constitution, and that it was even repugnant to the constitution of November 29, 1802, lately superseded.

After examining the Constitution of the United States, with great care and patience, I can find no clause which seems to me pertinent in the least degree to the question. I find, however, that Congress never has regarded the ability of a citizen in the assessment of federal taxes. The system of collecting revenue by duties, or imposts, is one which always has operated, and always must operate, to the injury of the poor and to the benefit of the rich. The system of excises (which is also allowable) has become a proverb of inequality and injustice. And even when direct taxes are to be levied by Congress, they cannot be apportioned among the states according to property, but must be according to population.

In the constitution of November 29, 1802, I find several sections more or less appropriate to the question. Article eight, section twenty-three, is in these words:

> "That the levying taxes by the poll is grievous and oppressive; therefore the legislature shall never levy a poll tax for county or State purposes."

Article four, section one, provides that "all white male inhabitants, above the age of twenty-one years, having resided in the State one year next preceding the election, and who have paid or are charged with a state or county tax, shall enjoy the right of an elector."

But section five, same article, says:

> "Nothing contained in this article shall be so construed as to prevent white male persons, above the age of twenty-one years, who are compelled to labor on the roads of their respective townships or counties, and who have resided one year in the State, from having the right of an elector."

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The constitution adopted June 17, 1851, declares:

> "The levying of taxes by the poll is grievous and oppressive; therefore, the General Assembly shall never levy a poll tax for county or State purposes." Art. XII, Sec. I.

The second section of the same article does not provide that all taxes shall be equal, nor that all taxes shall be according to the ability of the person, nor (in strictness of language) that excises even may not be levied. The Constitution of the United States prohibits the levy of duties or imposts, by State authority, except in special and limited cases. But the section first named of our constitution only provides:

First—That monies and credits shall be taxed according to a uniform rule.

Second—That real and personal property shall be taxed according to its true value.

The section does not require that the rate of taxation upon monies and credits shall be the same as that upon real and personal property; it does not require that monies and credits shall be valued by the same rule necessarily, as real and personal property are valued. I take pains to note these things here because infinite confusion has been produced by the misconstructions which are so industriously put forth in certain quarters.

The first section of the article declares that the levying of taxes, by the poll, is grievous and oppressive. That is the only utterance of a maxim which no one cares to dispute; and unless followed by some direction or limitation, it could only be taken as matter of advice to the legislative power—certainly not as a prohibition. We are not left in doubt, however, as to that. The constitution proceeds to give its own conclusion from the premises so broadly stated, and a practical, direct, plain conclusion it is. "Therefore," because the system is a grievous one—"the General Assem-

bly shall never levy a poll tax for county or state purposes." But the constitution recognizes, also, the existence of townships, and the necessity of taxes for township purposes, in section seven of the tenth article and, indeed, throughout that article and elsewhere. The expression of two things forbidden, in such a case, is the permission of another thing evidently contemplated, and yet *not* forbidden. Cannot the legislature levy a poll tax for *township* purposes? It seems to me too plain for dispute. The constitution supposes that the system, though grievous and oppressive, is or may be requisite to maintain township organizations, so that even if the act of March 20, 1837, should be construed as imposing a poll tax it would, in my opinion, be constitutional. For the construction and repair of public highways and the care of the poor were the original objects of all township organizations. The duty of townships in respect of schools was not known till twenty-three years after the constitution of 1802 had taken effect and more than thirty years after the ordinance of 1787 had established townships. It is true that both for road and school purposes, townships have been subdivided into districts, but that is only for the sake of convenience and efficient control. The repair of roads, the management of schools, and the support of the poor are still township duties, and are so treated by the law, except in particular cases.

But is it true that the charge of one dollar for not laboring on the roads is a tax? In Overseers of America vs. The Overseers of Stanford, 6 Johnson, 93, a case involving the question of a pauper's settlement, the court said:

> "Taxes in the popular and ordinary sense of the term (and in that sense laws are genrally to be read) mean pecuniary contributions; and when the word paid is added, by way of defining it, the sense becomes more clear and certain. The pauper's father, while he lived in America, worked on the highways. He performed labor or personal ser-

> vice, and this was no more *the payment of a tax* than training in the militia would have been."

The charge is, it seems to me a penalty for the non-performance of certain duties enjoined by law, or, at least, a commutation for such non-performance. There are some duties which every able-bodied citizen, between certain ages, and not specially exempted, is liable to perform. He must defend the country in time of war. He must, whenever called by the sheriff or any peace officer, assist in executing the process of the law. He must serve as a juror, when summoned, unless excused or disqualified. And so must he labor on the public roads, for that is a duty as requisite, as ancient, as well-defined, as any to which he can be called. In the early times of this State, as appears by the statutes, every male between sixteen and fifty years of age, although a *resident* only, was required to perform duty, as a militiaman even in peace. 1 Chase's Statutes, 92, 102. In December, 1808, the law demanded that "each and every able-bodied white male person" of eighteen years and under forty-five should be trained in the militia. 1 Chase's Stat. 592. Even the act "to regulate the militia," passed March 12, 1844, provides for the enrollment of "every able-bodied white male inhabitant resident within this State, who is or shall be of the age of twenty-one years and under the age of forty-five years, excepting persons who may be members of volunteer companies, persons absolutely exempted by law, idiots and lunatics," as a militiaman. 42 Gen. L. 53. And until the militia system was legislated into confusion, by the act of February 8, 1847, every such inhabitant was chargeable with either a penalty, or a commutation, for not performing his duty in this respect.

The act of March 20, 1837, concerning roads and highways, is of the same character as the acts which I have just mentioned. It is for the non-performance of a duty enjoined upon all residents of the township *as such,* that a

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penalty or commutation is thereby imposed. The duty is not as severe as it once was. By the records of the territorial courts, it appears the inhabitants were called out, by whole townships, two or three times a year, to construct or repair the public roads. This was done by supervisors appointed for that purpose by the Court of Quarter Sessions under the territorial government. The first law on the subject was that of August 1, 1792, published by the governor and judges. It required that all the inhabitants of each township should be liable to a call, by the supervisor, to open a road and also liable to ten days of labor, annually, for the purpose of keeping the roads in repair. The penalty was fifty cents and liability to the same period of labor, when called again, as if no default had occurred. 1 Chase's Stat. 120. The first territorial legislature confirmed this law. 1 Chase's Stat. 212. On the 13th of December, 1799, the territorial legislature passed an act on the subject. It required all male persons between twenty-one and fifty years of age, resident thirty days in the township, and not a township charge, to perform two days of labor, each year, on the public roads. The penalty for disobedience was seventy-five cents. 1 Chase's Stat. 262. And we have had laws of similar import, ever since.

The constitution of November 29, 1802, in article four, section five, recognizes this as a public duty in plain terms, for it defines as electors, all "white male persons, above the age of twenty-one years, who are compelled to labor on the roads of their respective townships or counties." Yet that constitution has the very same clause against poll taxes which the present constitution has.

I am satisfied, furthermore, that the clause, so carried from the old constitution into the new one, never was intended to embrace commutations for this or any other kind of public service; it had reference to different legislation altogether. On the 8th of December, 1800, the territorial legislature passed an act imposing a veritable and professed

"poll tax" of fifty cents on "all able-bodied free male inhabitants of the age of twenty-one years and upwards," for the purpose of defraying county expenses. 1 Chase's Stat. 298. The governor and judges commenced the practice June 19, 1795, in this wise: "But as to those single men whose estates shall not be rated at one hundred dollars, they shall be assessed after the rate of fifty cents a head upon a tax of twelve and a half cents per two hundred dollars, both for poor rates and county levies." 1 Chase's Stat. 170. And the first territorial legislature, December 19, 1799, taxed "every able-bodied single man, of the age of twenty-one years and upwards, who shall not have taxable property to the amount of two hundred dollars, a sum not exceeding two dollars nor less than fifty cents." 1 Chase's Stat. 273. These were the enactments at which the old constitution aimed, most evidently, for they fell when that constitution took effect. Yet the law requiring labor on the roads continued in force, and was re-enacted time and again, until the law of March 20, 1837, came into being and operation.

In every view, therefore, it seems to me that the law must be holden as constitutional and valid.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH,
Attorney General.

To the Auditor of State.

Application of Certain Railroad Companies to Build Drawbridges Over Sandusky Bay and Huron and Portage Rivers.

APPLICATION OF CERTAIN RAILROAD COMPANIES TO BUILD DRAWBRIDGES OVER SANDUSKY BAY AND HURON AND PORTAGE RIVERS.

Attorney General's Office,
Columbus, July 8, 1852.

GENTLEMEN:—I have examined the questions arising from the application of The Toledo and Sandusky Railroad Company and the Junction Railroad Company for leave to construct drawbridges and railroad tracks over Sandusky Bay and Huron and Portage Rivers. Your note informs me that neither the bay nor either of the rivers is a navigable water connected with the public works of the State.

The third section of the act "prescribing a tariff of freight on railroad," passed May 1, 1852, is but an extension of the policy embodied in sections eight and fifteen of the act passed March 23, 1840, for protecting the State canals. It was designed that as well the "public or navigable" rivers, streams, lakes and reservoirs with which those canals are united or connected, as the canals themselves, should be preserved from appropriation, interference or use, whether by individuals or by corporations, unless with leave of the Board of Public Works, an acting commissioner, or the principal engineer in charge.

By this immunity alone can the State guard the public canals against abuse and keep them in good repair and navigable condition.

But the present application discloses a case within neither the language nor the intent of the law. If the applicant should do mischief to private property or rights by the erection of drawbridges as proposed, the citizens aggrieved can and doubtless will apply to the courts of justice. The State has no interest and the authority of the

board extends only to the prohibition of the State improvements and the lakes and rivers united or connected with them.

I recommend that the application be dismissed.

I am, gentlemen,

Very respectfully, your obedient servant,

G. E. PUGH.

To the Board of Public Works.

THE QUESTION OF JURISDICTION AS BETWEEN THE COURT OF COMMON PLEAS AND THE PROBATE COURT TO TRY CASES OF PETIT LARCENY AND OTHER INFERIOR OFFENSES.

(*Circular to the Prosecuting Attorneys.*)

Attorney General's Office,
Columbus, August 14, 1852.

SIR:—I have received a number of letters from prosecuting attorneys and other officers, as well as from private members of the bar, on the subject of indictments for offenses of a less grade than infamous crimes. The difficulties suggested resolve themselves, however, into three questions:

First—Has the Court of Common Pleas jurisdiction to try such cases?

Second—Must offenses of this sort be prosecuted by indictment?

Third—How shall the prosecutions be instituted and how conducted to trial?

These questions are of such importance, and the newspaper controversy now in progress relating to them, is so

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well calculated to alarm the public mind, that I deem it necessary to address you at length upon the subject.

It is my own opinion that of all prosecutions for inferior offenses commenced since the 25th of February, 1852, the Court of Common Pleas, except in Cuyahoga County, has no jurisdiction. It is also my opinion that, except in the counties of Cuyahoga and Hamilton, the Probate Court has ample jurisdiction for the trial of such cases, and should proceed at once to exercise it. The authority of the present Courts of Common Pleas to hear and determine causes, is derived from two constitutional provisions:

First—That which makes them successors of the late Courts of Common Pleas in their respective counties as to all suits, prosecutions and proceedings which were in progress on the 9th of February, 1852, when the present judicial system came into operation. (See sections four and thirteen of the schedule.)

Second—That which is conferred by the fourth section of the fourth article.

With the former, of course, we have nothing now to do; it is with prosecutions commenced since the 9th of February, 1852, that we must concern ourselves. The authority to hear and determine such cases is derived from the fourth section and fourth article, or else it does not exist. That section is in these words:

> "The jurisdiction of the Courts of Common Pleas, and of the judges thereof, shall be fixed by law."

Let us resort to the laws, therefore, for assistance. If they do not confer jurisdiction to try such cases as I have specified (prosecutions for inferior offenses) the dispute is at an end.

Now, until the legislature passed a law subsequent to the 9th of February, 1852, the Courts of Common Pleas

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had ample jurisdiction; for it was conferred by laws enacted under the old constitution from time to time, and as those laws were not repugnant to the new constitution in this respect, they were expressly re-enacted by the first section of the schedule. It is very true, also, that the tenth section and first article, of the new constitution, does not forbid prosecutions for "petit larceny and other inferior offenses" by indictment; and as the laws passed under the old constitution requiring indictments in all such cases, were not repugnant to that article or section, necessarily, it was right that proceedings by indictment should be continued.

But several clauses of the constitution warn us to expect a change in this particular, when the legislature should address itself to the duty of fixing "by law" the jurisdiction of the courts of justice. Section ten of the first article is one of them. The eighth section, article four, after vesting in the Probate Court jurisdiction over probate and testamentary matters and several kindred subjects, says that it shall have "such other jurisdiction in any county or counties as may be provided by law," having in view (as the rest of the article proves) the conferring upon it of criminal jurisdiction in two or more counties.

Section four, article four, certainly gives us to expect that when the legislature shall undertake to fix the jurisdiction of the Court of Common Pleas "by law," it will be a complete enactment, and supersede all previous legislation upon the same subject. And the first section of the schedule only continues the former laws in force "until amended or repealed" by new enactments.

Until the legislature passed some law, therefore, the Court of Common Pleas had jurisdiction to try such cases, and they were properly tried by indictment. But on the 19th of February, 1852, the legislature proceeded to fix "by law" the jurisdiction of the Supreme Court, the District

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Court and the Courts of Common Pleas; it was "an act relating to the organization of courts of justice and their powers and duties," as the title informs us. The fifteenth section relates to the Court of Common Pleas alone, and says, amongst other things, that "it shall have original jurisdiction of all crimes and offenses except in cases of minor offenses, the exclusive jurisdiction of which is possessed by justices of the peace, or that may be vested in courts inferior to the Common Pleas." General Laws, Vol. 50, page 70.

I will not construe this clause with all the strictness which it can admit. I will say that here the legislature expresses its purpose to confer jurisdiction over "cases of minor offenses" upon some court to be *thereafter* organized. The eighteenth section shows that this is the true construction:

> "All process and remedies authorized by the laws of this State, when the present constitution took effect, may be had and resorted to, in the courts of the proper jurisdiction under the present constitution; and all the laws regulating of, and imposing duties upon, or granting powers to the Supreme Court, or any judge thereof, and the Courts of Common Pleas respectively under the former constitution, except as to matters of probate jurisdiction in force when the present constitution took effect, shall govern the practice of, and impose the like duties upon the District Courts and Courts of Common Pleas respectively, created by the present constitution, so far as such process, remedies and laws may be applicable to said courts and judges respectively, or any judge thereof."

This section is of temporary application, but it served to retain the jurisdiction of Common Pleas courts over the "cases of minor offenses" until "courts inferior to the Common Pleas" could be organized.

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On the 25th of February, 1852, the act "defining the jurisdiction and regulating the practice of Probate Courts" was passed; it must have been before the legislature while the act of February 19, 1852, was under consideration. Its third section provides:

> "That in addition to the other powers and jurisdiction of the judge of the Probate Court, as provided by this act, the said court shall have jurisdiction in the trial and conviction of persons accused of any crime or misdemeanor, in the trial of which by the constitution and laws of this State, a presentment or indictment by a grand jury shall not be required."

There is a *proviso* to this, however, exempting the Probate Court of Hamilton and Cuyahoga Counties from its operation. Gen. Laws, Vol. 50, pp. 84, 85.

The Probate Court is a court "inferior to the Common Pleas" by express provision of law; for the sixteenth section declares that its final judgments, orders and decrees may be reviewed in the Court of Common Pleas by appeal or writ of certiorari as the case may require.

Subsequently, March 12, 1852, the legislature created a "Court of Criminal Jurisdiction" for Hamilton County, and, by the fifth section of the act, conferred upon it exclusive authority to hear and try the cases therein specified. Gen. Laws, Vol. 50, page 90. By a supplementary act, passed April 30, 1852, the power of this court was enlarged and its practice defined. Gen Laws, Vol. 50, page 103.

The legislature did not create a Court of Criminal Jurisdiction for Cuyahoga County: but it was expected at the time the Probate Court law was passed, that such a court would be created during the session. In Cuyahoga County, therefore, the Court of Common Pleas retained jurisdiction

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over "minor offenses" by virtue of the act of February 19, 1852, sections fifteen and eighteen.

But as late as April 30, 1852, the legislature again acted upon the subject as respects *other* counties. By an act of that date, further prescribing the powers and duties of the courts of justice, it repealed the eighteenth section of the act of February 19, 1852, and substituted the following provision:

> "That all process and remedies authorized by the laws of this State when the present constitution took effect, may be had and resorted to, in the courts of the proper jurisdiction under the present constitution, and all the laws regulating the practice of, and imposing duties on, or granting powers to the Supreme Court or any judge thereof respectively, under the former constitution, except as to matters of probate jurisdiction in force when the present constitution took effect, shall govern the practice of, and impose like duties upon, the District Courts and Courts of Common Pleas, and the judges thereof respectively, created by the present constitution, so far as such process, remedies and laws shall be applicable to said courts, respectively, and to the judges thereof, *and not inconsistent with the laws* passed since the constitution took effect." Gen. Laws, Vol. 50, page 102.

Excepting, therefore, such cases as are confided to the jurisdiction of the police judge in cities of the first class, mayors in other cities and incorporated villages, and justices of the peace, I conclude:

First—That in Cuyahoga County the Court of Common Pleas must hear and determine all cases of inferior offenses as well as of capital and infamous crimes.

Second—That in Hamilton County, except in cases of which the Police Court of Cincinnati has jurisdiction, the

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Criminal Court must hear and determine all cases of inferior offenses as well as of capital and infamous crimes.

Third—That in all other counties the Probate Court must hear and determine all cases of inferior offenses, and the Court of Common Pleas all cases of capital and infamous crimes.

If this be not the interpretation of the laws passed since the 9th of February, 1852, they can have, in my judgment, no sense at all.

It has been urged that the third section of the act defining the jurisdiction of the Probate Courts was not intended to take away the power of the Courts of Common Pleas over cases of inferior offenses and reference is made to what was said in debate upon the passage of that bill. There is no standard of interpretation so unsafe as that derived from the arguments or opinions advanced in such debates; for the reason which guided the majority in adopting a proposition may not be (and often is not) the same as that which influenced the author of the proposition, or half a dozen of its principal supporters.

And, besides, the language of this third section is too clear to admit of qualification from any extraneous source.

I have said already that the constitution does not *forbid* an indictment in cases of inferior offenses, but certainly, the constitution does not *require* an indictment. Now, as we have seen, the third section provides that the Probate Court "shall have jurisdiction in the trial and conviction of persons accused of any crime or misdemeanor in the trial of which, by the constitution and laws of this State, a presentment or indictment by a grand jury, *shall not be required.*" The section does, to be sure, use the words "and laws" in this connection; but to what laws does it refer? To the statutes passed under the old constitution requiring indictments? Obviously not, I suppose, for two reasons:

First—To speak of the requirements of the present con-

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stitution and of those statutes as being identical (and the section speaks of "the constitution *and* laws" as requiring the same procedure) would be merely absurd. Those statutes require an indictment and the constitution expressly dispenses with one.

Second—To give the Probate jurisdiction only of those offenses which were not required to be prosecuted by indictment under the "laws" formerly in force, would be to give it no jurisdiction at all for the old constitution declared (article eight, section ten) that no person should "be put to answer *any criminal charge* but by presentment, indictment or impeachment."

I take the "laws" specified in this third section to mean such laws only as require what the constitution requires—those laws which define the jurisdiction of the Court of Common Pleas and regulate its practice, and the duties of public officers, passed *since* the constitution took effect.

The constitution and those laws do not require an indictment in any except capital and infamous crimes. The act of February 19, 1852, by its original eighteenth section, required (or at least permitted) an indictment *until* the legislature should have completed its scheme of judicial organization. But when the Probate Court bill passed into a law, February 25th, indictments became unnecessary and useless everywhere except in Hamilton and Cuyahoga Counties; for how could such cases be tried in the Probate Court (as that law provides) if indictments were appropriate? That court cannot impanel a grand jury to inquire and make presentments, and no provision was made for certifying indictments found in the Common Pleas to the Probate Court for trial.

After the 30th of April, 1852, indictments for inferior offenses became unnecessary in the Criminal Court of Hamilton County; they are dispensed with in so many words by

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the fifth section of the supplemental act of that date. Gen. Laws, Vol. 50, page 103. I doubt even whether they were necessary after the act of March 12th took effect.

It worked no prejudice to a defendant, however, to be accused by the grand jury as well as by the prosecuting attorney, and the court had jurisdiction to try the case whether presented by indictment or by information.

After the 30th of April, too, indictments for inferior offenses became unnecessary in Cuyahoga County; the first section of the act of that date, further prescribing the powers and duties of the courts of justice, only permitted the use of such "process and remedies" as were "not inconsistent with the laws passed since the present constitution took effect." Gen. Laws, Vol. 50, page 102. And the constitution itself declares that "all laws of a general nature (and such, certainly, are laws regulating prosecutions for crime) shall have a uniform operation throughout the State," shall operate in Cuyahoga County just as they operate elsewhere. But neither has it worked any prejudice to a defendant heretofore tried, in that county, that he was accused by the grand jury, the court had jurisdiction to try both indictments and informations.

The case in all counties, other than these two is manifestly different. If a person should be indicted in the Common Pleas for an inferior offense (although the finding of an indictment, rather than the filing of an information, would not afford him any ground of complaint) the court could not *try* the case; for, whether presentable by indictment or by information the court lacks jurisdiction to hear and determine cases of that sort. The jurisdiction to hear and determine is given to the Probate Court alone; and as that court can neither swear a grand jury, nor receive indictments by certification from the Common Pleas, it follaws that such cases must be presented in some other mode.

That mode I take to be as clearly ascertained as the

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mode in which a private person narrates his complaint against another, in an ordinary action at law; it is by information of the prosecuting attorney upon the State's behalf. This pleading is quite as ancient as an indictment and its requisites are as well known. They differ in this only, that an indictment is preferred upon the oath of the grand jury and an information upon the complaint of the State's counsel. They are subject, in all other respects, to the same rules of pleading and the same system of procedure.

There are two other statutes, passed at the late session which confirm me in the view here expressed. It is all a question of legislative intent, and that intent must be ascertained by a careful consideration of what the General Assembly has said.

The first statute is that "to provide for the election of prosecuting attorneys, and prescribing their duties," passed April 30, 1852. The fourth section provides that each prosecut attorney "shall also receive such compensation for his services in the Probate Court semi-annually, as shall be allowed by the Probate Court of the county wherein such services shall have been rendered,"—" the amount of such services to be determined (the act continues) by the Probate Court annually hereafter, on or about the first Monday in February." Then comes a proviso indicating beyond doubt that the legislature had, by some *previous* act, defined certain services which he could *forthwith* render in that court: "Provided, however, that the Probate Court may, at any time after the passage of this act, make allowance, to the prosecuting attorney, for his services *rendered for the year eighteen hundred and fifty-two.*" Gen. Laws, Vol. 50, page 216.

Now, if the jurisdiction of the Probate Court had not vested, by the effect of some previous statute, how could the legislature say, on the 30th of April, within a few days of

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the adjournment, that a prosecuting attorney should be paid for services rendered in the year eighteen hundred and fifty-two? And if these services are not to be rendered in prosecuting minor offenses before that tribunal what services are they, or what services can they be?

The second statute is that "to provide for collecting the statistics of crime," passed May 1, 1852. That requires each prosecuting attorney to furnish the attorney general, before the 20th of December, "a particular statistical account of all crimes prosecuted by indictment in his county during the year next preceding," which shows (I take it) that the legislature supposed "crimes" only, and not misdemeanors or inferior offenses, would be prosecuted by indictment. Gen. Laws, Vol. 50, page 261.

It is suggested, however, that the jurisdiction of the Probate Court and the jurisdiction of the Commn Pleas Court are *concurrent* in these cases. But that is impossible (I think) for two reasons:

First—The act of February 19, 1852, only gives the Common Pleas jurisdiction to try prosecutions whereof no inferior court has jurisdiction. So that, if the Probate Court has jurisdiction, the Common Pleas clearly has none.

Second—Although concurrent *civil* jurisdiction is a thing well known to the common law and familiar to us all, concurrent *criminal* jurisdiction is a thing of which the common law furnishes no precedent. There are a few cases in our statutes, but a very few, where both the Common Pleas and justices of the peace may hear and determine *concurrently*, prosecutions for misdemeanor. It requires plain language to make the jurisdiction of two courts, to try offenses, a concurrent jurisdiction; for that (as I have said) is a jurisdiction unusual, unknown to the common law, and never to be presumed. The statute which formerly allowed a prisoner, charged with a capital crime, to elect whether he would be tried in the Supreme Court or in the Court of

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Common Pleas, did not give concurrent jurisdiction to those two courts; their jurisdictions were alternative, and not concurrent. After election made, and plea received, the jurisdiction of one court vested to the entire exclusion of the jurisdiction of the other.

But a concurrence of jurisdiction in the Probate and Common Pleas Courts in the case of inferior offenses, would be mischievous to the last degree. A justice of the peace might recognize a prisoner to appear before the one, or the other, as whim or choice might suggest. If tried in the Probate Court by information, the prisoner could remove his case to the Common Pleas after conviction by writ of certiorari. If tried in the Common Pleas Court by indictment the prisoner could remove his case to the District Court by writ of error. It might happen, also, that he would be recognized to one court and yet prosecuted at the choice of the State's counsel in the other. That the legislature designed such a departure from the principles and practice of the common law—a departure fraught with confusion to public officers and hardship to the prisoner—I cannot believe.

In answer, therefore, to the first two questions which are stated, at the commencement of this letter, I must conclude that the Court of Common Pleas has no jurisdiction (except in Cuyahoga County) to try a case of petit larceny or other inferior offense, prosecuted since the 25th of February last, and that such prosecutions should be by an information of the prosecuting attorney, filed in the Probate Court.

The objections which have been alleged, against these views of the law, rest entirely upon certain *supposed* difficulties in exercising the jurisdiction of the Probate Court over such cases.

That there are difficulties in the way, requiring patience and care, both by judges and prosecuting attorneys, it would

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be vain to dispute; they are inseparable from the adoption of a new constitution, the reorganization of the judiciary, or even the passage of new statutes. It is required, in article fourteen of the constitution, that the legislature shall, at its first session, make arrangements for reviving, reforming, simplifying and abridging the practice, pleadings, forms and modes of procedure now in use. Until that result shall have been accomplished (and we may hope that its accomplishments is not distant) why should the legislature waste time and money in substituting a new practice act for the acts heretofore in force? Such changes as those acts require, to correspond with the new judicial organization, are warranted to be made by the courts themselves in the very constitution which creates the courts and the laws which define their jurisdiction. The Probate Court must exercise its authority in all cases according to the principles embodied in our present statutes, and conform itself, as far as possible, to the language and literal requirement of those statutes. But this, in some cases, is impossible; it has often heretofore been rendered impossible for the Common Pleas to comply with the General Statutes regulating the practice of courts and the method of trial, by mere delay to pass the annual act fixing its terms in the different counties and circuits. Does that defeat the jurisdiction of the court in any case? He must have an imperfect comprehension, indeed, of legal principles, a vague idea of government itself, who would so assert.

Each court must exercise its jurisdiction according to the general principles of the law as evidenced by the constitution, the body of the statutes, and the maxims of sound judicial discretion. If by any failure or change of legislative enactment, by any alteration of fundamental laws or any other reason it should become impossible to execute the authority of the court according to the literal requirement of the statutes, as *then* in force, the court must, by means

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of general or special rules, administer substantial justice, and in accordance with the principles upon which courts usually proceed.

The main difficulties suggested in the present case arise from the fact that the Probate Court has no *terms* fixed by law, the constitution having declared that it shall be "open at all times" for business. There seems to be an apprehension that, as the court has no terms, justices of the peace cannot recognize defendants to appear before it at any particular time. Prosecuting attorneys cannot know when to file their informations and juries cannot be drawn and summoned under the existing statutes.

But, were all those difficulties more serious than they are, the solution of them would still be obvious. Such parts of the statutes heretofore enacted, as are inapplicable to *any* court created by the constitution and the laws (whether it be the Probate Court or any other) are *quoad hoc* repealed or annulled, and the court is under no obligation to observe them. It must, by *rules of its own,* supply all defects so caused, and thus administer the authority which the constitution and later statutes command it to administer.

This principle—that courts must provide for the exercise of their jurisdiction, *by rules of practice,* wherever the statutes are silent, defective, or inapplicable—is well settled and of universal application. Our own reports furnish, perhaps, the most decisive case.

On the 15th of July, 1795, the governor and judges of the northwestern territory adopted, from the statutes of New Jersey, a law allowing foreign attachments. 1 Chase's Stat. 197. This law provided (section one) that the lands, tenements, goods and chattels, etc., of non-resident debtors might be seized by writ of attachment, "and, as nearly as may be, shall and may be proceeded against in the same manner as is directed against the lands, tenements, hereditaments and estates of absconding debtors." Certain pro-

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ceedings in attachment having taken place against *the lands* of a non-resident debtor, wherein they were seized and sold, it was argued by counsel that no act or law could be found to authorize an attachment against the lands, tenements, and hereditaments of an *absconding* debtor, and that, as the act of July 15, 1795, required proceedings against the lands of a *non-resident* debtor to be in accordance with such an act, or law, it was void for uncertainty, incompleteness and false reference. Without deciding whether the allegation was true or otherwise, in fact, the court said:

> "It is urged by plaintiff's counsel, that there was no such law in force, as is here referred to, as applicable to the estates of absconding debtors, and that therefore, this was a void enactment. The only law in force, so far as appears upon the statute book, relative to attaching the lands of an absconding (debtor), is the second section of the act before referred to (June 1, 1795. 1 Chase's Stat. 142), regulating domestic attachments. There might have been some other adopted, but not published, or, if published, it may not have got into the statute book. But does it therefore follow that, if there was no such law, the law of the 15th of July, 1795, must be void. The imperfection of a law will not render it void, unless it is so imperfect as to render it utterly impossible to execute it."

Chief Judge Hitchcock, who delivered this opinion, then proceeded to examine the act in detail, and continued thus:

> "Now this law does not, it is true, go so far into detail as to describe every particular step to be taken from the commencement to the final end of the suit, but it authorizes the issuing of an attachment, the seizure of the property of the debtor, a judgment against him, the liquidation of all claims presented against him, the sale of the proper-

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> ty attached, and the distribution of the avails amongst the creditors. It is a law which may be executed. The mode of liquidating the claims, of the sale of the property, and other matters relative to the business might well be provided for *by rules of court.*
>
> "In the opinion of the court (the learned chief justice concluded) the law of the 15th of July, 1795, was not void, but under its provisions, the courts of the territory might acquire jurisdiction in cases of attachment." *Lessee of Cochran vs. Loring,* 17 *Ohio Reports,* 427, 428, 429.

This case answers, completely, another objection. It is that section three of the Probate Court law, after conferring jurisdiction to try minor offenses, proceeds thus: "Which powers and jurisdiction shall be exercised and employed in such manner as shall be prescribed by law" (50 G. L. 85.) I do not take these words, "as shall be prescribed by law" to refer, in this connection, to a law to be thereafter passed; for even without applying the phrase, "which powers and jurisdiction" to the powers and jurisdiction conferred by the second section of the act, it *must* apply to *all* the powers and *all* the jurisdiction conferred by the third section. Now, amongst those, is the jusidiction to hear inquests of lunacy and idiocy, and the power of taking depositions—as to both which subjects no new prescription of law has been made, and none was, at the time, contemplated. But, admitting that further legislation was designed a law to prescribe the "manner" in which Probate Courts should exercise the jurisdiction to try minor offenses, a failure of such legislation would not authorize the Court of Common Pleas to resume the jurisdiction hereby taken from it, nor incapacitate the Court of Probate to proceed in such cases. It would only be a parallel to the predicament of the governor and judges when on July 15, 1795, they ordered attachments to proceed in the "manner" directed by

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another law which they designed to adopt, but never did adopt in fact.

But the legislature has not left us to general principles here; it has in the act of February 25, 1852, given the Probate Court no excuse for failing to exercise the jurisdiction thereby conferred.

The court has power (section seven), to appoint a deputy clerk to keep its records, and issue its orders and process. It has (section eight) a proper seal. By the next section (ninth) the sheriff of the county is required to exercise all process of the Probate Court directed to him, and to attend the session of that court whenever required. The court can, by section ten, furnish all contempt or disobedience of its orders and process. Section fifteen is in these words:

> "That in the exercise of all the duties and jurisdiction imposed and conferred upon judges of probate, they shall be governed by the laws now in force, upon the subjects, respectively, to which they relate, until otherwise provided by law."

And, to the end that every doubt may be removed, we have also section six: "That the judges of the Probate Courts shall have full power and authority to issue whatever process may be necessary for the efficient discharge of their duties, and to make and publish rules and orders regulating the business and practice of their several courts, not inconsistent with the laws of this State."

Therefore, as it seems to me, each probate judge should forthwith make and publish (if he has not *already* made and published) such "rules and orders" as will regulate "the business and practice" of his court in these (with other) particulars:

First—To what periods prisoners, examined by justices of the peace, shall be recognized to appear, in the Probate Court, for trial.

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Second—At what period, after such appearance, the prosecuting attorney must file his information.

Third—How juries, for the trial of inferior offenses, shall be drawn, summoned and impaneled.

The probate judge should in these respects, and in all respects, conform to the existing statutes as nearly as possible.

It is not for me to dictate what rules ought to be adopted, but as the probate judge will perhaps call on you for assistance (and it is but proper that he should do so) I take the liberty of a few suggestions on that subject.

I would advise all the probate judges to set apart a given time (the first Monday of each month, and the rest of that week, probably would suffice) for the trial of prosecutions. That would, I presume, suit your official engagements. The court could then make a rule, to be entered upon its minutes, that ten or fifteen days before each of these sessions, the common pleas clerk and the sheriff should draw a jury from the box in the possession of the former, which rule could be certified and delivered to the clerk for his guidance. That box, although in the possession of the common pleas clerk, does not belong to the Court of Common Pleas exclusively; it belongs to all the courts of the county, in common. Such is the purport of the act of February 9, 1831, "relating to juries," Swan's Statutes, 489. Under the old constitution, as we all know, the clerk of the Common Pleas Court was not *ex officio* clerk of the Supreme Court, and, in some counties, the appointments were holden by different persons. But the juries of the Supreme Court were, nevertheless, drawn from that box, although it was then, as now, in the exclusive possession of the common pleas clerk.

I refer you to the third and fourth sections of the act "to provide for compensation to owners of private property appropriated to the use of corporations," passed April 30,

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1852, as both affirming this doctrine and illustrating the suggestion which I make. The third section provides that the probate judge shall notify the clerk of the Court of Common Pleas and the county sheriff, of the filing of a petition to appropriate lands, and that the clerk and sheriff "shall within one day after receiving such notice, proceed to select, *from the names returned to serve as jurors,* a jury of twelve men in the same manner that jurors are selected for the trial of any cause in the Court of Common Pleas." Ohio Laws, Vol. 50, page 201. The fourth section provides how the sheriff shall summon the men whose names are selected.

Should the Common Pleas clerk refuse or fail so to draw a jury, or should the names in the box be exhausted, the sheriff could be directed to summon twelve bystanders, or neighboring citizens. For it is the principle of the act of February 9, 1831, that whenever the regular jury fails, no matter from what cause, a jury of talesmen shall be impaneled. Swan's Statutes, 494, section eighteen. This principle extends even to the failure of township trustees or judges of election, to choose names for jurors according to law, and, consequently, the possible failure to put any names, legally, into the jury box. Swan's Statutes, 493, section sixteen.

The Probate Court can award a "struck jury" in such cases. Swan's Statutes, 494, 495.

Under the act of March 22, 1849, "to amend the act relating to juries," the Probate Court can issue a special *venire facias* as any other court may and does. 47 Gen. Law, 34, 35.

I do not intend, by this letter, to interfere with your own sense of propriety, and what you may conceive to be the path of duty as a public officer. My name has been so used (in the newspaper controversy to which I have alluded) that I deem it proper for me to state the opinion which I

entertain, and some of the principal reasons by which I have been governed. If you should think otherwise, or if the Common Pleas Court of your county should otherwise direct, I do not wish to interpose the authority or the influence which may belong to this office. I prefer that you should, at all times, follow the guidance of your own judgment, and only call upon me, for assistance, when your industry and patience are exhausted.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH.

TAXATION OF FOREIGN AND MUTUAL INSURANCE COMPANIES.

Cincinnati, September 10, 1852.

SIR:—I have examined the questions stated in a letter from the president of the Board of Underwriters at Cleveland, which you have referred to me.

FIRST QUESTION.

tI is no longer requisite that the agent of a foreign insurance company should give bond to the county treasurer as provided in section four of the act of March 12, 1831, "to tax bank, insurance and bridge companies." Swan's Stat. 918. The condition of such a bond differs from the requirement of section twenty-one of the act "for the assessment and taxation of all property in this State, and for levying taxes thereon, according to its true value in money," passed April 13, 1852.

SECOND QUESTION.

The reports of all agents of foreign insurance companies should include the period of one year next preceding

their respective dates; it will not suffice to report the "gross receipts" of such an agency from the first day of January in one year to the first day of January in another year.

THIRD QUESTION.

The term "gross receipts" was designed to include the amount of all notes given for premiums of insurance as well as the receipts of cash. Such notes are received in payment of the premiums, and if the agent chooses to accommodate the parties insured by giving them time, it is an affair between themselves. The notes are clearly within the term "credits" as defined in section two, clause two, of the law. But no agent is required (see section three) to report a greater portion of any credits than he believes will be received or can be collected. 50 G. L. 138. It does not strike me as an argument to the purpose that these "receipts" may be taxed as money whenever the notes are paid; for the object of the law is to ascertain and tax, from year to year, the "credits" of the agency—all its property—as well as the gross income of each year. It will be observed that section twenty-one (at the commencement of the paragraph) requires an insurance company "whether incorporated by any law of this State or not," to list for taxation all the real and personal property, monies, and *credits* which it may own, within the State, at their actual value. 50 G. L. 145. And, as I have said, such notes are "credits" by express definition of the law itself. I do not think the case one in which "a liberal construction" would satisfy the designs of the legislature or advance the principles of justice. These agencies are not now taxed beyond what individuals are taxed, and they have escaped for many years their equal share of the public burdens. The law is too plain, however, to admit any construction except that which I have given.

FOURTH QUESTION.

In the case of an insurance company, chartered by the

General Assembly of this State, the capital of which consists of the promissory notes of the stockholders, the value of such notes must be returned as "credits" of the company and taxed as such. This value must be estimated by ascertaining what amount of interest will be payable upon them to the company during the current year, and, also, what portion of the principal will be assessed or called in, and become payable during the same period. It is additional to any accumulation of the company's profits.

The reason why I do not decide that the amount of such stock-notes shall be taken as their value for taxation, is that section eleven does not permit a stockholder to deduct "any bond, note, or obligation, of any kind, given to any mutual insurance company" from the amount of his taxable monies and credits. 50 G. L. 141, 142. But whatever interest or whatever assessment or portion of the principal may become payable within the year is a debt to the company different in character from the amount of the stock-note itself. It is an installment called in, and demandable, according to law, or in other words, a credit actually created.

I wish to restrain these remarks, however, to the case of mutual insurance companies, for, in their case, the stock-note is but an estimate of the total sum for which the party giving it expresses his consent to become contingently liable. Stock-notes given to other insurance companies, in lieu of cash payments are credits, in a general sense, and taxable as the credits of an individual are. See section three and clause nine, 50 G. L. 138.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH,

Attorney General.

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

TAXATION OF FOREIGN AND MUTUAL INSURANCE COMPANIES.

Cincinnati, October 5, 1852.

SIR:—I have been compelled to attend the daily sessions of our District Court for three or four weeks past, and could not, therefore, respond to your letter of the 21st ultimo at the time I received it.

I understand you to say that the Commercial Mutual Insurance Company, of Cleveland, has $100,000 of capital, but that this sum is represented by the promissory notes of individuals. I understand you to say, furthermore, that these notes do not bear interest, and are only kept to insure the holders of policies against loss in case the other effects of the company should prove insufficient. I understand you to say, furthermore, that in case of a loss after exhausting the company's other effects, the makers of these notes would be liable to contribute pro rata for indemnity for the loss. And, finally, that although the makers of the notes receive a compensation or dividend (whatever the trustees of the company choose to give) for the use of the notes, as a guaranty capital, the bulk of the company's profits is divided among the holders of policies.

Do I understand you rightly? For it is upon these particulars one and all, that I base an affirmance of the opinion which I gave the auditor of state some time ago.

Taking the facts as I have stated them, in relation to the Commercial Mutual Insurance Company of Cleveland, let us describe the character of the notes in question. That they are not promissory notes in the usual acceptation of the term, is quite plain. The company could not collect one of them as a note by an action at law; it would be necessary to prove also that a loss had happened, that the other effects had been exhausted, and that an assessment had been made pro rata to cover the loss. Although in form these are

promissory notes, therefore they are in fact something different. I said in my opinion to the auditor of state that they were estimates or memoranda of the sums for which the parties giving them had consented to become contingently liable.

To test this definition, whether it be accurate or not, we have only to inquire what is the real contract between the company and the maker of one of these notes. Is it that he will pay the company the amount of his note? Doubtless in form it is, but in fact it is only that he will pay upon the happening of certain contingencies, and then in the proportion which the amount of his note bears to the amount of all the notes.

In effect, therefore, these are not promissory notes, nor even due bills; they approximate ordinary subscriptions to capital stock, and yet the difference is perceptible. Installments of stock are payable absolutely; but no installment can be collected upon these notes, until a loss has happened and until the other effects of the company have been exhausted. And yet (as I told the auditor of state) these notes are "credits" according to section two, clause two, of the present law for the assessment of taxes. Gen. Acts, Vol. 50, page 137. Their value must be ascertained, returned and taxed as part of the "credits" of the company; for such is the express language of the statute.

What, therefore, is the taxable value of these notes? If they were promissory notes in fact, as they are in form, the nominal sums payable would fix their value, provided, of course, the makers were solvent or the collateral securities sufficient. But they are not promissory notes; they are payable on contingency, and to the extent only of a loss accrued and the deficiency of other effects. Would the nominal sums stated to be payable in such notes, ascertain truly the present value of the notes? I think that they would not.

On the other hand, however, as the makers of these

notes are not absolutely bound for payment, but liable only upon condition it would be unjust that they should deduct the amount of such notes from the amount of their monies and credits. And so the law provides (eleventh section) that "no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation of any kind, given to any mutual insurance company." Gen. Acts, Vol. 50, page 141.

The law does not design to assess double taxation upon the same property when that can be avoided; although it does tax two kinds of property, in several cases, which represent the same wealth. I suppose, however, that when the legislature requires a citizen to pay taxes upon the amount of his note, given to a mutual insurance company, it does not require the company also to be taxed upon the whole amount of that note.

But if the Commercial Mutual Insurance Company should call for an installment upon notes of this description, the sum so called in and directed to be paid would assume a new character; it would be an ordinary debt payable to the corporation and might be collected by process of law.

I do not see how, upon your statement, any installment could be demanded except to pay a loss accrued and to the extent of that loss over and above the company's other effects.

I refer to this distinction, therefore, only out of abundant caution.

It is true that the company has a "credit" capital as you term it, rather than a "cash" capital; and it is just that the wealth which that "credit" capital represents should be taxed. But it is taxed—taxed in the hands of the men who have given their notes—without regard to the company's profit or loss, and without regard to the question whether the trustees allow nothing or six per centum for the use of such notes.

I send this explanation through the office of the audi-

Legality of a Tax Assessed in School District No. 8, Henrietta and Camden Townships, Lorain County.

tor of state, and as part of the opinion already given to him.

I am, sir,

Yours respectfully, your obedient servant,

G. E. PUGH,
Attorney General.

I. L. Weatherby, Esq., President of the Board of Underwriters, Cleveland.

LEGALITY OF A TAX ASSESSED IN SCHOOL DISTRICT NO. 8, HENRIETTA AND CAMDEN TOWNSHIPS, LORAIN COUNTY.

Attorney General's Office,
Columbus, October 22, 1852.

Hon. Wm. Trevitt, Secretary of State:

SIR:—I have examined the questions relative to the tax assessed by the householders and resident taxpayers of School District No. 8, Henrietta and Camden Townships, Lorain County, and respond to them as follows:

First—Although the tax was voted for the double purpose of purchasing a site for the schoolhouse and building the schoolhouse, it is nevertheless valid.

The objects were so nearly akin that an attempt to avoid the tax, because of their having been united, seems to me rather captious.

Second—Inasmuch as one purpose of the tax was for the site of a schoolhouse and as the deed could not be demanded from the vendor until the money was collected and tendered, I do not think that the failure to procure a deed before the expiration of the thirty days during which the tax was to be collected, can now be treated as a fatal omission. The proviso to the eighteenth section of the act of

Legality of a Tax Assessed in School District No. 8, Henrietta and Camden Townships, Lorain County.

March 24, 1851, 49 G. L. 34, seems to me applicable to the case in which the tax is for the sole purpose of building a schoolhouse and not to the case in which the tax is for the double purpose of purchasing the site and building the house. The proviso was only designed (I think) to prevent the expenditure of money in building upon a site which the district may have acquired (or of which it may have possession) by some defective title.

Third—If the district treasurer has reported any person to the county auditor as a delinquent (under the said eighteenth section) he can no longer collect the tax by distress of personal property; the county treasurer must collect it. The district treasurer must collect it. The district treasurer cannot now be permitted to urge that he neglected his duty, and is therefore entitled to distrain after the thirty days of payment have expired.

I recommend that, henceforth, taxes be assessed separately for the purchase of a site, for the purchase of fuel, and for building, repairing or furnishing the schoolhouse or schoolhouses of the district. (Act of March 7, 1838, section seven, Swan's Stat. 826.) That is the better plan; although courts will incline to sustain (as I have sustained) a tax already assessed and in part collected, for school purposes. It requires a fatal mistake, one violating some right of the citizen to induce from any court the strict application of legal principles to what the voters or the officers of a township or a school district have done.

In the case of *Harding vs. The Trustees of New Haven Township*, 3 Ohio Rep. 227, it was so decided in reference to the proceedings of a justice of the peace.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH.

Taxation of Railroad Companies for School District Purposes.

TAXATION OF RAILROAD COMPANIES FOR SCHOOL DISTRICT PURPOSES.

Attorney General's Office,
Columbus, October 23, 1852.

SIR:—I have examined the question submitted by the auditors of Huron and Delaware Counties, whether, namely, railroad companies are liable to be taxed for school district purposes, upon their movable property without the district.

It is evident that the act of April 13, 1852, section twenty-one, meant to apportion the value of a company's movable property, for all taxable purposes, according to the value of its real estate and fixed property in each ward, town, city and township. The word "school district" is not used; but I take the section as establishing *a principle of apportionment* among our political subdivisions, and not as a section to be literally construed. It supersedes, in my opinion, the principle adopted by previous statutes.

I think, therefore, that a railroad company is liable to be taxed for school district purposes by the same rule, and upon the same valuation and system of apportionment, as for county, township and municipal purposes. That rule is explained in my opinion of the 7th of May last.

The auditor of Huron County has decided correctly, and the auditor of Delaware County should adopt the decision.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH.

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

Printing of Legislative Documents in German Language for 1852.

PRINTING OF LEGISLATIVE DOCUMENTS IN GERMAN LANGUAGE FOR 1852.

Attorney General's Office,
Columbus, November 8, 1852.

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

SIR:—I have examined the question submitted by your letter dated September 24th, relative to the claim of Messrs. Reinhard and Fisser for printing the legislative documents of last session in the German language.

On the 5th of January, 1852, the Senate directed its clerk "to procure the necessary printing until a law could be passed in accordance with article fifteen, section two, of the constitution" (Senate Journal, Vol. 50, p. 5). On the 19th of January, 1852, the clerk was directed to govern himself in respect of the German printing by the prices which the House of Representatives had allowed at the previous session (page 90). The clerk informs me that, under these resolutions, he employed Messrs Reinhard and Fisser to print such documents as the Senate might order to be printed in the German language.

On the 20th of January, 1852, the House of Representatives directed its clerk "to obtain such printing" as the House might order, at the prices of the previous session, until a law could be passed as the constitution requires. (House Journal, Vol. 50, p. 66.) On the 26th of January, in obedience to a resolution, the clerk reported that he had made a contract with Samuel Medary to print such matter as the House might direct to be printed, and had taken a bond, with two sureties, to that effect. (Appendix, pp. 57, 58, 59.)

Not only, therefore, did the Senate and the House contract by separate resolutions, but they contracted with separate persons. Whatever printing Messrs. Reinhard and

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Fisser did by order of the House of Representatives, they did as Colonel Medary's employes or sub-contractors. The case must be treated, therefore, as if Colonel Medary had himself presented the bills for it. And, in such a case, I think Messrs. Reinhard & Fisser are entitled to charge for composition of the Senate documents and Colonel Medary is entitled to charge for composition of the House documents. Whatever arrangement or agreement may have existed, as between themselves, is an affair with which the State has no concern. The accounts for printing done under the contract of Messrs. Reinhard and Fisser with the clerk of the Senate must be audited and paid just as though there was no contract by the clerk of the House with Colonel Medary or with any other person. And, so, upon the other hand, the accounts for printing done under Colonel Medary's contract (whether done by himself or by Messrs. Reinhard and Fisser as his employes) must be audited and paid as though the clerk of the Senate had made no contract at all.

The two contracts are independent of each other, and distinct in every sense. They cannot be blended, changed or mutilated, to suit "equitable" or other considerations according to any legal principle with which I am acquainted.

And even if the Senate and the House had employed the same person—if the resolutions and contracts were separate—I do not see how the result could be at all different. For every contract is a complete thing; it must be construed by its own terms, and without reference to other contracts of the parties. All such references lead into collateral inquiries, and confuse what otherwise would be plain enough. The contract of Messrs. Reinhard and Fisser with the clerk of the Senate is one thing; their rights must be ascertained under that alone, and without the least regard to any contract with the clerk of the House or with any citizen in the State. A contract (whether it be written or in parol) expresses what the parties intend; it is "the

Printing of Legislative Documents in German Language for 1852.

only outward and visible expression of their meaning," in any case, as Mr. Greenleaf has well said. (Greenleaf on Evidence, Vol. 1, section 277.) To vouch in another contract (to which the parties, themselves, made no reference) would be to alter their meaning and violate their agreement.

According to the report of the Committee on Public Printing, January 19, 1852, the Senate agreed to pay Messrs. Reinhard and Fisser thirty-five cents per thousand ems for composition and thirty-five cents per token for press work. Those gentlemen accepted the terms, and have performed their part of the contract. Why should not the Senate keep its promise? Because (you answer) the House of Representatives also employed Messrs. Reinhard and Fisser as printers, or rather, the House employed Colonel Medary, and he employed them, and promised to pay the same prices for similar descriptions of work. But, in my judgment, it is of no consequence whether that be so, or otherwise; for the contract of the Senate is, nevertheless, a contract to pay the prices named. Nor is it of any consequence, I think, whether Messrs. Reinhard and Fisser distributed their types after printing the Senate documents and reset them to print the House documents or printed both parcels from the very same form. It cannot affect their rights, not a whit more than I could relieve myself from a contarct with any mechanic by proving that his work did not cost him one-half what I had agreed to pay for it.

Nothing could have been more easy, if the Senate or the House had thought fit, than to have put into the contract a stipulation against separate charges for composition whenever the documents of the two branches were printed from the same form. But neither branch made such a stipulation, and you have not the power, I think, now to add it. This was the substance of Mr. McCormick's opinion as attorney general, to Mr. Woods, auditor of state, June 20, 1851, with which I entirely agree.

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All this, however, has been upon the supposition that the Senate and the House had power to make the contracts to which I have referred. That power you deny in distinct terms.

> "My reading of the existing constitution," you say, "leads me to believe that the entire legislative printing of the last winter was ordered in violation of that instrument, and that, in the absence of constitutional authority to warrant its execution in the manner adopted, the printers must rest their claims to compensation on the general principles of legal equity."

I am not able to agree with you in this respect. It is true that the constitution provides in article fifteenth and section second, that "the printing of the laws, journals, bills, legislative documents and papers for each branch of the General Assembly, with the printing required for the executive and other departments of State, shall be let on contract to the lowest responsible bidder by such executive officers and in such manner as shall be prescribed by law."

The constitution was adopted June 17, 1851, and took effect on the 1st of September, afterward. It provided that the General Assembly should convene the first Monday of January, 1852, and not before. (Article two, section 25.) Yet between those two dates (the first of September and the first Monday of January) all the executive departments required the printing of blanks, circulars, forms, returns, etc. These were indispensable to the transaction of public business. They were printed, in fact, by direction of the executive officers, and without any law upon the subject.

No advertisement for bidders was made. Yet, if the second section of article fifteenth excludes all printing for the legislature after the first of September, 1851, except what may be done "on contract" by the lowest responsible bidder, under the provisions of some law, our "executive and other departments of the State" violated the constitution, systematically, for a period of four months and more.

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And, in truth, the doctrine which you maintain would reduce them to the alternative of so violating it or ceasing to transact the public business. Can that be a sound construction of any law which would stultify the authors of the law?

The General Assembly met on the 5th of January, 1852, as required by the constitution. If a bill to prescribe the manner in which the public printing should be let, on contract, to the lowest responsible bidder, had been already prepared and perfected, it would not have become a law before the tenth of January; for the constitution requires that "every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule." (Article two, section 16.) And then, necessarily, further time must be allowed for advertising, reception of bids, awarding contract, etc.

But is this all? Does not the constitution design that the law should be really as in name the expression of legislative will and judgment?

To acquire the requisite information, to prepare the bill, to adjust the details, to give the whole subject a fair, deliberate, cautious examination before acting upon it; these are duties which the fifteenth article, section second, devolves upon the General Assembly, and they are duties which demand time for reflection in order to perform them well.

What period should be allowed for the reception of bids is a question of itself to be maturely considered. If the period be short, or the notice limited, there will be little competition for the work, and the very purpose of the constitution will be defeated.

The whole subject, therefore, rests in a sound legislative discretion.

What "law" shall be passed, how shall it be arranged, and when shall it take effect? These were questions which the General Assembly was compelled, at its last session, to

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decide. The constitution confided in its judgment, honesty and experience to decide them. That a legislature may abuse its power and yet keep within the authority conferred upon it, is certainly true. The present General Assembly might, if its members had chosen, neglected or unreasonably delayed action upon this very subject, or it might have passed a law postponing the time for the reception of bids and awarding of contracts beyond all necessity or just excuse. But it belongs to the people to rebuke their senators and representatives in such a case as in every other case of misconduct. The executive officers of the State, however, have no right to interpose; they cannot review the action of the legislative department. In my opinion, therefore, the taking effect of article fifteenth and section second of the constitution was postponed by the very import and letter of the section until the legislature should have exercised the authority and discretion thereby conferred. It could not possibly take effect before the fifth day of January and, according to all the usual modes of procedure, not until a much later period.

But the General Assembly could hardly progress a day without requiring bills, reports, etc., to be printed; it could not discharge, to any advantage, the legislative duties which the constitution has imposed.

Did that constitution design to paralyze the legislature, as well as every executive department for months together, at a time when it needed their vigorous and united efforts to accomplish the purposes of its own creation? Could nothing be done toward the transaction of public business until a law had been prepared, examined, passed and executed in conformity with article fifteenth and section second? That is the whole question.

If the case were one of omission simply—one for which the constitution had not provided—a mere expression of the legislative will (whether in the shape of a resolution, a law or otherwise) would be the remedy for it. But this is not

Printing of Legislative Documents in German Language for 1852.

an omitted case; it is one for which the constitution sufficiently provides. The eighth section of article second declares:

> "Each house, except as otherwise provided in this constitution, shall choose its own officers, may determine its own rules of proceeding, punish its members for disorderly conduct, and with the concurrence of two-thirds, expel a member, but not the second time for the same cause, and shall have all other powers necessary to provide for its safety and the undisturbed transaction of business."

That the printing of bills, reports, etc., is necessary for "the undisturbed transaction of busness," in each house seems to me very plain; no business can be transacted without it. And, therefore, except when "otherwise provided" by the constitution, each house can direct as much printing and at such prices as its power was deduced by a very clear argument from similar clauses of the old constitution in Mr. Stanbery's opinion, as Attorney General, April 16, 1847, to your predecessor. (Legislative documents, Vol. 12th, part 2d, pp. 90-93.) I admit that article fifteenth, section second, is a provision "otherwise" in the new constitution; and whenever that section becomes operative by the passage of a law and the execution of a contract under it, the power of the two houses is abridged in this particular.

But suppose that, during a legislative session, the contractors for printing bills, reports, etc., should neglect their duty or become unable to perform it. The State might sue them upon their bonds and prosecute their cases to judgment. Meanwhile, however, what could the General Assembly do? Would it be compelled to adjourn and leave the public business unfinished because "the lowest responsible bidder" could not or would not any longer print its bills and reports? That, I imagine, will not be pretended. The General Assembly would direct a new advertisement, call for new bidders and authorize the making of new contracts. But, meanwhile, necessarily, each house would order its

clerk to obtain or procure such printing as it might require and at such prices as it might deem reasonable.

I am of opinion, therefore, that the contracts respectively made by the clerks of the two houses in January last are valid to all intents and purposes, and that Messrs. Reinhard and Fisser are entitled to payment for the work they have done according to the terms of those contracts.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH.

ACT OF MARCH 22, 1851, RELATING TO THE TREASURER OF HAMILTON COUNTY.

Attorney General's Office,
Columbus, November 10, 1852.

SIR:—You inquired of me, by letter, on the 20th of March last, whether the act "to reduce the fees of the sheriff of Hamilton County and for other purposes," passed March 22, 1851, was abrogated by the new constitution or remains yet in force. A difficulty had arisen, it seems, in adjusting the accounts of the late treasurer of Hamilton County and in estimating the compensation to which he was entitled.

I delayed to answer your letter at first because I wished to examine the question with all the care which its importance demanded. Afterwards, understanding that the treasurer and yourself had differed in other particulars, and that the settlement of his accounts had been postponed, I determined to retain the subject for more deliberate consideration.

I have since considered the question in many aspects, and am as well prepared to answer it now as I shall ever be.

And as the expression of my views will perhaps require a thorough revision of the statutes regulating the fees of county officers in order to prevent abuses, the present is an appropriate time for that expression to be made.

I presume that your question relates only to so much of the act passed March 22, 1851, as fixes the compensation of the treasurer of Hamilton County, and shall confine my answer to that portion of it.

The third section is in these words:

> "The treasurer of Hamilton County shall be allowed, on his settlement with the county auditor, in the month of February, annually, upon all taxes charged on the duplicate of the county and collected by him, the same rates per centum that are now allowed by law to county treasurers upon the taxes collected on their duplicate up to one hundred thousand dollars and upon the balance over one hundred thousand dollars he shall be allowed one-half of one per cent., and no other fees or compensation shall be allowed to said treasurer for any money collected, received or paid out by him, except such fees for collection as are now allowed by law for collecting taxes by distress; and the fees allowed to said treasurer, as provided in this section, shall be deducted by an equal and proportionable rate from the several taxes collected on the duplicate." 49 L. L. 319.

The fourth section runs thus:

> "The five per cent. now allowed on all taxes charged on the duplicate which shall not be paid on or before the twentieth day of December, annually, shall be collected and accounted for in the same manner that the taxes on which such per cent. shall be collected are required to be accounted for." 49 L. L. 319.

These two sections differ from and (so far as Hamilton

County is concerned) supersede the statutes elsewhere in force.

The act of March 2, 1837, a general law, provides that each county treasurer shall be entitled to "eight per centum on the first thousand dollars, six per centum on any sum between one and two thousand dollars, five per centum on any sum between two and three thousand dollars, four per centum on any sum between three and four thousand dollars, three per centum on any sum between four and five thousand dollars, two per centum on any sum between five and twenty thousand dollars, and one per centum on any sum over twenty thousand dollars by him collected," etc. Swan's Stat. 969.

The act of January 3, 1843, another general law, provides (section second) "that if any person shall fail to pay the taxes charged to him, her or them by the twentieth of December next after the same become due, such person or persons may pay the same at any time before the treasurer shall distrain any property for the payment of such taxes, but may be charged with five per centum thereon for the use of the treasurer," General Laws, Vol. 41, page 5.

It seems, therefore, that the laws regulating the office of county treasurer in the State at large—fixing his compensation, defining his accountability, etc.—have been excluded from operation in Hamilton County by the local act of March 22, 1851, and the act to which it is a successor.

The new constitution declares, article second, section twenty-sixth: "All laws of a general nature shall have a uniform operation throughout the State; nor shall any act except such as relates to public schools be passed to take effect upon the approval of any other authority than the General Assembly except as otherwise provided in this constitution."

To comprehend the meaning of this clause and rightly address it to the case in hand, let us inquire:

Act of March 22, 1851, Relating to the Treasurer of Hamilton County.

First—What is meant by the term "laws of a general nature" as used here?

Second—What is meant by the "uniform operation" of a law?

For the section has either a wide and (all things considered) a beneficial effect upon our system of legislation or else it is idle to the last degree.

We need not look far to ascertain what "laws of a general nature" are. By an act passed February 2, 1822, the legislature provided that "the acts of a local nature" should thereafter be printed in a separate volume. 2 Chase's Stat. 1243. Until that time it appears no distinction between general and local acts had been recognized; they had been printed annually in a single volume and called "the laws" of the State. But after "the acts of a local nature" came to be thus printed in a separate volume, the other acts of the legislature took a name which appears now annually on the title page of a new statute book, "laws of a general nature."

In the act of February 20, 1824, "for the distribution and safe keeping of the laws and journals," this phrase is first used. Thus, section seventh, "That when the laws of a general nature and those of a local nature shall be printed and stitched in separate books or volumes," etc. 3 Chase's Stat. 1960.

In an act supplemental to the last one, passed February 22, 1830, the same laws are called "general laws" in two instances. 3 Chase's Stat. 1979.

And in the act of March 12, 1834, which is a substitute for the acts just named, the two phrases "general laws" and "laws of a general nature" are both used and are perfectly synonymous. 3 Chase's Stat. 1904. That is still in force. Swan's Stat. 549.

In a further act upon the same subject passed March 9, 1835, we find the phrase "laws of a *general* nature" used in contradistinction to the phrase "laws of a *local* nature" once more. Swan's Stat. 548.

Act of March 22, 1851, Relating to the Treasurer of Hamilton County.

I am sure, therefore, that I have not the least difficulty in deciding what "laws of a general nature" are; the meaning of the phrase had been ascertained and setteld, in our legislation, for more than twenty-five years previous to the meeting of the constitutional convention. Every act defining the duties and fixing the compensation of county officers is a law of a general nature, and, as such, must have a uniform operation throughout the State.

The second question is one susceptible of as plain an answer. It is not in the nature of things that all acts of the General Assembly should be applicable equally in every part of the State. A law regulating suits against steamboats is, of course, a dead letter in all the inland counties. The act of April 26, 1852, "to encourage the killing of wolves" can have little or no application in many counties. And I might refer to a number of like cases. Yet these are laws of "uniform operation throughout the State" as I understand it. A general law is the mere expression of legislative will. No case may ever arise for its application; but it is none the less a law, and if a case should arise, none the less applicable. So, under a general law, many cases may arise in one county or part of the State, and few cases or no case in the eighty other counties. Yet the law is general and its operation is uniform. For whenever a case shall arise upon which the law can operate, its effect in all instances and in all counties will be the same.

The legislature may describe cities (as was done in the municipal corporation bill) by classes and distinguish those classes according to the numbers of population. For, although Cincinnati may be the only city this year upon which many sections will operate, it is not impossible that Cleveland or Columbus may reach the same class next year, or the year afterward, or even ten years hence. So the legislature may act (if the municipal corporation law be a safe precedent) in reference to counties. Yet even this exercise of power may be merely colorable and may be abused. But

to single out a county or city by its name, or by geographical position, or by any mark which no other county or city can ever attain, is to make a law "local" in its nature, and (unless warranted by express constitutional provision) to depart from obedience to section twenty-sixth, article second, already quoted. It is to create an exception in the State government—to render the operation of the laws other than uniform. That odious word "privilege" originally meant nothing but a particular or local law.

I spoke of an express provision, a moment since, as necessary to warrant a local exception in our statutes. The policy of the constitution in this respect is quite plain. Wherever it designs to allow such legislation (or any legislation applicable, in terms, to a single county or district) it requires the assent of the citizens thereby to be affected. Thus, in section thirtieth of article second, it enumerates certain acts—"creating new counties, changing county lines or removing county seats"—which are only to take effect after having been approved by a vote of the people.

It will be observed, also, how many times the constitution itself excludes Hamilton County from the operation of general laws.

The "debates" afford us some aid, likewise, in determining the intent of this section. I do not, ordinarily, give much importance to the remarks of individual members made during a debate as evidence of what the clause adopted really means; for it has been well said that what was one man's reason for supporting a proposition, is oftentimes not the reason of ten other men who voted with him. But I have been anxious on this question to derive assistance from all the sources at my command; because, although the present case is one of temporary interest, and trivial perhaps at that, I cannot avoid the consciousness that beyond it, and even beyond all I can now imagine, serious consequences will develop themselves in every direction from the principles to be applied here.

Act of March 22, 1851, Relating to the Treasurer of Hamilton County.

The clause was proposed, in convention, by Mr. Smith, of Warren, January 2, 1851. That gentleman used in explaining it, this sort of language:

> "The principle upon which he insisted, in this branch of his amendment, was that all laws of a general nature should be uniform in their operation throughout the State. Was not that a correct principle? Was it proper that we should have one system of laws in one county and another in another? He wished to cut off all that sort of legislation, and remove it from the statute book. In relation to the punishment of crimes, although we had a general law upon the subject, petit larceny was punished by fine and imprisonment in some counties, and in other counties (by a constructive provision extending the limits of the jail to the limits of the county) the same offence was made punishable by hard labor upon the streets or in the stone quarries. He objected to all this. He objected also to every law which made an act criminal in one county of the State which was not also criminal in every other county in the State. This was all wrong in principle, and it was the object of his amendment to arrest this practice of partial legislation."

Mr. Smith said furthermore, that to the constitution of California he was indebted for the provision.

Another friend of the amendment, Mr. Nash, of Gallia, said:

> "With reference to the first part of the amendment, it had been said by the gentleman from Franklin (Mr. Stanbery) that there was no necessity for it. Was not that gentleman aware that we had now, all over the State, almost as many different laws as we had counties? That crime was punishable in Hamilton County in one way and in Greene County in another way? That a man guilty of petit larceny in Hamilton County was put into the chain-gang and made to work the streets, whilst in other counties this was not

> the case? We had a law also by which the county commissioners could change the character of the punishment of criminals. So that a man in one county, guilty of petit larceny, might be confined in the county jail, and subject to pay a fine, whilst in another county another criminal of this class might be subject to hard labor for thirty or sixty days. Again, we had a general law that land should not be sold under execution for less than two-thirds of its appraised value, yet in Cuyahoga and two or three other counties at the north, this law was not in force. We had, also, different laws in relation to the transmission of real estate, in different counties. Now it was the design of the first clause of this section to provide against all exceptions and discrepancies of this character in our general laws—to provide that all laws of a general nature shall be uniform throughout the State. In the State of Massachusetts the court had decided that any act of the legislature which undertakes to suspend the operation of a general law, in regard to an individual case, was void." See the debates of the constitutional convention, second volume, pp. 225, 226, 227, 228.

Without further argument then, let me say that the constitution designed, I believe, to abolish almost entirely what is known as local legislation—one of the great and crying evils with which the citizens of this State had become familiar. This twenty-sixth section, article second, will effectuate that purpose. Here it may work out a result not convenient or agreeable, but its operation in nine hundred and ninety-nine cases will be a blessing of the first magnitude. If the compensation of the treasurer of Hamilton County, as estimated by the present general laws, should be found at all disproportionable to his services and his responsibilities, the legislature can by a law pursuing the principle of the municipal corporation act, classify counties according to their population or even according to the value of the taxable property listed upon the duplicate. The evil

(if there be one) is short lived, and not to be compared with the evil of frittering away the language of the constitution by artificial paraphrase, or unwarranted limitations, in order to attain, in any case, a convenient or agreeable result.

There remains to be considered as yet a single other question. How does the constitution operate upon the local act of March 22, 1851, or upon the general acts already quoted?

I have considered this question in many aspects since my term of office began. An idea was promulgated last fall that about three-fourths of the new constitution never could take effect nor be of practical benefit until the General Assembly had revised the whole statute book—that certain acts passed by the General Assembly in former times, but opposed to the new constitution, both in spirit and letter, would continue to have the force of laws until repealed by express enactment. If I could assent to this idea as a correct one, I should believe that the electors of Ohio had done a vain thing to adopt the constitution at all, and certainly so if they expected the benefit of its wise reforms during this generation. It would only require that one-half of the legislators elected last fall, or one-half of those to be elected next fall, should oppose the principles and policy of the constitution in some particular or other to put at defiance the solemnly expressed will of the people.

But I do not need to combat the idea with arguments which, though conclusive, are general in their character.

The first section of the schedule saves only such statutes as are consistent with the constitution; all other statutes as to anything commenced since the 31st of August, 1851, any new rights supposed to be acquired, any new enterprises undertaken are as ineffectual as if they never had been passed. Let me, out of abundant caution, explain this remark. A former statute—as for instance the act to incorporate the State bank and other banking companies—may still remain in force as to the government of the banks,

or companies which were organized under it before the constitution took effect. So may special charters of every kind under which organizations had been perfected before that period. Those statutes retain, to this extent, life and being and operation; they regulate the transfer of stock or property, the exercise of powers, the administration of duties or trusts as to such corporations or companies until the legislature shall otherwise direct. But the State bank cannot now have an additional branch; no new independent banking company can be created; and all those hundreds of charters passed before the first of September, 1851, but of which the corporators had not then availed themselves, are gone forever. The constitution operates upon them all, just as it found them, by its own supreme and original vigor. Such as had spent their force in the creation of a company or companies, it left as mere ordinances to direct the management and definition of the property or rights already acquired; but no such act can have any offspring of later birth than the constitution itself. For every law possessing creative energy or life is the continual declaration of the legislative will, as much so, to all intents, as if proclaimed anew each day by the voice of a public herald.

But whenever on any day the legislature loses the ability to declare such and such propositions as law to the citizen, that day the declaration (how solemnly soever made) is vain and futile. The case of Fisher vs. Harnden, 1 Paine's C. C. Rep. 59, illustrates perfectly this doctrine.

The constitution executes itself and needs no legislative aid to repeal statutes which are contrary to its paramount and expressed will. Wherever, therefore, it finds a law of a general nature, the uniform operation of which throughout the State is impeded by exceptions or limitations of any sort—whether expressed by way of proviso to the law or otherwise, whether contained in that law or in some other general or some local law—it strikes off the exceptions or limitations and leaves the case as though they had never been

written. It may, by the same principle, extend the language of a law to persons and things not originally embraced. For the constitution is legislative in its effect; it is the highest, the overruling, law of this State and people.

In the present case, therefore, the constitution has superseded the sections (third and fourth) of the local act of March 22, 1851, and thus left Hamilton County under the government of the acts of 1837 and 1843 which purport in terms to be applicable in all counties. Such, after thorough consideration and a careful review of all the principles involved, is my opinion. I can express no other without expressing what I do not believe.

I am, sir,

Very respectfully your obedient servant,

G. E. PUGH.

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

TITLE TO LOT 207 IN THE TOWN OF MANSFIELD.

Cincinnati, November 22, 1852.

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

SIR:—I have read the letter addressed to you by Messrs. Kirkwood and Burns, relative to the title of a lot (No. 207) in the town of Mansfield.

It appears by the letter that the State became proprietor of this lot some years since by conveyance from Winn Winship or in satisfaction of a claim against him.

It appears also that the State sold the lot to Thomas Edgington on deferred payments reserving the legal title to secure the purchase money unpaid. A part of the purchase money ($200) never has been paid and, therefore, the State has never made any deed to the purchaser. Edgington has since sold the lot to Dr. Lake and it was listed in Lake's name for taxes. The taxes not having been paid, however, the lot was sold for delinquency to some other

person, and a deed was made by the county auditor to that person.

Dr. Lake's grantee now presents himself by Messrs. Kirkwood and Burns, his attorneys, claiming that inasmuch as the State owned the lot when the tax was assessed, the sale for delinquency is void. And he offers to pay the two hundred dollars with interest if the invalidity of that sale can be established.

I should like very much to find a method of recovering the sum due the State on Edgington's purchase, but I cannot see how the tax sale (if regular) can be avoided.

The State, to be sure, retained the *legal* title, but that was only by way of mortgage or security for the deferred payments. The ownership of the lot was in Dr. Lake (as Edgington's grantee) at the time the taxes were imposed, and he was liable, as the owner, to be taxed for its value. Taxes are upon property, not upon titles, under our law. The property was Lake's property, although it seems the State retained the *title* in her own name.

The purchaser at tax sale took the lot free of all incumbrances of the State included, as well as all former titles. If the proceedings were regular (which Messrs. Kirkwood and Burns seem to admit) that purchaser has now both the legal and equitable estate. For a title by tax sale is a new title proceeding from the sovereign directly and independent of all former titles, equities, liens or incumbrances.

The case of Gwynne vs. Niswanger, 20 Ohio Rep. 556, establishes all these propositions and establishes them upon reasoning which I take to be invincible.

I see no method, therefore, in which Dr. Lake's grantee can recover the lot, or the State obtain the deferred payments on the original purchase, except the statutory process of redemption. If that has been barred by lapse of time, the case is remediless.

I am, sir, Very respectfully your obedient servant,

G. E. PUGH,
Attorney General.

Meeting of the Electoral Colleg—Case of the Coshocton Union School.

MEETING OF THE ELECTORAL COLLEGE.

Cincinnati, November 23, 1852.

Hon. R. Wood, Governor of Ohio:

SIR:—You should issue a proclamation or notice certifying who have been elected electors of president and vice-president of the United States, and cause that proclamation or notice to be published in the newspapers printed at Columbus. Swan's Statutes, 303, section 5th.

The electors are to vote for a president and a vice-president of the United States on the first Wednesday of December, which will be this year the first day of the month. (Act of Congress, approved March 1, 1792, section second. U. S. Statutes at large, Vol. 1, pp. 239, 240.)

But the electors must meet in Columbus for the purpose of ascertaining who are in attendance on the day before the first Wednesday in December, which will be this year the thirtieth day of November. Swan's Statutes, 304, section eighth.

I am, sir,

Very respectfully, your obedient servant,

G. E. PUGH.

CASE OF THE COSHOCTON UNION SCHOOL.

Cincinnati, November 24, 1852.

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

SIR:—I have examined the questions submitted by the Auditor of Coshocton County whether the fourth section of the act "for the encouragement of the Coshocton Union school," passed March 19, 1851, is yet in force.

The section provides that the proceeds of all licenses for shows exhibited within the town of Coshocton after the passage of the act shall be paid to the treasurer of the board

of education of that town by the officer or person collecting or receiving the same, and applied to the purpose of education under the direction of the board in that town. 49th L. L. 575.

I am not advised whether it is claimed under this section that the proceeds of licenses granted by the council of the incorporated village (what was formerly the town) of Coshocton, should be paid to the board of education or not. The act of February 28, 1831, "to regulate public shows," contained a proviso that it should not be necessary for any exhibitor or exhibitors to obtain a permit from the county auditor to show or exhibit in any incorporated town or city where, by the laws or ordinances of such town or city, the exhibitor or exhibitors might be required to obtain a permit or license from the municipal authorities. Swan's Statutes, 863, 864.

The third section of that act directed that all monies paid into the county treasury for permits of exhibition should be appropriated to the support of the common schools of the county and apportioned among the school districts according to the number of youth in each district. Swan's Stat. 864.

The act "to create a permanent agricultural fund in the State of Ohio and for other purposes," passed February 8, 1847, increased the minimum to be charged for permits by county auditors to twenty dollars. The act provided also, "that one-half the revenue in each and every county, derived from such source, be set apart to the State agricultural fund to be paid over by the county treasurers to the Treasurer of State, at their settlement with the Auditor of State, as other moneys collected for State purposes now are, and that the other half remain, as now provided by law, for the use and benefit of the common school fund." 45 Gen. Laws, 43, 44.

Under these two acts it will be perceived the proceeds of licenses for shows exhibited in any incorporated town, or city, belonged to the town or city as part of its municipal revenue. Only the proceeds of licenses granted by the

county auditor were payable into the county treasury and liable to division equally between the common school and the agricultural funds.

On the 21st of March, 1849, the act of February 28 1831, "to regulate public shows" was amended. The first section repeals the proviso contained in the original act. The second section provides that before any person or persons shall be permitted to exhibit any public show in any incorporated town or city in this State he or they shall first be required to obtain a permit from the auditor of the county in which such town or city may be located, according to the provisions of the act to which this is an amendment, and the act to create a permanent agricultural fund, passed February 8, 1847, and all moneys paid into the treasuries of the several counties under the provisions of this act, shall be paid over and disposed of according to the provisions of the act last above mentioned."

The third section provides that "nothing in this act shall be construed to interfere with the right or power of any incorporated town or city in this State to impose a license upon all shows exhibited in such town or city, in addition to that imposed by this act."

Under the terms of this act (General Laws, Vol. 47, page 51) the proceeds of licenses granted by any municipal authority belonged to the city or town corporate as part of its revenue and only the proceeds of licenses granted by the county auditor could be divided between the common school and the agricultural funds.

The act of March 19, 1851, "for the encouragement of the Coshocton Union school," is broad enough in its terms to include as well the proceeds of licenses granted by the county auditor as of those granted by the mayor or council of the town. The board of education was constituted, doubtless, under the authority of the act of February 21, 1849, "for the better regulation of the public schools in cities, towns," etc. (47 G. L. 23). It is entitled to whatever moneys are or may be appropriated to common school purposes in

the town of Coshocton, or to the school district within which the town is situated.

I do not perceive how the act of March 19, 1851, notwithstanding its title, can afford any encouragement to the Coshocton Union school. Of that school, to be sure, the board of education has charge and oversight, but the board has charge and oversight also of the primary schools. The phrase used in the fourth section of the act, *"the purposes of education,"* embraces as well the primary schools as the Union school. It is not material to enquire of this, however, at present; there may be some act, local or general, to explain how "the purposes of education" can *only* be subserved, in the village of Coshocton, by the support or "encouragement" of the Union school.

Whether the proceeds of licenses granted by the municipal authorities of Coshocton previous to May 16, 1852, did or did not belong to the board of education of the town (either for the encouragement of the Union school exclusively or for "the purposes of education" in general), I am not now called to decide. But since May 15, 1852, the act "to provide for the organization of cities and incorporated villages" has been in force, and the proceeds of all such licenses belong to the village of Coshocton for its general and corporate purposes, not to the board of education, nor to the common school fund.

The twenty-fifth section of that act confers upon the village authorities power to regulate or prohibit all theatrical exhibitions and public shows, and all exhibitions of whatever name or nature for which money or any other reward is in any manner demanded or received. 50 G. L. 231.

The ninety-sixth section authorizes the council of any incorporated village or city to license all exhibitors of shows and performances of every kind not otherwise prohibited by law, all hawkers and pedlars, all auctioneers of horses and other animals in the highways or public grounds of the corporation, all vendors of gunpowder, all taverns and houses

of public entertainment, all hucksters in the public streets or markets, and "in granting such license," to exact and receive such sum or sums of money as the council may think fit and expedient. 50 G. L. 256.

It is under the title *"Revenues and Debts of Municipal Corporations,"* that we find this ninety-sixth section; and therefore, without clearly examining its language, I conclude that the proceeds of all licenses for shows, granted by the council of Coshocton since May 15, 1852, belong to the treasury of the village as part of its corporate revenues.

But, as we have seen, all shows exhibited in the town or village of Coshocton since March 21, 1849, required a license from the county auditor as well as a license from the municipal authorities. The proceeds of the county licenses were to be divided equally between the State agricultural fund and the county common school fund. The act of March 19, 1851, "for the encouragement of the Coshocton Union school" changed the operation of the general acts of February 8, 1847, and March 21, 1849, in two particulars:

First—It deprived the State agricultural fund of all revenue from licenses granted by the county auditor to exhibit shows within the town of Coshocton.

Second—Instead of allowing the proceeds of such licenses to be added to the proceeds of licenses for exhibiting shows in other parts of the county, and then apportioning the total sum among all the school districts of the county according to the number of youths in each district, it gave them *entirely* to the school district within which the town of Coshocton is situate.

This act of March 19, 1851, was in force and full effect undoubtedly till the first day of September, 1851, when the present constitution took effect. If "consistent" with the constitution in principle, it is saved by the first section of the schedule; but if consistent it ceased to be a law on the 31st of August last.

The constitution provides in article second, section twenty-sixth, that "all laws of a general nature shall have a uniform operation throughout the State."

The act of February 8, 1847, "to create a permanent agricultural fund in the State of Ohio and for other purposes," is a law of a general nature; the act of February 28, 1831, "to regulate public shows," and the act amending it, passed March 21, 1849, are laws of a general nature likewise. What prevented them, previous to September 1, 1851, from operating uniformly throughout the State, or, in other words, operating in the town of Coshocton just as they operated in other towns? Clearly, we must answer the local act of March 19, 1851, "for the encouragement of the Coshocton Union school" was the obstacle; for, by its effect, an exception to the general policy of the State was created. Can such an act continue to have force—continue to be a law—under the second article and twenty-sixth section of the constitution which I have quoted? I think not.

To give it validity or further existence would be to render the operation of our general laws other than uniform.

I am of opinion, therefore, that one-half the proceeds of all licenses or permits granted by the auditor of Coshocton County since the 31st of August, 1851, belongs to the State agricultural fund, and that the other half belongs to the common school fund of the county, to be apportioned among its several school districts according to the number of youth in each district. The proceeds of licenses or permits granted by the authorities of the incorporated village of Coshocton, since the 15th of May, 1852, belong to the village as part of its municipal revenues.

Having stated in the case of the late treasurer of Hamilton County, what I understand to be laws of a general nature, what the uniform operation of a law and the mode in which the new constitution affected statutes in force when

it took effect, I refer you to that case for an elaborate explanation of my views.

I am, sir,

Very respectfully your obedient servant,

G. E. PUGH

PROBATE COURT; CRIMINAL JURISDICTION.

Office of the Attorney General,
Columbus, February 1, 1854.

SIR:—Your letter of the 17th of January to the late Attorney General, has been before me for some time, and I have carefully considered the questions upon which you desire an opinion.

First—Has the Probate Court criminal jurisdiction in the absence of a former inquiry, transcript and recognizance?

The Probate Court is one of special and limited jurisdiction as to criminal prosecutions. It can only exercise jurisdiction of the cases, and in the mode, as provided by law. The thirty-fourth section of the act defining its jurisdiction and regulating its practice, 51 Ohio Laws, 174, prescribes the mode in which criminal cases are brought before that court, "by filing a recognizance and transcript." No other mode is provided by law and therefore, no other exists. It was certainly not intended to confer upon that court or upon the prosecuting attorney, the inquisitorial power possessed by the grand jury, or it would have been so declared. A prosecuting attorney cannot therefore, "*suae spontae*," file an information in the Probate Court; the recognizance and transcript must necessarily precede any action on his part.

Second—Will the law permit the transfer of indictments for minor offences, found by a grand jury, to the Probate Court for trial?