Member of State Board of Equalization Not Entitled to Compensation During a Recess or a Journey.

been adopted than what you say has been the practice of your department.

Second—Concerning your second question: I am of the opinion that both the charge and collection against insurance companies provided for in section 2745, should be completed during the month of December.

Third—I do not think you would have the right to credit companies with tax vouchers forwarded to you after the 31st day of December of any year, unless the circumstances of the case were such as to satisfy you that the delay was unavoidable.

Very truly yours,
DAVID K. WATSON,
Attorney General.

MEMBER OF STATE BOARD OF EQUALIZATION NOT ENTITLED TO COMPENSATION DURING A RECESS OR A JOURNEY.

Office of the Attorney General,
Columbus, Ohio, January 12, 1891.

Hon. E. C. Cherry, President State Decennial Board of Equalization, Columbus, Ohio:

My Dear Sir:—Last Friday you called up my office and had a short conference with me concerning the passage of a resolution by the State board of equalization, under which the members of said board would be entitled to receive pay during the time the board was not in session. I told you it was my opinion that the members were not entitled to receive pay, and that *I had previously advised the auditor of state to the same effect.* You said, that as the statute required you to certify the amount

Member of State Board of Equalization Not Entitled to Compensation During a Recess or a Journey.

due to the auditor of state, you would be governed by my official opinion, and desired it at an early day.

I have learned upon investigation, that the facts are substantially these: The board met on the third day of last December, when after perfecting its organization, it was ascertained there was no business for it to attend to, consequently, after being in session two or three days, it recessed until the 6th inst. when it again met, and the following day passed the resolution referred to.

The act which provides for the compensation of members of the board is found in Vol. 87, O. L., page 199, the second section of which provides as follows: "That each member of the State board of equalization, including the auditor of state, for the equalization of the real property of the State, as returned to the state auditor by the several county auditors of the State, in the year 1890, shall be entitled to receive for each day necessarily employed in the performance of his duties, the sum of five dollars; also twenty-five cents per mile each way for traveling from and to his place of residence, by the most direct route of public travel, to and from the seat of government, the same to be paid out of the general revenue fund of the State, the same having been certified to the auditor of state by the president of the board."

The question turns upon the construction to be given to the words "for each day necessarily employed in the performance of his duties." To my mind the meaning of this language is not only clear, but the *legislative intent* is also clear. The General Assembly intended that members of the board should receive pay only for such days as they necessarily spent in the performance of their duties as such members. In the case of Jos. B. Smith, appellant, vs. the mayor, etc., of the city of New York, respondents, reported in 37 N. Y. Court of Appeals, the court, following the language of the opinion in Connor vs. Mayor, 1st Seld. 285, held: "The right to fees does not grow out of

Superintendent of Insurance; Collection of Taxes; Section 2745.

any contract between the officer and the government, *but from the rendition of the services.*"

I do not see how members of the board could be occupied in their own affairs during the recess and at the same time be necessarily employed in the performance of their duties as members of the board. There is an inconsistency in this view which is irreconcilable with the statute and the decisions.

In my opinion, there is no law under which members of the board can receive pay during the recess from December 5th to January 6th, and you would not be justified in certifying services during the recess to the auditor of state for payment.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SUPERINTENDENT OF INSURANCE; COLLECTION OF TAXES; SECTION 2745.

Office of the Attorney General,
Columbus, Ohio, January 17, 1891.

Hon. W. H. Kinder, Superintendent of Insurance, Columbus, Ohio:

DEAR SIR:—I have your communication of the 16th inst. When I rendered you my opinion of the 29th ult. relative to the requirements of section 2745 of the Revised Statutes, I did not have before me the fact that a number of companies had actually paid their taxes in whole or in part, to the various county treasurers of the State. You subsequently, verbally, informed me that such was the case and further informed me that said companies claimed, that the reason they had not notified you of having paid their taxes was because the time was

Superintendent of Insurance; Collection of Taxes; Section 2745.

too limited for them to get the information from their various sub-agencies and report it to your office; and also that the statutes do not require them to furnish you this information. The difficulty with the whole matter seems to grow out of the limited time between the date when the companies are required to pay their taxes, to-wit, November 20th, and the time when you are required by the statute to charge and collect whatever may remain unpaid of the two and one-half per cent. on their gross premium receipts; and also from the failure of the statute to state whether it is your place to ascertain if the companies have paid their taxes or not, or incumbent upon the companies to furnish you with proof of such payment. I do not think that section 2745 requires that a company shall pay its taxes twice, and when a company has paid the taxes required of it in the various counties, but by reason of the fault of some agent or agents has been unable to furnish you with all the proof to that effect within the time provided by the statute, I do not believe that the spirit of the law requires it to pay its taxes again.

As above stated, the difficulty arises from the limited time in which the taxes are to be paid by the company and the time when you are required to charge whatever may remain unpaid of the two and one-half per cent. and from the failure of the statute to specify how this information is to be obtained.

I suggest that it is most important for you to at once call the attention of the General Assembly to the condition of affairs in reference to this matter, and ask that legislation upon this question be definite, and also that the time between the payment of the taxes by the companies and the charge which the law requires you to make of the unpaid portion of the two and one-half per cent. be extended. In this way I think all further difficulty may be avoided and it is the only way in which I see it can

be. In the cases presented in yours of above date, I think in view of all the circumstances, you would be justified in accepting the vouchers of the companies as evidence of their taxes having been paid, and give them proper credit therefor.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SECTION 3656 RELATIVE TO CERTAIN WORDS.

Office of the Attorney General,
Columbus, Ohio, January 20, 1891.

Hon. W. H. Kinder, Superintendent of Insurance, Columbus, Ohio:

DEAR SIR:—I am of the opinion that the words "nor unless the entire capital stock of the company is fully paid up and invested as required by the laws of the State where it was organized," as they occur in section 3656, Revised Statutes, mean, that when a company has complied with the laws of its own State in respect to paying up and investing its capital, it may do business in this State.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SECTION 2818 "GRAND AGGREGATE."

Office of the Attorney General,
Columbus, Ohio, February 5, 1891.

F. L. Wells, O. E. Niles and E. W. Poe, Committee, Columbus, Ohio:

GENTLEMEN:—You recently submitted to me a communication in writing, asking for my official opinion on the following question:

> "In paragraph numbered fourth, section 2818, reference being had to the phrase 'if any increase or reduction shall be made in the valuation of the grand aggregate, it shall only be made after the equalization of all the counties of the State,' do the words 'grand aggregate' refer to the grand aggregate made by the addition of all the county aggregates as returned by the county auditor; and if so, are we required to carry on our work of equalization, so that when we have completed the equalization of all the counties of the State, our additions and deductions shall balance, thus preserving the grand aggregate with which we began?"

The board of equalization of which you have the honor to be members is not a board of appraisers or assessors but a board of equalizers. You are, therefore, to equalize the returns as presented to you by the various county auditors. The words "grand aggregate" as they occur in subdivision 4, section 2818, mean the amount obtained by adding together the appraisement of each county in the State. In other words it is the aggregation of the appraisement of all the counties of the State as returned to you by the county boards exclusive of the twelve and one-half per centum mentioned in subdivision 4, that being a matter with which the board has nothing to do until after it has gotten through with equalizing the appraisement as returned by the county auditors.

Section 2818 "Grand Aggregate."

You also submit the following question:

> "Paraghaphs first, second and third of said section 2818 require us to raise or lower the aggregate value of every county to its *true value in money*. How would you reconcile these requirements with the provisions of paragraph fourth, should we find that by working on the basis of 'real value in money,' we would change the grand aggregate of the State in violation of the limitations of said paragraph fourth?"

It does not occur to me that there is any serious conflict in these separate paragraphs. I think the board can properly assume that the counties have already been appraised substantially at their *true value in money*, and it is the duty of the board to equalize these valuations or appraisements on this theory, and not to establish new appraisements or new valuations. By bearing this rule in view and working according to it, I do not see how the board can come to any contradictory or conflicting conclusions. It occurs to me that if your board once undertakes to go back of the appraisements returned to it, and ascertain the true value in money of all the property of the various counties, it would enter upon a sea of confusion. Nor do I think it was the intention of the Legislature that your board should do this, but simply equalize the returns already sent to it upon the basis that those returns establish the true value in money of the property of the various counties.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Regarding Truant Act—Money of State Employe Not Subject to Garnishment.

REGARDING TRUANT ACT.

Office of the Attorney General,
Columbus, Ohio, February 5, 1891.

Captain J. M. Crawford, Superintendent Girls' Industrial School, Delaware, Ohio:

DEAR SIR:—I have given as much time to the examination of the question recently submitted to me by you, as was possible under the circumstances. While there may be some irregularities in the truant act, yet I am of the opinion that you should receive those truants who are committed to your charge under the provisions of that act.

Trusting this will be satisfactory, I am,

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

MONEY OF STATE EMPLOYE NOT SUBJECT TO GARNISHMENT.

Office of the Attorney General,
Columbus, Ohio, February 17, 1891.

General M. F. Force, Commandant, O. S. and S. Home, Sandusky, Ohio:

MY DEAR SIR:—I returned a few days ago from New York City where I had been for some time on important business, and found yours of the 10th inst. awaiting me.

The case of the city of Newark vs. Funk & Bro., 15 O. S., 462, to which you refer in your communication, decides that *"salaries of officers of incorporated cities, due and unpaid,* may be subjected by judgment creditors of such

officers to the payment of their judgments under the provisions of section 458 of the Code of Civil Procedure."

On page 464, the court says: "We cannot entertain any doubt that a salary already due, and suffered to remain in the hands of a municipal corporation, liable to be recovered by suit of the officer himself, is liable also under the provisions of the act, to be subjected, like other claims, to the payment of creditors. The rule might, perhaps, be safely laid down, that *whenever the debtor himself has a right of action* or a present claim which lapse of time alone will ripen into a cause of action, his creditor may, in cases specified in the statute, be substituted to his rights, by garnishment."

You will thus see, that the court puts the right of garnishment on the ground, that the officer or debtor would himself have had a cause of action against the city. But, how can that rule apply in this case? The baker could not maintain an action against the State for his salary, and if he could not maintain such an action, how could his creditors subject his salary due him from the State, in the hands of a State officer, by process of garnishment. In the tenth edition of Swan's Treatise, page 405, the author, in a foot note, says: "Whether a claim of the defendant upon public moneys in the hands of a fiscal officer, such as the treasurer of a county, or state, or the like, is subject to garnishment, has not been decided by the Supreme Court. Probably, such officers cannot be garnisheed." See 4 Howard, W. S., 20.

The case in 4 Howard is short and I will state as much of it as is necessary to give you a proper understanding of the decision. Mr. Justice McLean delivered the opinion. Six writs of attachments were issued by a justice of the peace against certain seamen who had just returned from cruise. The writs were laid on moneys in the hands of the purser, the plaintiff in error, due to the seamen for wages. Justice McLean said:

> "The important question is, whether the money in the hands of the purser, though due to the seaman for wages, was attachable. A purser, it would seem, can not in this respect be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances, it might be fatal to the public service. The funds of the government are specifically appropriated to certain national objects and if such appropriations may be diverted and defeated by state process or otherwise the function of the government may be suspended. So long as money remains in the hands of a disbursing officer it is as much the money of the United States, as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund can not, in any legal sense, be considered a part of his effects."

The syllabus of the case is as follows:

> "Money in the hands of a purser, although it may be due to seamen, is not liable to an attachment by the creditors of those seamen. A purser can not be distinguished from any other disbursing agent of the government; and the rule is general, that, so long as money remains in the hands of a disbursing officer it is as much the money of the United States as if it had not been drawn from the treasury."

This case, it seems to me, is much in point.

There is a general discussion of the subject in Mechen on Public Officers, section 876, where the rule is

laid down, and authorities cited to sustain it, as follows: "A public officer who has money in his hands which is due him in his official capacity to a third person, cannot be charged as the garnishee of such person on account of such indebtedness. This rule has been applied to county treasurers, clerks of courts, sheriffs, justices of the peace, receivers and the like."

I am of the opinion that the reason of the rule as stated by our Supreme Court in the case in 15 O. S. does not apply in the case like the present one, because in that case the officer to whom the salary was due from the city, could have maintained his right of action against the city for the amount due him, but that is not the case here. The State cannot be sued, and I do not see how the creditors of a debtor can obtain money by garnishment which the debtor cannot obtain by suit.

Does not the fact that the money is sent to the quartermaster by the State officers make him the agent of the State for the purpose of paying out the money to its employes, in which event, supposing the quartermaster should fail to pay, would not the State be liable? In fact, I think this is the exact point decided by the Court of Claims in a late case where the doorkeeper of the National House of Representatives absconded with a large amount of funds belonging to members of Congress. The court held that the government was liable for the act of its agent. Applying this rule to the present case, I still do not see how the garnishment will lie.

Upon the whole I am inclined to the opinion, that the money is not subject to garnishment in the hands of the quartermaster.

If you were not too much burdened with your duties, and your time is not too much occupied, I should be greatly pleased to have you write me again upon the subject, after having noted the authorities to which I have referred and the suggestions I have made.

Of one thing you may be assured, any opinion which comes from you will be regarded by me with the highest respect and accepted almost as an absolute authority.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SECTION 1260 RELATING TO CLERKS' FEES IN CERTAIN MATTERS.

Office of the Attorney General,
Columbus, Ohio, February 23, 1891.

Hon. E. W. Poe, Auditor of State, Columbus, Ohio:

MY DEAR SIR:—You recently submitted to me the following communication, and asked my official opinion thereon:

> "I wish your construction on that part of section 1260 of the Revised Statutes of Ohio, reading, 'entering attendance, each witness, four cents.' What I wish to know is, whether the clerk is entitled to the fee prescribed for entering attendance of the witnesses but once during the trial of a case, or for each day's attendance during said trial."

After an examination of the section to which you refer, I am of the opinion that the words "entering attendance, each witness, four cents," when fairly construed, mean that for each time the clerk enters the attendance of a witness, he is entitled to four cents.

I am aware that one of my predecessors, the Hon. James Lawrence, has held differently, but I cannot agree with his construction of the statute.

Every witness in a case is entitled to certain fees for each day's attendance at court. If the witness reports his attendance to the clerk from time to time (as he

Relating to Travelers' Insurance Company as to Authority to Transact the Business of Employes' Accident Insurance in Ohio; Not Authorized to Do So.

should in order that the amount which he is entitled to receive may be correctly ascertained), I do not see why the clerk is not entitled to compensation for making each entry of the witnesses' attendance the same as he is for first entering the attendance of the witness. He performs the same labor and renders the same service to the county each time the attendance is claimed, and in my opinion is entitled to be paid the amount fixed by the statute for each time that he enters the attendance on the docket.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

RELATING TO TRAVELERS' INSURANCE COMPANY AS TO AUTHORITY TO TRANSACT THE BUSINESS OF EMPLOYES' ACCIDENT INSURANCE IN OHIO; NOT AUTHORIZED TO DO SO.

Office of the Attorney General,
Columbus, Ohio, February 24, 1891.

Hon. W. H. Kinder, Superintendent of Insurance, Columbus, Ohio:

DEAR SIR:—I recently received a communication from you in which you stated, in substance, that the Travelers' Insurance Company of Hartford, Conn., is authorized to transact, by its charter, the business of accident insurance, and all insurance appertaining thereto or connected therewith; that it had been licensed by the superintendent of insurance for this State, to transact the business of life and accident insurance in this State during the current year, and that said company had applied to

Relating to Travelers' Insurance Company as to Authority to Transact the Business of Employes' Accident Insurance in Ohio; Not Authorized to Do So.

you for authority to do an employes' accident (liability) business.

You further stated, "I desire to ask you officially, whether a company, chartered as is the above company, may lawfully transact the business of employers' accident (liability) insurance in this State, and if it may, whether such business may be transacted by the company under a license to transact accident insurance in this State; or is it necessary that the license specifically authorizes employers' accident insurance?"

In my judgment it is only necessary to determine one of the above questions, namely whether a company chartered as is this company, may lawfully transact the business of the employers' accident (liability) insurance in this State. I do not think that it can. The only authority under which it is claimed that such company may transact an employers' liability insurance, is found in the first section of the amended charter of the Travelers' Insurance Company which amendment was approved on the 15th of June, 1864, and is as follows:

> "Section No. 1. That the Travelers' Insurance Company be, and the same is hereby authorized and empowered to insure persons against, and to make all and every insurance connected with, accidental loss of life, or personal injury, sustained by accident, of every description, on such terms and conditions and for such periods of time, and confined to such countries and to such persons, as shall be from time to time ordered and provided for by the by-laws of said corporation."

Unless the amendment is broad enough to include employer's accident (liability) insurance, it is clear that the company cannot be authorized to carry on such business in this State. This proposition, I think, even the friends of the company will admit.

Relating to Travelers' Insurance Company as to Authority to Transact the Business of Employes' Accident Insurance in Ohio; Not Authorized to Do So.

We will be greatly aided in construing the amendment referred to by going back and examining the original charter of the Travelers' Insurance Company, and observing carefully what its original purposes and objects were. Section 1 of that charter provides as follows:

> "That certain persons, their successors and assigns forever, be, and they are hereby created and made a body corporate and politic, for the purpose of insuring persons against the accidental loss of life, or personal injury sustained while traveling by railway, steamboat or other mode of conveyance by the name of the Travelers' Insurance Company."

There was certainly great propriety in taking such a name after having incorporated for such a purpose, for the object was to insure persons against the accidental loss of life, or personal injury, sustained while traveling by the ordinary modes of conveyance, and, therefore, it was especially appropriate to call this company the Travelers' Insurance Company. This charter was approved by the General Assembly of the State of Connecticut on the 17th of June, 1863. Subsequently, the company conceived the idea of enlarging the scope of its business. It desired broad fields in which to operate and was not content to confining its policies to insuring persons "against the accidental loss of life, or personal injury sustained while traveling by railway, steamboat or other mode of conveyance." Consequently, it petitioned the General Assembly of Connecticut for an amendment to its charter. Section first of that amendment has already been quoted in this opinion. It authorizes the company to insure persons "against and to make all and every insurance connected with, accidental loss of life or personal injury sustained by accident, of every description," etc. This amendment was approved on the 16th of June, 1864

Relating to Travelers' Insurance Company as to Authority to Transact the Business of Employes' Accident Insurance in Ohio; Not Authorized to Do So.

—just one year and one day after the approval of the original charter—but twenty-seven years ago.

It is a fact which I cannot ignore in arriving at my conclusion, that employers' liability insurance is a comparatively recent division of that great branch of business. It has grown up within the last two or three years. I mention this, because it is hardly possible, that the General Assembly of Connecticut, twenty-seven years ago, could have contemplated that the amendment heretofore referred to, should be broad enough to cover a class of insurance business that was not distinctly recognized as an independent branch of that business for a quarter of a century afterwards. I certainly do not think that the language of the amended charter refers to other than personal insurance.

That is, insure a person against an accident which may befall him, and this, I understand, is very different from employers' liability insurance, which means insuring an employer against loss or damage resulting from an accident occurring to his employes

In my judgment the amendment to the charter of the Travelers' Insurance Company cannot stand such a stretch of corporate power as would be necessary for you to give it in order to authorize it to carry on the business of employers' accident insurance in this State, and, therefore, it is my opinion that you should decline to grant it such authority.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Prisoner Sentenced to Penitentiary for Life; Commuted by Governor Not Eligible to be Paroled.

PRISONER SENTENCED TO PENITENTIARY FOR LIFE; COMMUTED BY GOVERNOR NOT ELIGIBLE TO BE AROLED.

Office of the Attorney General,
Columbus, Ohio, February 25, 1891.

Hon. B. F. Dyer, Warden Ohio Penitentiary, Columbus, Ohio:

DEAR SIR:—Some time ago, I received from you the following communication:

> "The board of managers of the Ohio Penitentiary desires your written opinion in the following case: Is a prisoner who has been convicted of murder in the second degree, and sentenced to life imprisonment, whose sentence has been subsequently commuted by the governor to a term of years imprisonment, eligible to be paroled?"

I have carefully examined the above question in connection with provisions of sections 7388-9, of the Revised Statutes, which govern the parole of prisoners, and have experienced much difficulty in coming to a conclusion.

I am of the opinion, however, that a prisoner sentenced to the penitentiary for life whose term of imprisonment is subsequently commuted by the governor, is not eligible to parole.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

As to Filing Articles of Incorporation of the "Forest City Investment Company;" Not Warranted to So Do.

AS TO FILING ARTICLES OF INCORPORATION OF THE "FOREST CITY INVESTMENT COMPANY;" NOT WARRANTED TO SO DO.

Office of the Attorney General,
Columbus, Ohio, March 8, 1891.

Hon. Daniel J. Ryan, Secretary of State, Columbus, Ohio:

DEAR SIR:—You recently submitted to me for my examination and official opinion thereon, the proposed articles of incorporation of the "Forest City Investment Company." The purpose of said proposed incorporation, as set forth in its articles, is "buying, selling, dealing and investing in bonds, stocks and other investment securities, and doing all things incident thereto."

This raises the question whether a company can be incorporated in this State for the purpose of buying, selling and owning bonds, stocks and securities of another corporation. If it can, you should file these proposed articles; if it cannot, you should decline to file them. The question so far as I am able to discover, is entirely new in this State and is a very important one; and I assure you I do not underestimate its effect, but in my opinion there is no authority for filing these proposed articles of incorporation, and you would not be warranted in doing so. The general rule is that one corporation cannot become a stockholder in another. If it could, adopting the language of Judge Boynton in the case of Franklin Bank vs. Commercial Bank, 36 O. S., page 357, "one corporation may buy up the stock of another and thereby enable itself to interfere with the internal management of its affairs." A corporation cannot in this State buy from one of its stockholders its own stock. (Coppin vs Greenlees, et al., 38 O. S., page 275, 280.) But the principal ground upon which I base my opinion, is the provision of section 3, article 13, of our Constitu-

As to Filing Articles of Incorporation of the "Forest City Investment Company;" Not Warranted to So Do.

tion, which provides, "Dues from corporations shall be secured, by such individual liability of the 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."

Thus the organic law of the State fixes upon each stockholder of a corporation in addition to the amount which he or she may own, a further liability of one hundred per cent. Now, if a corporation can become a stockholder in another corporation, the protection which this provision of the Constitution affords creditors of a corporation would be greatly if not wholly impaired, because the creditor would then be compelled to look not to individuals, as the Constitution contemplates, but to a collection of individuals organized into and doing business as a corporation. The very language of the section—to say nothing of its spirit—precludes such construction. See the case of Ohio ex rel. vs. Sherman, 22 O. S., 411, where it was held "the Legislature has no power under the present Constitution of Ohio, to create corporations without securing the individual liability of their stockholders, at least to the minimum amount required by the Constitution; and if the act of incorporation does not secure this, either by expressed provision, or by requiring from the incorporators or stockholders such acts of organization or otherwise, as will subject them to the constitutional provision, the act will be unconstitutional and void.

But there is another objection to your filing these articles which proceeds from the statute, and while it may be remedied by the Legislature, until that is done, the objection is as fatal to the proposed incorporation, as though it was founded on constitutional provisions. It is this: The statute provides, that "all directors must be

holders of stock, and that each director before entering upon his duties, shall take an oath to faithfully discharge his duties as such director." And it further provides, "the directors must choose one of their number to be president of the incorporation." Now, if one corporation can be a stockholder in another then a corporation could be formed all of whose stockholders would be other corporations, in which event it would be impossible to carry out any of these provisions of the statute, for a corporation could not take an oath, nor could it be president nor director of another corporation. I am, therefore, of the opinion, that there is no authority under our statute which would warrant you in filing these articles of incorporation, and I respectfully suggest that you decline to do so. Very respectfully yours,

DAVID K. WATSON,
Attorney General.

SECTION 19, ARTICLE 2, OF STATE CONSTITUTION, CONSTRUED.

Office of the Attorney General,
Columbus, Ohio, April 17, 1891.

Hon. David Morrison, Columbus, Ohio:

DEAR SIR:—I have given the question submitted to me by you, growing out of the language of section 19, article 2, of our State Constitution, as much consideration as possible under the circumstances. It is my opinion, that the office referred to in that section is not a municipal office, but one which relates to the State government; in other words a State office.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Successor to Assistant Mine Inspector; Should be Appointed to Fill Unexpired Term in Case of Resignation, Etc.

SUCCESSOR TO ASSISTANT MINE INSPECTOR; SHOULD BE APPOINTED TO FILL UNEXPIRED TERM IN CASE OF RESIGNATION, ETC.

Office of the Attorney General,
Columbus, Ohio, April 18, 1891.

Hon. James E. Campbell, Governor of Ohio, Columbus, Ohio:

DEAR SIR:—You submitted to me the following and asked my official opinion thereon:

> "John L. Morris was appointed assistant mine inspector for the Fourth District, May 1, 1888. He subsequently resigned, his resignation to take effect June 1, 1889. His successor, Thomas H. Love, was appointed on that date for the term of three years, and under his commission his term of office would not expire until June 1, 1892."

You then say:

> "I desire to know whether he could be commissioned for a term longer than the vacancy caused by the resignation of Morris, whose term would have expired at the end of the present month. Second, whether his term and commission run, as they purport to, until the first day of June, 1892."

The act of March 24, 1888, Ohio Laws, Vol. 85, p. 106, provides, as follows:

> "The chief inspector shall hold his office for the term of four years, and the district inspectors shall hold their office for the term of three years from the date of their appointment and until their successors are appointed and qualified; * * * * and in case of the resignation, removal, or death of the chief inspector or any district inspector, the vacancy shall be filled in the manner above provided for original appointments for the unexpired term only, of the position so made vacant."

In view of this language, I am of the opinion, that when Morris resigned, to-wit, June 1st, 1889, Love, who was appointed his successor, could only have been appointed to fill Morris' unexpired term. I think this answers the questions submitted to me by you.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

DIRECT TAX QUESTION.

Office of the Attorney General,
Columbus, Ohio, April 21, 1891.

Hon. James E. Campbell, Governor:

MY DEAR SIR:—You recently submitted to me the following communication and desired my official opinion thereon:

> "Claims have been filed with me for services alleged to have been rendered and expense incurred by the claimants in the collection from the Federal Government of the direct tax. One of said claims is based wholly upon section 4 of the act of April 14, 1888, to be found upon pages 262 and 264 of the 85th volume of the Laws of Ohio.
>
> "I desire to know whether the appropriation made under said section is now in force. I desire also to know whether if the same be in force, I am authorized at my discretion, to approve vouchers for said alleged services and expenses to the amount of two per cent. of the moneys paid by the Federal Government under the direct tax refunder law.
>
> "I desire further to know whether, if such services were rendered upon a contract made prior to said act, either written or verbal, with a former incumbent of this office, or any other State official, such contract is lawful and enforceable.
>
> "Another of the claims made is by an agent of

the State employed in conformity to the act of April 16, 1883, Ohio Laws, Vol. 80, page 123. He bases the amount of his compensation, however, not in conformity to that law (and the contract made thereunder with the proper officials of the State) but in conformity to the law of 1888 above referred to.

On the 16th of April, 1883, the General Assembly of Ohio passed an act, the first section of which provides: "The governor of the State, auditor of state and the attorney general of the State are hereby fully authorized and empowered, if they deem it expedient, to employ and contract with a competent agent to prosecute to final settlement before Congress and the proper department at Washington, the claims of the State of Ohio against the government of the United States for reimbursement of all sums of money which may be due or owing to this State on account of expenditures made or liabilities incurred by said State in enrolling, equipping, subsisting and paying troops entering the service of the United States during the war of 1861, *and all other claims of this State against the United States growing out of the late war of 1861, which have not been reimbursed to the State.*"

Acting in pursuance of the above Joseph B. Foraker as governor, Emil Kiesewetter as auditor of state, and Jacob A. Kohler as attorney general, on the first day of April, 1886, entered into a contract with W. O. Tolford (a copy of which contract, together with other papers, were submitted to me by you). The contract provided, that the agent should receive the sum of five per cent. on the first $75,000, and three per cent. on all sums over that amount collected during any one year, but which compensation the agent was not to receive until he had paid the money collected into the State treasury. This contract has, from time to time, been renewed and is still in force and operative between the parties.

One of your questions is: "I desire to know whether

his employment (meaning the employment of Mr. Tolford under the aforesaid contract) covers the collection of the so-called 'direct tax money,' and if so, is that refunder such a claim as is contemplated and described by section 1 of the act of 1883 alluded to?" I answer in the affirmative. The closing language of section 1 of the act of 1883 is, "and all other claims of this State *against the United States growing out of the late war of* 1861, *which have not been reimbursed to the State.*" It would be difficult to conceive how language could be broader, and also difficult to understand how the State of Ohio could have any claim against the United States growing out of the late war, for which the government had not reimbursed the State, which would not be covered by this language. The claim which Ohio had against the general government known as the "direct tax money" certainly grew out of the late war. The recent act of Congress of March 2, 1891, which contemplated the payment to the several States of the moneys collected under the direct tax levy, speaks of "such sums as may be necessary to reimburse each State, Territory and the District of Columbia for all money found *to be due them.*"

The same act provided that "no money shall be paid to any State or Territory until the Legislature thereof shall have accepted by resolution, the sums herein appropriated, and the trusts imposed in *full satisfaction of all claims against the United States on account of the levy and collection of said tax.*"

From my examination of this branch of the case, I cannot resist the conclusion that the employment of Mr. Tolford fully covered the collection of what is ordinarily known as the "direct tax money," and under his contract he is entitled to compensation on the amount of that fund paid to the State, the same as on other collections. I do not find that there was any authority by which any State officer was at any time empowered to make a contract which should embrace the collection of this fund except

under the act of 1883; nor do I understand that it is seriously contended there was such authority.

It appears from papers which you submitted to me, that Mr. Kiesewetter had a letter from Governor Foraker in which the governor gave his consent that Mr. Kiesewetter should go to Washington and assist, so far as he was able, in securing the passage of the direct tax bill; but the letter expressly declares that there was no authority on the governor's part to make any contract with Mr. Kiesewetter and this was true. Mr. Kiesewetter doubtless rendered services for which he should be compensated, but the only way he can get compensation is by appealing to the General Assembly, for there certainly was no law authorizing any one to contract for his services in that respect.

Concerning the act of April 14, 1888, O. L., Vol. 85, p. 264, I have this to say: It may have been the intention of the General Assembly, as expressed in the fourth section of that act, to appropriate two per cent. of the amount collected from the government "for defraying the cost and expense that the State might incur in the collection thereof."

But the General Assembly in 1888 had no power to, and it certainly will not be contended that it could, pass an act which would impair the obligations of the contract made under the statute of 1883, and, therefore, it is that the act of 1888 cannot be considered as cutting much of a figure in this case.

In conclusion, I am of the opinion, first, that the act of 1883, authorizing the governor, auditor and attorney general to contract with a competent agent for the collection of certain claims due Ohio from the general government, is the only act under which you are authorized to act. Second, that the contract which the aforesaid officers entered into with Mr. Tolford is still in force and effect. Third, that under the provisions of the contract, Mr. Tolford would be entitled to receive upon the money

recently paid into the State treasury known as the "direct tax money," the same compensation that he received for making other collections under the terms of his contract, to-wit, five per cent. on the first $75,000, and three per cent. on the balance, unless other collections which had been made during the year changed the basis of the calculation. It appears, however, that Mr. Tolford seems to regard the act of 1888 as being somewhat indicative of the legislative intent to limit his compensation to two per cent., and he has accordingly presented his claim for allowance for that amount only. I cannot but regard this as an act of generosity on the part of Mr. Tolford, for under his contract he is fairly entitled to receive a much larger amount; but he has presented his claim upon the basis of the two per cent., and if he chooses to waive a portion of the compensation to which he is entitled, I know of no law which makes it your duty or mine to insist upon his taking more than he asks.

Under the fourth section of the act of 1883, the governor and attorney general are authorized to draw their order on the auditor of state for the amount due the agent under his contract, and I am ready to sign such an order in favor of Mr. Tolford for the amount which he claims, namely, $26,640.50.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Terms of District Inspectors of Workshops and Factories Under Act of 1885.

TERMS OF DISTRICT INSPECTORS OF WORKSHOPS AND FACTORIES UNDER ACT OF 1885.

Office of the Attorney General,
Columbus, Ohio, May 4, 1891.

Hon. W. Z. McDonald, Chief Inspector Workshops, Etc., Columbus, Ohio:

DEAR SIR:—You recently submitted to me a written communication in which you asked my opinion as to "what time the terms of office expire of John H. Ellis, inspector for the Second District, and James A. Armstrong, inspector for the Third District, appointed May 8, 1888, according to the meaning of section 2 of the law creating district inspectors of workshops and factories, passed April 29, 1885."

The statute to which you refer is found on page 179, Vol. 82, Ohio Laws, and reads as follows:

> "The district inspectors shall hold their office for the term of three years, from the first day of May after their respective appointments, and until their successors are appointed and qualified."

Your communication says they were appointed on the 8th day of May, 1888. It is my opinion, that the terms of their respective offices do not expire until three years from the first day of May, 1889.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

Board of Managers of Ohio Penitentiary as to Having Power to Restore Good Time, Etc.

BOARD OF MANAGERS OF O. P. AS TO HAVING POWER TO RESTORE GOOD TIME, ETC.

Office of the Attorney General,
Columbus, Ohio, May 9, 1891.

Hon. B. F. Dyer, Warden Ohio Penitentiary, Columbus, Ohio:

DEAR SIR:—You recently submitted to me the following facts:

> "On the 25th of January, 1886, one Smith was received at the Penitentiary, as a prisoner, to serve a seven years' sentence. On the 10th day of November, 1888, Smith was paroled by the board of managers. On the 28th day of December following, he was returned to the prison for an alleged violation of his parole. On the 8th of January, 1890, the board of managers excused all infractions of the prison rules committed by Smith to that date, so that his record is now clear. The short time of the prisoner expired on the 24th of April last."

You now desire to know if you have any legal authority to detain Smith longer in the penitentiary. In other words, you say: "Did the board of managers possess the power to restore to the prisoner his good time after he had been guilty of an infraction of his parole?"

There are various sections of the statutes bearing upon this question, but I am of the opinion that section 7388-12 controls this case. After making certain provisions relative to the control of prisoners, said section proceeds as follows: "And it is hereby provided that, any prisoner violating the conditions of his parole or conditional release as fixed by the managers, when by a formal order entered in the manager's proceedings he is declared a delinquent, shall thereafter be treated as an escaped prisoner owing service to the State, and *shall be liable*

Board of Managers of Ohio Penitentiary as to Having Power to Restore Good Time, Etc.

when arrested, to serve out the unexpired period of the maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of time served."

I construe this language to mean that a prisoner who violates the conditions of his parole is to be treated by the board of managers, after his return to the prison for having violated his parole, as a prisoner who has escaped and been returned to the prison; and authority is given to the board of managers to require him, possibly as a punishment for having violated the conditions of his release, to serve out the remaining portion of his sentence.

Whether he shall serve out such unexpired sentence or not, is a matter of discretion with the board. Otherwise, the very significant words "and shall be liable" cannot be given any intelligent meaning.

After a careful examination of the statute, I am forced to the conclusion, that the board of managers is vested with discretionary authority. That is to say, when a prisoner is returned for having violated his parole, he is liable to be compelled to serve out the remainder of his unexpired sentence; but whether he shall do so or not, is a matter resting in the judgment of the board of managers.

In the case covered by your communication, I understand that the time for which you could have held the prisoner, had he not violated his parole, has already expired, and inasmuch as the board has not seen fit to require the prisoner to serve the full term of his sentence, you should, in my opinion, discharge him. The board had the authority to require the prisoner to serve the full term, but not having done so, there is no law for detaining him. Very respectfully yours,

DAVID K. WATSON,
Attorney General.

State Board of Health; Authority to Burn Infected Buildings—"Good Time" Law Passed in 1891.

STATE BOARD OF HEALTH; AUTHORITY TO BURN INFECTED BUILDINGS.

Office of the Attorney General,
Columbus, Ohio, May 12, 1891.

C. O. Probst, M. D., Secretary Ohio State Board of Health, Columbus, Ohio:

DEAR SIR:—I have examined your communication of the 25th ult. in reference to the power of the State board of health to order the destruction of a building by fire, which has been infected with smallpox, and which cannot be successfully disinfected, as carefully as I have had time to do so. Without going into the details of the matter and citing particular cases which sustain my opinion, I will say, that, in my judgment, the authorities would justify you in taking such steps.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

"GOOD TIME" LAW PASSED IN 1891.

Office of the Attorney General,
Columbus, Ohio, May 23, 1891.

Hon. B. F. Dyer, Warden Ohio Penitentiary, Columbus, Ohio:

MY DEAR SIR:—You recently submitted to me the following questions and asked my official opinion thereon:

> First—"Does the recent act of the General Assembly known as the 'Good Time' act, contemplate that prisoners now here shall be entitled to its

benefits from the date of their arrival or only from the passage of the act?"

Second—"Should the gain be calculated under the former law to May 4, 1891, and from that time under the present act?"

Three—"If it should be so calculated, should the time gained under the former law be counted as time served in determining the time yet to serve under the new law?"

I will answer these questions in the order in which you ask them.

First—The act takes effect from the date of its passage, and applies only from that time.

Second—Prisoners, who, by their conduct, have gained good time under the former statute, should not lose the benefit of that gain and I think you should calculate the gain that has been made under the former law, to the passage of the new law, and from that time the new law should govern.

Third—I know of no better wayto carry out the provisions of this new act—and at the same time do justice to the prisoners who have gained good time under the old law—than to count the time gained as time served, and reckon the time yet to be served under the new act from the expiration of the time so gained under the former act.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Vacancy in School Commissioner's Office to be Filled by Governor.

VACANCY IN SCHOOL COMMISSIONER'S OFFICE TO BE FILLED BY GOVERNOR.

Office of the Attorney General,
Columbus, Ohio, June 4, 1891.

Hon. James E. Campbell, Governor:

My Dear Sir:—You this morning addressed me the following communication:

> * * * * "Owing to the death of the state commissioner of common schools, it becomes my duty to fill his place by appointment. I would be obliged if you would advise me for what length of time I should appoint and commission his successor." * * * *

Article 2, section 27, of the Constitution, provides: "The election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this Constitution or the Constitution of the United States, shall be made in such manner as directed by law," etc. We must, therefore, look to the provisions of the statutes bearing upon this question. Section 354 provides: "There shall be elected triennially at the general election of State officers, a State commissioner of common schools, who shall hold his office for the term of three years, from the second Monday of July succeeding his election; and in case of a vacancy occurring by death, resignation or otherwise, the governor shall fill the same by appointment." This section, it will be seen, confers the power upon you to fill the vacancy occasioned by Professor Hancock's death, *by appointment.* Turning to section 11, of the statutes, we find the provision "when an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office till his successor is elected and qualified, and such successor shall be elected at the

first proper election that is held more than thirty days after the occurrence of the vacancy," etc. In this case, the vacancy occurred on the first inst., and as Professor Hancock was an elective officer, and as the first election held more than thirty days after the vacancy occurred, is the election occurring next November, it is my opinion that that is the proper time for the election of his successor.

It is my opinion, therefore, that Professor Hancock's successor, by appointment should hold his office until the second Monday of July, 1892; and that his successor, by election, should be elected at the general election in next November for the period of three years beginning on the second Monday of July, 1892—that is, for the full term of the office as defined by statute. The reason why his successor by election, should hold for the full term of three years is, that the Supreme Court in the case of State ex rel. Ellis vs. Commissioners of Muskingum County, 7 O. S., pages 125-128, decided that "a fractional term cannot be filled by an election." This applies, of course, to an elective office other than a judicial one.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SECTION 3630c CO-OPERATIVE ASSESSMENT LIFE ASSOCIATIONS.

Office of the Attorney General,
Columbus, Ohio, June 24, 1891.

Hon. W. H. Kinder, Superintendent of Insurance, Columbus, Ohio:

MY DEAR SIR:—You recently called my attention in an official communication, to the fact that a recent act of

Section 3630c; Co-operative Assessment Life Associations.

our Legislature relating to co-operative assessment life associations and companies, provided that such associations should be subject to section 3630, of the Revised Statutes of Ohio, and the section supplementary thereto. You further called by attention in the same communication to the provisions of section 3630c, which are as follows: "No such corporation, company or association, issuing endowments, certificates or policies, or undertaking, or promising to pay members, during life, any sum of money or thing of value, or certificate, or policy guaranteeing any fixed amount to be paid at death, except such fixed amount or endowment shall be conditioned upon the same being realized from the assessments made upon members to meet them, shall be permitted to do business in this State, until they shall comply with the laws regulating regular mutual life insurance companies."

I understand that the Mutual Reserve Fund Life Association of New York has made application to you to be permitted to do business in this State, and that you have refused them such permission upon the ground that their policy does not conform to the above provisions of our statutes, and you have referred this question to me for my official opinion.

Counsel for the company and yourself both appeared before me and argued the question, and you will remember that during the argument it was discovered that there were two kinds or forms of policies which this company issued. How this came about I am not aware, but in my opinion there is a material difference in them. The sixth provision in one of the policies contains among other things, this clause "the total assets of the association including its reserve or emergency fund and accretions thereon, and also the amount held or deposited in the death fund account, and the proceeds from the next mortuary call, are hereby made liable for the payment of all benefits payable under this policy, and the *insurance* hereunder is conditioned thereupon."

Section 3630c; Co-operative Assessment Life Associations.

While this language is not as clear and plain a compliance with the provisions of section 3630c as could be made, yet I am of the opinion, that it is a substantial compliance with them. I think the position you took in your argument before me, namely, that the language of the policy should indicate to the insured, that the policy must be paid from an assessment made upon the members of said company, is correct. The question, therefore, resolves itself into this: Does the language of this policy I have referred to, sufficiently advise one, proposing to insure in the company, of the fact, that the loss, if any, would be payable from assessments made upon the members of the company? If so, I think the company should be permitted to do business in Ohio. The language of the policy is, "and the proceeds from the next mortuary call are hereby made liable for the payment of all benefits payable under the policy, and the *insurance thereunder is conditioned thereupon.*" To my mind this fairly advises the insured what fund the money is to be payable from in case of loss, and is, I think, a substantial compliance with the provisions of section 3630c; but the other policy which was submitted to me by you—or Mr. Harrison who represented the company—does not, I think, sufficiently comply with the provisions of the above section.

It is my opinion, therefore, that if this company uses the policy containing the above quoted provisions, that you should permit it to do business in this State; otherwise, you should not.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

ALTERNATE TO COLUMBIAN EXPOSITION.

Office of the Attorney General,
Columbus, Ohio, August 1, 1891.

W. T. Alberson, Esq., Ashland, Ohio:

MY DEAR SIR:—Some time since, Governor Campbell submitted to me a resolution of the "Ohio Manager's, World's Fair Commission," asking my official opinion upon the following question:

> "A federal commissioner and his alternate (both ex-officio members of this commission) being present at a meeting of this commission have both the voting power, and can both be paid subject to section five of the act?"

I have understood since the question was submitted to me, that an opinion upon the subject by the fifth instant would be in time, therefore, have not taken the time from my other official duties to answer you before this. Section 5 of the act of March 26, 1891, reads as follows:

> "The World's Columbian Commissioners and the Board of Lady Managers of the World's Columbian Commission from the State of Ohio, and their respective alternates, and the World's Columbian Commissioner at large and alternate from the State, if any there be, shall be ex-officio members of the Board of World's Fair Managers for the State of Ohio. And shall have the same powers and same compensation as the other members of said commission save and except they shall not receive any pay for transportation or subsistence for which they are compensated out of the treasury of the Federal Government."

This language is ambiguous, and, consequently, when reading it, a person is liable to be misled; but it is my opinion that the Legislature meant, that the *alternates*

should have the same power and receive the same compensation as regular members of the commission, when they were performing the duties of such commissioners, and not otherwise. Any other construction would give the alternates the same absolute authority and power that the commissioners themselves have, and in this way the number of commissioners would be increased, by the number of alternates. This, I do not think, was the intention of the Legislature; nor do I think the language of the act will bear this construction. It is my opinion, therefore, that when a Federal commissioner and his alternate are each present at the meeting of the commissioners, the commissioner alone has the power to vote. It follows that the alternate is not entitled to vote or exercise the power of the commissioner at such meeting; nor is he entitled to receive compensation except when he is present and performing the duties of a commissioner by virtue of his being an alternate.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

SECTION 3353; THE LIGHTING OF CARS ON RAILROADS.

Office of the Attorney General,
Columbus, Ohio, August 14, 1891.

Hon. J. A. Norton, Commissioner of Railroads, Columbus, Ohio:

MY DEAR SIR:—I have received from you an official communication in which you state: "Several railroad companies in this State are lighting their passenger coaches by what is known as the Pintsch gas, a gas made from crude petroleum and compressed in iron cylinders

Section 3353, The Lighting of Cars on Railroads.

carried under the car. It is claimed by the makers of this gas, that it will not ignite at a temperature under three hundred degrees. As to the truth of this, I cannot state."

You then ask for my official opinion, whether under a strict construction of section 3353, of the Revised Statutes of Ohio, the use of this gas would be a violation of law. The section to which you refer reads as follows:

> "No passenger cars on any railroad shall be lighted by naptha, or any illuminating oil fluid made in part from naptha, or wholly or in part from coal or petroleum, or other substance or material which will ignite at a temperature of less than three hundred degrees Fahrenheit; and the commissioner of railroads and telegraphs, by himself or agent, may, at any time, enter the cars running on any railroad and take from any lamp therein sample of the oil found there, for the purpose of testing the same, and if it proves of a lower grade than is required by the provisions of this section, he shall bring suit for the penalty provided in section three hundred and fifty four."

The Legislature undoubtedly in the exercise of its police powers has the right to regulate the lighting of passenger cars on railroads. The above section, as you will observe, prohibits the use, in the lighting of cars, of naptha, or any illuminating oil fluid made in part from naptha, or wholly or in part from coal or petroleum, or other substance or material which will ignite at a temperature of three hundred degrees Fahrenheit. You state that the gas, to which you refer in your communication, is made from crude petroleum. A strict construction of section 3353 would, therefore, exclude the use of this gas as a lighting medium unless it requires a temperature greater than three hundred degrees Fahrenheit, to ignite it. On this subject I have no information; nor have I the means of ascertaining it. It may be that the Pintsch

Inspector of Workshops and Factories; Condemnation of Buildings.

gas is safer than other kinds of light, but with that neither you nor I have anything to do. The question is wholly with the General Assembly. It has seen fit to use such language as in my judgment prohibits the use of this gas unless it will require a temperature greater than three hundred degrees, Fahrenheit, to ignite it. It is my opinion, that if you, as the railroad commissioner, of the State, are satisfied from an analytical test or otherwise, that the Pintsch gas will not ignite at a temperature of three hundred degrees Fahrenheit, it may be used.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

INSPECTOR OF WORKSHOPS AND FACTORIES; CONDEMNATION OF BUILDINGS.

Office of the Attorney General,
Columbus, Ohio, August 1891.

Hon. W. Z. McDonald, Chief Inspector Workshops, Etc., Columbus, Ohio:

DEAR SIR:—You recently addressed me an official communication, in which you state in substance, that you have inspected the building at the corner of High and Hickory streets, this city, known as the Park Theater, under the authority of sections 2572*a* and 2572*b*, of the Revised Statutes of Ohio. You further state that you find "with some additional changes the means of exit in the building will be sufficient; the means of extinguishing fire is admirable. Continuing, you say: "I find, however, on minute examination, that it is constructed in the most inflammable manner, that is, the materials used, and the manner in which they are put together, in case of fire at or in this building, while an audience is present, the rapidity of the fire by reason of this inflam-

mable construction, would render it extremely dangerous to the lives of the population that might be sheltered therein. For this reason, I consider it a dangerous building for public use. I also find that this building is not provided with a ventilating system in any particular, thus violating section 2 of the law to prevent the erection of dangerous buildings for public use. Now, therefore, in view of this dangerous construction by reason of its highly inflammable character, and the failure to provide a ventilating system, does section 3 of the law to prevent the erection of dangerous buildings for public use, authorize me to refuse a certificate of inspection such as is mentioned in section 2572*a* of the Revised Statutes of Ohio?"

There are several sections of the Revised Statutes bearing upon the subject you refer to, in a general way, and it is difficult to harmonize their various provisions. The act of April 15, 1889, entitled "An act to prevent the erection of dangerous buildings for public use," provides among other things, "This act shall not be construed so as to interfere with existing laws relating to the inspection of buildings, but no certificate as now provided for by law, shall be issued for buildings hereafter erected or alterations hereafter made, unless they conform to the requirements of this act."

In a previous section, the act requires certain buildings—and a theater would be included among them—to have a ventilated system, which would be capable of changing the air in such room every thirty minutes. Section 2572*a* provides that "Whenever any structure referred to in section 2572 shall have been inspected by the State inspector of shops and factories, and such inspector shall have issued to the owner thereof, or his agent, a certificate that such structure is properly arranged for the safe and speedy egress of persons who may be assembled therein, and also properly provided with means for the extinguishment of fire at or in such structure, as now required by law, then such certificate shall dispense with

all other inspections and certificates required by law in regard to the safety of such structures for public assemblages; and in case such inspector shall find on inspection that such structure is not properly arranged for the safe and speedy egress of persons who may be therein assembled, or not properly provided with means for the extinguishment of fire at or in such structure as now required by law, he shall notify the owner, officer or agent in charge of such structure and the mayor of the municipal corporation wherein the same is located, in writing of the fact," etc.

Going back to the act of April 15, 1889, I am of the opinion that section 3 of that act authorizes you to refuse the certificate provided for in section 2572*a* when a public building does not have the ventilating system which section 2 of the act of 1889 provides for.

You admit that the building referred to in your communication "has sufficient means of egress;" and also admit that the "means of extinguishing fire is admirable," but you state that it is constructed in an "inflammable manner * * * and that its construction is inflammable." The statute does not confer upon you any authority to condemn a building as unsafe for public use, or to refuse a certificate to the owner because it is constructed of inflammable material. The General Assembly has not yet taken such advanced grounds upon this subject as to authorize the condemnation of a public building because it is composed of material which will burn quickly when ignited. If public safety requires greater exactness in the law than it now contains on this subject, the public must look to and hold this law-making power responsible for the omission. Certainly, the fault is not yours or mine. It is because a building is supposed to be inflammable, that the law is so specific in its provisions regarding the means of egress, and the means of extinguishing fire, for if a building was constructed of material which was not inflammable, there would be no occasion for the provisions which the law contains on this subject. You

have, therefore, no right to refuse a certificate in this instance, because, as you say in your letter, the building is composed of inflammable material; but you have the right to refuse your certificate if the building is not ventilated according to law, and has not such means of egress and such means of extinguishing fire as the law provides. It appears in this instance, that only one of these provisions are wanting—that of ventilation; but if the building is deficient in this respect, you would, in my opinion, be justified in refusing your certificate until the defect is remedied. Very respectfully yours,

DAVID K. WATSON,
Attorney General.

SECTION 3686; FIRE ASSOCIATIONS.

Office of the Attorney General,
Columbus, Ohio, August 27, 1891.

Hon. W. H. Kinder, Superintendent of Insurance, Columbus, Ohio:

DEAR SIR:—You recently addressed to me an official communication in which you called my attention to the provisions of section 3686, of the Revised Statutes, of this State. You further state in your communication as follows: lows:

> "Information comes to me that certain fire associations of this State organized under the provisions of the above section, and the sections supplementary thereto, are, and have been, receiving as members, citizens of other states, and issuing certificates or policies covering property located outside the State of Ohio."

You then ask my official opinion "whether a *fire association* organized under the above section of the laws

of this State, may lawfully include in its membership citizens of other states or issue policies or certificates covering property located beyond the limits of this State."

I have examined the provisions of the section to which you refer in your communication, to-wit, section 3686, and it is my opinion, that a fire association organized under its provisions cannot lawfully include in its membership citizens of other states, nor can such association lawfully issue certificates or policies covering property outside the State of Ohio.

Very respectfully yours,
DAVID K. WATSON,
Attorney General.

STATE INSTITUTIONS; PURCHASE OF SUPPLIES.

Office of the Attorney General,
Columbus, Ohio, September 16, 1891.

Daniel Hartnett, Esq., Steward Deaf and Dumb Institution, Columbus, Ohio:

DEAR SIR:—You this day submitted to me a written communication in which you ask for the construction of sections 643-649 of our Revised Statutes, and you state in your communication that you think there is a conflict between the provisions of these sections, and ask my official opinion thereon.

Section 643 provides, that "whenever in the opinion of any board of trustees, the interest of the State, and of the institution under their charge, will be subserved thereby, said board shall advertise for sealed bids to furnish at the institution any article or articles needed for its use, at such times and in such quantities, as the superintendent may from time to time, direct, each bid to

be accompanied with a bond in such amount as the board shall direct," etc.

Section 649 provides, that "under the direction of the superintendent, the financial officer of each institution shall purchase all its supplies upon the best possible terms and lowest cash value," etc.

These two sections must be construed together. There is not necessarily any conflict between them. Section 643, as I construe it, contemplates the purchase of articles in bulk, such as coal, while section 649 contemplates the purchase of an entirely different class of articles. For instance, take the supply of vegetables or fruits of any kind, or articles whose consumption is regulated largely by the season of the year, and concerning the purchase of which there must be judgment and discretion vested in the financial officer.

The conclusion which I have arrived at, is this: Section 643 was intended to vest in the trustees the power when in their judgment it would be of benefit to the State and institution under their charge to purchase articles in bulk, and to this end they were required to advertise for sealed bids for such articles, and the bidder was required to give bond, etc. Section 649 refers to the purchase of the daily consumption of the institution.

I can hardly conceive that the Legislature intended that a grocer should be required to furnish bond when he sold the institution a few pounds of lard or a barrel of flour, or that a dealer in fruit should do likewise when he sold a few pecks of apples or a bushel of potatoes. The fact, that one section requires the trustees to advertise for bids and requires the execution of a bond on the part of the bidders, and that the other section does not make such requirement, is strongly conclusive to my mind, that the distinction which I have drawn is correct.

Very respectfully yours,

DAVID K. WATSON,

Attorney General.

Attorney Fees; Payment for Representing State in Extradition Matter.

ATTORNEY FEES; PAYMENT FOR REPRESENTING STATE IN EXTRADITION MATTER.

Office of the Attorney General,
Columbus, Ohio, September 24, 1891.

Hon. E. W. Poe, Auditor of State:

DEAR SIR:—A day or two since, you submitted to me an itemized cost bill in the case of the State of Ohio vs. McCartney, who was convicted of forgery and sentenced to the Ohio Penitentiary, from Lucas County, and asked if you would be justified in paying the following item:

To cash paid Barristers, Cameron and Allen; Perdue and Robertson, as per bill No. 4, $492.06.

A letter from the prosecuting attorney of Lucas County advises me of the facts in the case. The defendant, after committing the forgery, fled to Canada, where he was arrested, and under the provisions of our extradition laws, was sought to be brought back and tried in Toledo. The prosecuting attorney then says: "McCartney resisted extradition in all the courts for three months, and he would have beaten us had we not taken witnesses over there from here and tried the case (ex-parte, of course,) on its merits to the courts of Canada. He employed the ablest counsel of Winnipeg, and as we did not want the State of Ohio beaten by one of the boldest forgers that was ever imposed upon anybody here, our commissioners had to employ attorneys to get him. Not a cent was expended in this matter extravagantly."

Whether you should pay this claim or not, depends upon the construction which is to be given to section 7332 of our Revised Statutes which provides as follows: "Upon sentence of any person for felony, the officers claiming costs made in the prosecution shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and seal of the court, a complete bill

of the costs made in the prosecution, *including any sum paid by the county commissioners for the arrest and return of the convict on* the requisition of the governor, or on the request of the governor made to the president of the United States, which, if correct, the judge of the court shall allow and certify."

The language of this section might have been broader and in that way preclude any possible question arising. The "sum" as used in the above section to my mind means any *necessary* sum paid by the county commissioners for the arrest and return of a criminal. It appears that, in this case the defendant resisted the provisions of our extradition laws. The object of our penal statute is to punish the guilty and this is done in order to protect society from their outrages and crimes. If a criminal is permitted to commit a crime and then flee to a foreign country and employ counsel to defend him and in that way resist any attempt to return him to this country for trial, and no effort is made on the part of the country in which the indictment against him lies to return him here, a great advantage would be given criminals. In this case, it was absolutely necessary to employ counsel in Canada in order to effect the return of the criminal.

You will observe the Legislature uses the word "costs" in the first and third lines of the section referred to but there

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NOTE—From this point to the first opinion rendered by Mr. Watson's successor the original text is missing, and therefore this opinion is left unfinished.